

PARTIES: ARTHUR JOHN MENGEL,  
ELEANOR CAROLINE MENGEL,  
RODNEY JOHN MENGEL,  
SUSY CHRISTINE MENGEL,  
WALTER KLEIN and CAROLYN KLEIN

v

NORTHERN TERRITORY OF AUSTRALIA;  
DAVID TABRETT and  
ROBERT BAKER

TITLE OF COURT: SUPREME COURT OF THE NT

JURISDICTION: SUPREME COURT OF THE NT

FILE NO: No. 688 of 1989

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JUDGMENT OF: ASCHE CJ

**CATCHWORDS:**

**DAMAGES - MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT** - Loss on sales at most advantageous period - Reduced value of herd by drought - Factors to be taken into account - validity of computer analyses

**DAMAGES** - Movement restrictions on cattle - What damages flow therefrom - Method of computing

**INTERPRETATION OF INSTRUMENTS** - Government Gazette - Gazettal pursuant to s27(2) of *Stock Diseases Act* "where herds subject to an eradication programme" cannot in the

context bear the meaning "or where herds subject to an eradication programme" - Expression "where" conjunctive not disjunctive with other expressions in the Gazette - Gazette did not give legal authority for movement restrictions as imposed

**NEGLIGENCE** - Essentials of action for negligence - Reasonable care - Reasonable to restrict movement of the cattle on suspicion that one was infected

**NEGLIGENCE** - Essentials of action for negligence - Reasonable care - Not unreasonable to maintain movement restrictions of cattle in the circumstances

*East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, considered  
*Sutherland Shire Council v Heyman* (1984-1985) 157 CLR 424, considered

**NEGLIGENCE** - Essentials of action for negligence - Reasonable care - In the circumstances no undue delay in revoking movement restrictions or failure to take all reasonable steps in as short as time as possible

**NEGLIGENCE** - Essentials of action for negligence - Duty not to convey wrong information - Purporting to impose movement restrictions which were in fact unlawfully imposed - Lack of actual knowledge in defendants of illegality - Defendants acting bona fide - No breach of duty

*Caledonian Quarries Ltd v Spiers* (1956-7) 97 CLR 202, considered  
*Dunlop v Woollahra* (1978) 40 LGRA 218, considered  
*Dunlop v Woollahra Municipal Council* [1982] AC 158, considered  
*L Shaddock & Associates v The Council of the City of Parramatta* (1981-82) 150 CLR 225, considered  
*Murphy v Brentwood DC* [1990] 2 All ER 908, referred  
*Rowling v Takaro Properties* [1988] 1 AC 473, considered  
*Sutherland Shire Council v Heyman* (1984-1985) 157 CLR 424, considered

**NEGLIGENCE** - Essentials of action for negligence - Causation - question whether the damage would have occurred in the same way and with the same consequences without the movement restrictions

*March v Stramare* (1990-1) 171 CLR 506, considered

**TORT - MISCELLANEOUS TORTS - CONVERSION** - Defendants exercised control by restricting movement of the cattle - Not an assertion of possession or ownership, no "dominion" over the cattle - Not conversion

*Oakley v Lister* [1931] 1 KB 148, considered  
*Penfolds Wine Pty Ltd v Elliott* (1948) 74 CLR 204, considered

*R H Willis & Son v British Can Auctions* (1978) 2 All ER 392, referred

**NEGLIGENCE** - Miscellaneous forms of negligent conduct - "Beauesert Principle" - A person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another entitled to recover damages from that other - Principle applied

*Beauesert Shire Council v Smith* (1966) 120 CLR 145, followed  
*Elston v Dore* (1982) 149 CLR 480, considered  
*Kitano v The Commonwealth* (1973-4) 129 CLR 151, considered  
*Lonrho v Shell Petroleum No 2* [1982] AC 173, considered  
*Mogul Steamship Co Ltd v McGregor Gow & Co* (1889) 23 QBD 598, referred

**NEGLIGENCE** - Negligence of particular parties and between parties in particular relationship - Misfeasance in a public office - Must have malice or knowledge of acting without power - "Knowledge" - Constructive knowledge - Wilful closing of the eyes, a specific intent to avoid knowing something which might be to one's disadvantage - Constructive knowledge not found in this case

*Bourgoin SA v Ministry for Agriculture* [1986] 1 QB 716, referred  
*Brasyer v McLean* (1875) 6 PC 398, referred  
*British Industrial Plastics v Ferguson* [1940] 1 All ER 479, considered  
*Dunlop v Woollahra Municipal Council* [1982] AC 158, considered  
*Farrington v Thompson & Bridgland* [1959] VR 286, considered  
*James v Swansea City Council* [1989] 3 All ER 162, considered  
*Little v Law Institute of Victoria* [1990] VR 257, referred  
*Smith v East Elloe RDC* [1956] AC 736, considered  
*Takaro Properties Ltd v Rowland* [1978] 2 NZLR 315, referred  
*Wooley v Dunford* [1972] 3 SASR 243, considered

**STATUTES** - Interpretation - Headings of a statute may be taken into consideration where the provision is ambiguous - No ambiguity in s27(2)

*Stock Diseases Act* 1954 (NT) s27(2)  
*Silk Bros Pty Ltd v SEC (Vic)* (1943) 67 CLR, considered

**STATUTES** - Interpretation - *Stock Diseases Act* - "If the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust" - No reason why power under s27(1) must govern the power given under s27(2)

*Stock Diseases Act* 1954 (NT) s27  
*Cooper Brookes (Wollongong) Pty Ltd v FCT* (1980-81) 147 CLR 297, considered

**STATUTES** - Interpretation - "may" - Look at context to see if it is imperative or discretionary - In

this case nothing from context which confers a power but not a discretion

*Finance Facilities Pty Ltd v FCT* (1971) 127 CLR 106, considered  
*Re Wamba Wamba Land Council* (1989) 86 ALR 161, considered  
*Ward v Williams* (1955) 92 CLR 496, considered

**STATUTES** - Interpretation - "Quarantine" - Used by all parties to mean "movement restriction" as per s42 *Stock Diseases Act* - "Quarantine" not used in strict terms of s12 and 13 *Stock Diseases Act*

*Stock Diseases Act* 1954 (NT) ss12, 13 & 42

**REPRESENTATION:**

**Counsel:**

Plaintiffs: G.E. Hiley QC  
C.R. McDonald

Defendants: D. Mildren QC  
S. Gearin

**Solicitors:**

Plaintiffs: Cridlands  
Defendants: Solicitor for the Northern Territory

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA

No. 668 of 1989

BETWEEN:

ARTHUR JOHN MENGEL,  
ELEANOR CAROLINE MENGEL,  
RODNEY JOHN MENGEL,  
SUSY CHRISTINE MENGEL,  
WALTER KLEIN and  
CAROLYN KLEIN

Plaintiffs

AND:

THE NORTHERN TERRITORY OF  
AUSTRALIA

First Defendant

AND:

DAVID TABRETT

Second Defendant

AND:

ROBERT BAKER

Third Defendant

CORAM:     ASCHE CJ

REASONS FOR JUDGMENT  
(Delivered Friday 28 August 1992)

THE SCENE

In the vast areas of the Northern Territory many industries have been tried since Sturt and Stuart pushed forward from Adelaide into unknown and harshly challenging lands. Some, like mining, have basically succeeded, albeit in fits and starts, from the surface

scratchings of individual miners at Arltunga and Pine Creek to the highly mechanised open cut mines at Pine Creek and Woodcutters today. Some were doomed to failure by the climate, such as the remarkably optimistic attempt to run sheep. Others with apparently high potential, such as ricegrowing in the north, were destroyed by unexpected disasters. No doubt improved technological and agricultural research will find ways to develop the country in the future. In the meantime the Territory has for some 120 years seen one industry grow and generally prosper; through not without tremendous setbacks and many tragic tales of personal financial ruin by hardy and courageous people. That is the cattle industry. Much early exploration was devoted to finding suitable cattle runs which, with great labour and dedication, could be developed into stations often larger than some European countries. Areas were huge, markets far distant, water supplies often problematical and much country semi-desert. Cattlemen grew to know the country and its challenges. Gradually improvements came with the breeding of stock more suited to the environment, development of more efficient means of transportation, increased technology and business methods. The cattle industry is an industry requiring experts. The cattleman of today is far more than a graduate stockman. He must have more than an elementary grasp of agricultural and veterinary science. He requires a working knowledge of the soils, plants and water content of his land, of the genetic structures of his herd, of marketing and business methods, and be at home as much in a helicopter, truck or motor bike as on a horse. He is a highly skilled professional. Even then it remains a risky business. It helps to have been born into it.

### THE MENGEL FAMILY

In 1962 Arthur John Mengel and Eleanor Caroline Mengel his wife purchased the lease of Neutral Junction Station which lies approximately 300 kilometres north of Alice

Springs and in area is approximately 4,500 square kilometres. Mr & Mrs Mengel had previously been at Mt Swan Station which lies about 250 kilometres northeast of Alice Springs. The evidence does not, I think, establish whether Mr & Mrs Mengel owned that station or managed it, but it is clear they were well experienced in the cattle industry by 1962 and would have been familiar with the Neutral Junction country which, as distances go in the Territory, is not far from Mt Swan.

Mr & Mrs Mengel ran Neutral Junction in partnership with two other persons who were Mrs Mengel's brother and sister.

Arthur John Mengel and Eleanor Caroline Mengel had two children Rodney John Mengel and Caroline Mengel. Apart from schooling in Adelaide, Rodney and Caroline Mengel have lived all their lives in the Territory and much of that time at Neutral Junction. I have heard little of Caroline Mengel but I think I can safely assume that, like her brother, she is completely familiar with the day-to-day workings of a cattle station.

Rodney Mengel worked as a stockman after leaving school and then spent about 5 years flying helicopters involved in mustering in the north of Australia. He married Susy Christine Mengel and returned with her to work at Neutral Junction. He has a considerable knowledge of the industry and particularly the topic of breeding cattle.

Caroline Mengel married Walter Klein and they too resided at Neutral Junction. Walter Klein had previously been a mechanic with the Department of Transport & Works for some 14 years before becoming involved in the general operations at Neutral

Junction particularly in the context of plant and equipment and stock transportation. He has been at Neutral Junction for the last 10 years.

In 1984 Rodney and Susan Mengel and Walter and Caroline Klein purchased the interest of Eleanor Mengel's brother and sister. Since that time the owners of the Neutral Junction lease have been those six persons namely Mr & Mrs Mengel senior, Mr & Mrs Rodney Mengel and Mr & Mrs Wally Klein. Mr & Mrs Rodney Mengel and Mr & Mrs Wally Klein had to borrow from the bank to pay out Eleanor Mengel's brother and sister. I assume that part of the security for these personal loans were the individual interests of Mr & Mrs Rodney Mengel and Mr & Mrs Klein in the Neutral Junction lease. However that may be, the loans were repaid by late 1986.

In August 1987 the six persons mentioned, together with a company known as Legnem Pty Ltd purchased the property known as Banka Banka Station. Legnem Pty Ltd is a company controlled by the six. It seems unnecessary to enter into the details of the individual shareholding in the company nor have I been given such details. By the terms of the contract of sale the leasehold of Banka Banka was sold to Legnem Pty Ltd and the improvements, plant, machinery, livestock, registered brands and earmarks to the six. Nothing has been made by either side as to the form of the contract and no suggestion has been put to me that, so far as this action is concerned, the interests of Legnem are in any way different from the interests of the six.

In the Writ and Statement of Claim the six comprise one set of joint plaintiffs, ("the first plaintiff") and Legnem comprises the second plaintiff.

Banka Banka is approximately 200 kilometres north of Neutral Junction. In area it is 3,315 square kilometres. The lease is a perpetual lease.

The advantages of purchasing Banka Banka were set out in the evidence of Rodney Mengel. The most obvious advantage for anyone actively engaged in the cattle industry was that of expansion. As a corollary to that there would be the equally obvious advantage, in a country of low rainfall often afflicted by drought conditions, of being able to move cattle in times of drought to the less afflicted areas. Banka Banka itself had an average annual rainfall approximately 5 inches higher than Neutral Junction. Furthermore, Banka Banka was somewhat more conveniently placed for Queensland markets and for export of cattle north to Asian markets such as Brunei, Sabah and Philippines.

The purchase price of Banka Banka was \$3,062,700. That amount was obtained by bank loan from Westpac on the security of a third mortgage over Neutral Junction and a first mortgage over Banka Banka. The financial arrangements were that \$2 million was, as the Bank put it, "locked in on a Fixed Interest Rate Bill for two years at 16% (including margin) with drawdown on 30/7/87". (Letter Westpac to Mengels/Kleins 6/7/87.) The remaining \$1 million was met by overdraft and short term loans.

The plan of the new proprietors of Banka Banka (the plaintiffs) was to pay off the \$1 million by cattle sales by the end of the 1988 season and thus reduce their indebtedness to the bank to the \$2 million Fixed Interest Rate Bill by the time that came due.

At the time of the purchase of Banka Banka the day to day management of the plaintiffs' business had passed to the younger generation, that is, essentially to Rodney Mengel and Wally Klein. By agreement Wally Klein and his wife remained at Neutral Junction while Rodney Mengel and his wife moved to Banka Banka. Rodney Mengel had the advantage that he was already familiar with Banka Banka. He had done mustering work (by helicopter) on the station as far back as 1980, and in 1986 he had also trucked cattle off the station. He had made improvements in breeding cattle at Neutral Junction and was anxious to do the same for Banka Banka.

The cattle at Neutral Junction were horned and polled Hereford. Improvements to the herd had been made over many years by the importation of better breeding stock, mainly polled Hereford, from interstate.

The cattle at Banka Banka were a Charollais-Brahman crossbreed. According to Rodney Mengel, whose expertise I accept on this matter, Banka Banka is north of the "tick line" i.e., in an area where tick infestation is likely, but the Charollais-Brahman crossbreed is resistant to ticks. The Brahman strain is also better adapted to the hot tropical weather than many other breeds. Rodney Mengel's plan was to make further improvements to the herd on Banka Banka. He also undertook various improvements to the station such as overhauling existing bores, opening up existing old roads and building trap yards.

A trap yard is built in the vicinity of a water supply, and as cattle congregate there in the dry season, they can be trapped in these yards. The purpose of this from Rodney Mengel's point of view was twofold. It enabled him to trap bush cattle mainly scrub bulls and

sell them immediately. It also enabled him to implement a controlled breeding programme with superior bulls and thereby improve the herd. The controlled breeding programme required separating the bulls from the herd for approximately 6 months and releasing them to the cows in approximately March/April. That results in what counsel for the plaintiffs Mr Hiley QC delicately referred to as a "flurry of activity" so that most of the cows become pregnant at that time. The gestation period of a cow being nine months, the consequence is that virtually all calves are born in the January-March period during the wet season when feed growth is more abundant and the cows therefore the better able to feed themselves and their calves, and give the calves time to build up condition before the latter part of the dry season when feed may become scarce.

The cattle industry is a risk industry. Throughout Australia, but particularly in the northern parts, it is vitally dependent on the vagaries of weather; but there are other contingencies such as economic climate, market fluctuations, transport costs, plant infestation and many more. The object of those experienced in the industry is to minimise the effect of the bad years by such precautions as their experience has taught them to take, and wait for the good years to build up capital and, on balance, move ahead. Science has come to the assistance of the industry in many ways and none more so than in the gradual eradication or control of many diseases which in earlier years could ravage or even effectively wipe out the herd and years of effort. Rodney Mengel and Wally Klein were well aware of various contingencies which might upset their plans. One of these was the possibility of the presence of the disease of brucellosis among the cattle.

## BRUCELLOSIS

Brucellosis is a serious disease which attacks both humans and a wide variety of other animals. In humans the clinical features commonly include fever, chills, weakness, malaise, sweating, headache, backache, muscle or joint pain, anorexia or weight loss. Complications due to the infection are potentially extensive and involve a variety of organs and systems. In some cases the disease or its after effects can last more than one year. Because of its similarity to influenza it may sometimes be misdiagnosed. Infection in humans depends upon contact with infected animals or their products. Milk and dairy products are a source of exposure though not generally in countries where such products are pasteurised. In these countries it still remains an occupational disease of sporadic occurrence among livestock handlers, veterinarians, laboratory workers and meat processing and slaughter plant personnel.

In cattle the disease is characterized by abortion, retained placenta, orchitis, epididymitis and impaired fertility. Transmission of the disease is by direct or indirect animal contact. The usual mode of spread is through introduction of an infected animal into a susceptible herd.

Brucellosis is a disease which, if it can be controlled, must be controlled, if only because of the serious effects upon humans. For the cattle industry the effects are a serious loss of production and infection spreading from herd to herd.

Dr Rolfe the Chief Veterinary Officer for the Northern Territory, and a person whose qualifications as an expert in this area I accept, gave three cogent reasons for the need

to eradicate the disease, which I summarise as follows:

- (a) To protect human health
- (b) To prevent loss of production and the cost of controlling the disease in animals, particularly in calf and dairy herds.
- (c) To safeguard export markets because of the many overseas countries that impose requirements of certification and testing for the disease.

The need for a national campaign to eradicate brucellosis throughout Australia was recognised by the 1970s and vigorous steps were taken to this end in the 1980s.

### THE BTEC CAMPAIGN

The initials BTEC stand for Brucellosis and Tuberculosis Eradication Campaign. Both were serious diseases in humans and cattle and both posed serious threats to the cattle industry for domestic and export markets. The campaign encompassed the two diseases because the methods of eradication were broadly the same i.e., by detection and elimination of all infected animals in a herd and the prevention of re-infection by further testing over a period of years. The following background information is taken from Technical Bulletin No. 44 of June 1981 of the Northern Territory Department of Primary Production - Division of Agriculture & Stock (Ex 87):

"1. THE BRUCELLOSIS ERADICATION CAMPAIGN (B.E.C.)

1.1 General Information

The Bureau of Animal Health in 1976 submitted for Government consideration the concept of eradicating brucellosis and tuberculosis from Australia. The fundamental reason was to protect our meat export industry as most of our traditional export market countries had

either already eradicated both diseases or were within sight of doing so. These 2 zoonoses (i.e. capable of infecting humans) are unacceptable in any country and particularly so in the advanced countries who have the technical know how and resources to eradicate them. It behoves countries such as ours that are large exporters of meat and meat products that they should not be exporting a potentially dangerous product. At the end of this bulletin there is a section detailing brucellosis as a zoonosis.

As late as 1968 brucellosis was thought not to exist in the Northern Territory. This was understandable as no one had ever looked. However, in the closing days of the bovine pleuropneumonia campaign the opportunity was taken to test female cattle for brucellosis and it quickly became apparent that the disease did in fact exist on a large proportion of properties on the Barkly Tableland. As many cattle had been sold onto Alice Springs district properties, we assumed that the disease was present in that area also. This unfortunately proved to be true. Relatively few cattle from the Tablelands were sold onto the Victoria River district and they were usually stud cattle. Relatively minor outbreaks of the disease occurred in this area and hopefully most of them have been eradicated. In fact only 6 stations in the Darwin Gulf/Victoria River district areas are known to be infected at the moment. The affected areas on the stations are known and we believe we are well on the way to clean status for these properties and thus a large area of the N.T. However brucellosis is an insidious disease and can exist in a beef herd at extremely low levels for many years prior to an eventual flare up.

Early in 1970 the branch set up an organisation to eradicate brucellosis. The necessity for this was obvious as some properties had calving percentages of less than 50% and a disease incidence of well over 25% in their breeding herds. A senior veterinary officer leads the team of field and laboratory workers. The Territory is split into what have become traditional subdivisions viz. Darwin and Gulf (DG), Victoria River district (VRD), Barkly Tablelands (BT) and the Alice Springs district (AS)."

I have not been given much information about the early stages of the campaign up to 1982 but it would appear that various difficulties then being encountered led the Australian Agricultural Council to set up "a BTEC Planning Group to develop a specific program including funding requirements, administrative arrangements and target dates". (AAC Resolution 26/7/82 included in Ex 44). That meeting also endorsed the setting up of a

Northern Australia Sub-Group.

In December 1982 the BTEC Planning Group made a number of recommendations including a recommendation that the Commonwealth and the States adopt an agreement detailing the financial and administrative arrangements for BTEC. It proposed a target date of 1992 for eradication of brucellosis and tuberculosis. It especially recommended further research on an improved brucellosis diagnostic test because "no individual test or combination of tests is entirely satisfactory".

In February 1983 the AAC "endorsed the plan put forward by the BTEC National Planning Group" and "agreed that implementation of the plan be undertaken in accord with an agreement between the Commonwealth and each State/Territory".

A detailed plan for the eradication of Brucellosis and Tuberculosis from cattle and buffalo in the Northern Territory "the Calley Plan" was brought out in March 1983 by the Department of Primary Production of the Northern Territory. It includes forward estimates, budget and plans of operations in various regions.

In May 1984 the Commonwealth and the Northern Territory entered into an agreement whereby the Commonwealth agreed to provide financial assistance to implement the plans for eradication of tuberculosis and brucellosis in cattle and buffalo. Paragraph B of the Preamble states:

"(B) Ministers of the Commonwealth and the Territory have agreed upon the Outlines of Schemes for the Eradication of the

diseases of Brucellosis and Tuberculosis in Cattle and Buffalo which is set out in the Schedule to this agreement as constituting a scheme under which assistance of various kinds could be provided; "

In the interpretation clause the expressions "the agreement" and "this agreement" are defined to include the Schedule.

Paragraph 2 provides, inter alia,

"2. (1) The Territory will, by using the financial assistance provided by the Commonwealth in accordance with this agreement, the payments referred to in sub-clause 13(3) and its own resources, establish and operate a scheme to eradicate brucellosis and tuberculosis in cattle in the Territory which scheme will include financial assistance to persons engaged in the cattle industry.

(2) The Scheme referred to in sub-clause (1) shall consist of the forms of assistance described in, and shall be operated in conformity and in accordance with the general principles and the provisions set out in the Schedule."

Paragraph 6 provides:

"6. The provisions of this agreement and the Schedule may be amended from time to time by agreement between the Minister and the Minister of the Territory for the time being responsible for the administration of the Scheme."

Paragraph 24 provides:

"Performance of Agreement

24. The Commonwealth will provide for or secure the performance by it and its authorities of the obligations of the Commonwealth under this agreement and the Territory will provide for or secure the performance by the Territory and its Authority, authorities and instrumentalities of the obligations of the Territory under this agreement."

In the Schedule it is provided by paragraph 1.3:

"1.3 The criteria, systems, programs, methods, procedures, definitions, standards and rules set out in BOVINE BRUCELLOSIS AND TUBERCULOSIS NATIONAL ERADICATION CAMPAIGN STANDARD DEFINITIONS AND RULES prepared in two volumes by the Australian Bureau of Animal Health in the Commonwealth Department of Primary Industry (hereinafter called "the Rules" which expression includes any amendment made from time to time to that publication by the Standing Committee on Agriculture of the Australian Agricultural Council) form the basis of the operation of the Scheme and must be complied with by all participants in the Scheme."

The Standard Definitions & Rules (SDR) mentioned in paragraph 1.3 of the Schedule have been amended from time to time. The copy exhibited to me is the 1986 version which I accept as governing eradication procedures in the field. Their legal effect will be discussed later.

The above documents namely:

1. AAC Resolution 26/7/82
2. North Australian Sub-Group Report October 1982 (selected documents - full copy available)
3. National Planning Group Report December 1982
4. AAC Resolution 7/2/83
5. "Calley" Plan - March 1983
6. Commonwealth (NT Agreement) May 1984
7. Standard Definition & Rules (1986)

have been tendered to me by the defendants as Exhibit 44. Together with another document (EX "SSS") which is a Manual of Procedures issued on a confidential basis to employees of the Northern Territory Department of Primary Production and is based on the SDR, this body

of documents is put forward partly as the background to the BTEC campaign and partly as a foundation for an argument raised by the defendants that they are the genesis of certain provisions incorporated into legislation. The plaintiffs contest the latter submission and also raise doubts as to the certainty of any supposed legislation based on these documents and in particular the SDR. I will deal with these arguments at a later stage.

The plan of the campaign was to test all herds in the Northern Territory and from the results classify herds and areas. Obviously the aim was finally to declare all areas free. That has in fact now been achieved. The whole of Australia has now been declared free of brucellosis. (Tabrett p.2315). But that was not the case in September 1988.

The Department of Primary Production - Division of Agriculture & Stock - Technical Bulletin No. 44 - June 1981 - Ex 87 sets out the following classifications of areas:

"There are 5 possible classifications of areas in relation to brucellosis:

- (a) Free- where all herds have been assessed and found to be free.
- (b) Provisionally Free - where all herds have been assessed and the prevalence of the disease is less than 2 reactors in 1,000 cattle.
- (c) Eradication - where the level of disease is not greater than 2% and where active eradication testing is being carried out.
- (d) Control - where the level of disease is variable and compulsory testing has not started.
- (e) Residual - where the level of disease is impossible at this stage of the campaign to eradicate.

An area progresses in status as the appropriate criteria, detailed in the

Australian Standard Definitions and Rules for BTB Eradication, are met."

Similarly a herd progresses in status in accordance with testing. Again this is explained in the Bulletin:

### "2.3 Progress of a Herd

An individual herd progresses in status as it satisfies herd testing and monitoring criteria (see Figure 2).

At the commencement of an eradication program all herds are classed as either:

- . IN (infected);
- . SU (suspect); or
- . NA (non-assessed).

The program aims to get these herds to CF (confirmed free) status by herd testing.

Monitoring, by abattoir sampling and miscellaneous testing (for sales, movement, export, etc.) may cause a herd to revert to SU or IN status until resolved by further herd testing.

CF herds will be monitored as above, or subjected to herd testing if the level of monitoring is insufficient. The level of monitoring considered sufficient will probably be 50% of the herd over a 3 year period.

A herd is classified as follows:

NA - Non-assessed: a herd which has not been tested and for which insufficient information is available for it to be classified otherwise.

SU - Suspect: a herd in which monitoring information and/or survey testing suggests that the herd is infected, but further evidence is required to classify the herd as infected or otherwise; or in which the field situations suggests that the herd has a high risk of becoming infected (i.e. your neighbour has a high incidence of brucellosis and fences are poor).

IN - Infected: a herd which has shown unequivocal serological or cultural evidence of infection.

RD - Restricted: a previously IN herd which has had 1 negative herd test without subsequent evidence of infection.

PC - Provisionally Clear: a previously IN herd which has qualified for removal of quarantine restrictions by having had 2 consecutive negative herd tests at an interval not less than 6 months but which has not yet completed all the required confirmatory tests to become confirmed free.

TN - Tested Negative: a herd not previously classified as IN which has had at least 1 negative herd test without subsequent evidence of infection.

MN - Monitored Negative: a herd in which monitoring information and/or survey testing indicates that the herd is free of brucellosis, but a whole herd test has not been carried out.

CF - Confirmed Free: a previously PC or TN herd which has had a negative confirmatory herd test at an interval of not less than 6 months (or 2 tests at intervals of 6 and 18 months for PC herds in extensive areas).

AF - Accredited Free: a herd meeting the requirements for registration in an Accredited Brucellosis Free Herd Scheme.

There are a number of allocated tail tags to which no cattle can be ascribed. These tags belong to property owners who move in and out of the cattle industry or who fatten steers, or to dealers. The status of DB or NB is given to these.

DB - Disbanded: a herd for which records were obtained but which no longer exists as a separate entity.

NB - Nil Breeders: a herd with no animals eligible for testing.

ST - Special Tags: a "status" applied to any tags for which a specific listing is required, though not necessarily on account of the Brucella status of the herd."

It is plain enough that the status of a herd is an important economic factor affecting sale of stock. This is emphasised by various restrictions on movement imposed by legislation in other States on cattle with a certain status. This will be discussed later.

## THE DEFENDANTS

It is the contention of the plaintiffs that, in purporting to implement the provisions of the BTEC scheme, the defendants exceeded their legal powers or acted without power, and in various ways which are set out in the Statement of Claim, caused the plaintiffs actionable damage.

It becomes necessary at this stage to introduce the defendants.

The first defendant is the Northern Territory of Australia. It is sued as being vicariously liable for the torts of employees and agents of the Department of Primary Industry & Fisheries ("the Department"). The vicarious liability of the first defendant for the torts of servants or agents of the Department is admitted by the Defence. The denial is that any such torts have been committed in this case.

The second defendant is David Tabrett. He is by training a veterinarian with a degree of B.V.Sc. and a Diploma of Animal Husbandry. He was involved in the BTEC campaign from at least 1967, participating on a voluntary basis, when he was a veterinary officer on the Barkly Tablelands. In 1969 he became District Veterinary Officer at Alice Springs and the Barkly Tablelands. In 1973 he was the senior veterinary officer in charge of the BTEC campaign in the Territory. In the same year he obtained a Churchill Fellowship and travelled to the United States, The Netherlands, Great Britain and Ireland to study brucellosis and tuberculosis eradication campaigns in those countries. In 1975 he was the senior veterinary officer of the Australian Bureau of Animal Health and had responsibility for

the national BTEC campaign. He was a co-ordinator for the compilation of the Standard Definitions and Rules to which all States and Commonwealth officers contributed. In 1977 he became a regional veterinary officer at Port Augusta. In 1978 he became Chief Veterinary Officer in the Territory for a short period but then held various other administrative posts in the Department of Primary Industry before again becoming the Acting Chief Veterinary Officer of the Department. The latter position he held in September 1988. At this same time he held the position of Chief Inspector of Stock under the Stock Diseases Act, and it is in this capacity that he is sued.

The third defendant Robert Baker was, in September 1988, and still is, a regional stock inspector. He has been employed by the Department of Primary Industry since 1972, has been a stock inspector since 1974, and at all material times was quite familiar with the Neutral Junction and Banka Banka stations. Until the happening of the events later described he was on friendly terms with Rodney Mengel and Wally Klein.

Although not named as defendants there are two other persons who were involved in the actions of which the plaintiffs complain and, as servants or agents of the first defendant, attention is directed to them in the evidence of the plaintiffs. The first of these is Graham Wilson, a qualified veterinarian who, in September 1988, held the post of Regional Veterinary Officer for the region comprising Neutral Junction and Banka Banka. He too was familiar with these stations and knew Rodney Mengel and Wally Klein.

The other person is Owen John Williams. He is a veterinarian. In addition to his qualifying degree of B.V.Sc., he also has a degree of Master of Veterinary Studies in

Pathology. He became veterinary pathologist at the Arid Zone Research Institute at Alice Springs (AZRI) in 1975 and in 1977 was appointed officer in charge of the laboratory at AZRI. Amongst other things he was involved in the serology of brucellosis. In September 1988 he was in charge of the laboratory and was also Regional Veterinary Officer for the Alice Springs region i.e. south of the region of which Mr Wilson was the Regional Veterinary Officer.

Tabrett, Baker, Wilson and Williams are now all officers of the Department of Primary Industries & Fishing. That is the more recent name of the Department in which they are employed. There was some re-shuffling and re-organisation of Departments or Divisions prior to September 1988 but nothing turns on this. Essentially these four persons performed duties of stock inspectors and veterinary officers over many years and the administrative regroupings and renaming of the various Divisions or the Department itself had no effect on the manner of performance of these duties. I will, for convenience, refer to "the Department" as meaning the present Department of Primary Industries & Fishing but also encompassing its predecessors.

#### THE EVENTS OF SEPTEMBER/OCTOBER 1988

On 21 February 1985 a certificate under s.27(1) of the Stock Diseases Act was issued by the Chief Inspector of Stock. That certificate reads as follows:

"     NORTHERN TERRITORY OF AUSTRALIA  
          STOCK DISEASES ACT

NEUTRAL JUNCTION PROPS.  
NEUTRAL JUNCTION STATION  
VIA TENNANT CREEK  
NT     5760

Pursuant to Section 27(1) of the Stock Diseases Act, I hereby notify you that on this day I have given to the holding known as NEUTRAL JUNCTION and designated by Taitag No. TCBT0161 the following classifications in respect of the prescribed diseases

BOVINE TUBERCULOSIS : TESTED NEGATIVE (TN)

BOVINE BRUCELLOSIS : TESTED NEGATIVE (TN)

Accordingly, as provided under Section 27(2), the movement of cattle and/or buffalo into and out of that holding shall be subject to the restrictions prescribed for holdings having TESTED NEGATIVE (TN) status in respect to tuberculosis and TESTED NEGATIVE (TN) status in respect to brucellosis.

Dated this twenty first day of February 1985

G.R. FALLON

CHIEF INSPECTOR OF STOCK"

When the plaintiffs were preparing to purchase Banka Banka it was obviously relevant to discover what status it possessed. That was made clear by a "Development Report" of the Department of Lands which recited at p15:

"Disease Status - Confirmed Free -  
Tuberculosis & Brucellosis".

So the station was one step ahead of the status achieved by Neutral Junction of "Tested Negative".

The plaintiffs also had access to a form dated 6 May 1987 and headed "Brucellosis Testing and Compensation Claim" which was signed by Baker as supervising officer confirming the "Present Disease Status" as "CF" and certifying the number of reactors as "Nil", and the test as a "clean test".

A "reactor" is an animal which has shown a positive reaction to a test for brucellosis or tuberculosis. That does not mean it has the disease but it raises a suspicion which may or may not be confirmed by further testing. Until that further testing proves negative the animal and the herd from which it comes may pose a threat which may require restrictions to prevent the possibility of further infection. The manner and extent of those restrictions in the particular circumstances in which a reactor is found is one of the matters at issue in this case.

Another Form dated 2 July 1987 and again signed by Mr Baker as supervising officer gave the same results i.e. "Clean Test", "Nil Reactors", "CF".

However a third form on 2 August 1987 did disclose one reactor described as "Aged cow that was heavy in calf and had been vaccinated with 45/20".

This did not apparently cause any great alarm because vaccination itself can cause a reaction and nothing was done to change the status of the herd or holding. I accept that it was concluded that this animal did not have brucellosis. The reactor was destroyed. A letter from the District Veterinary Officer to Rodney Mengel of 25 August 1987 mentions that "the triennial testing for Banka Banka Station is now complete. To maintain your Confirmed Free Status it is necessary to monitor each of your herds in accordance with the Standard Definitions & Rules".

Wally Klein also had a conversation with Baker before the purchase of the

property. According to Wally Klein, Baker said "it was CF2 and squeaky clean". (The expression CF2 means that it had been twice tested and confirmed free.) I accept that something like this was said by Baker but I also accept that it was a statement made in good faith and represented the truth of the matter as Baker knew it at the time. (In this respect I have been a little puzzled by paragraphs 7 and 7A of the Statement of Claim. These paragraphs allege that shortly prior to the plaintiff's purchasing Banka Banka the first and third defendants represented to the plaintiffs that the property was CF2. Assuming that such a representation was made all the evidence establishes that it was true at the time it was made. The Statement of Claim does not go on to plead that the representation was false or made fraudulently or negligently. While it alleges that the plaintiffs relied on the representation in purchasing and conducting their business at Banka Banka it does not plead that the plaintiffs suffered loss thereby. The losses subsequently alleged are pleaded as arising out of other actions or representations of the defendants. I can only conclude that paragraphs 7 and 7A were included as part of the background of the claim but insofar as any damage is claimed to have resulted from this representation I reject it). I return to the narrative.

For a year after the purchase of Banka Banka the plaintiffs conducted both Banka Banka and Neutral Junction in the usual manner, selling off cattle from time to time and engaging in the multifarious duties of cattlemen. Rodney Mengel continued to manage Banka Banka and Wally Klein Neutral Junction. In 1987/88, the season at Neutral Junction had been somewhat dry so about 2500 head of cattle were moved to Banka Banka from Neutral Junction where it was believed conditions were better. That entailed some extra work to open up further paddocks on Banka Banka and repair some bores on the property. However the season at Banka Banka did not turn out as hoped and as a consequence some

cattle had to be sent back to Neutral Junction.

Both stations began a mustering process in August/September 1988 (there had been an earlier muster in April/May 1988). At Banka Banka part of the muster was to implement the controlled breeding programme but at each station it was anticipated that a number of the cattle generally would be culled out (including steers i.e. castrated male calves) and a number of heifers would also be taken out. In each case it was planned to sell the cattle including the heifers. The cattle culled out for defects or as part of the controlled breeding programme would be sold to abattoirs while the heifers (female weaned calves) would be saleable as "breeders".

As a result some 4,400 head of cattle were about to be released for sale, about 2000 from Neutral Junction and about 2,400 from Banka Banka.

The plaintiffs allege that it was particularly important to dispose of the 2,400 cattle from Banka Banka because drought conditions were threatening there and their disposal would alleviate the lot of the remaining cattle. Furthermore there appeared good prospects of selling breeders to southern markets because good seasonal conditions prevailed there and there was a substantial demand for restocking. It was also important for the plaintiffs to obtain capital from sales to pay off part of the bank loans. Some cattle were sold.

On about 2 or 3 September 1988 Wally Klein mustered some 95 heifers at Neutral Junction for sale at Alice Springs.

At that time the Territory had been divided into different areas, for the purpose of the BTEC scheme. The area comprising Banka Banka and Neutral Junction was a "Provisionally Free" area. No restrictions were required for movement of cattle from one "Provisionally Free" area to another. In effect this meant that cattle could be moved eastward into Queensland. But an area below Alice Springs had been declared "Impending Free" or "Free" (Ex EEE) and to move cattle from a "Provisionally Free" area to a "Free" or "Impending Free" area required a test unless direct to abattoirs. (Williams 1741.) Since Wally Klein was proposing to sell the cattle southward he had to have them tested.

Baker therefore attended on 3 September at Neutral Junction and tested these 95 animals by taking blood samples. Ex 53 seems to establish the date at 3 September 1988 rather than 4 September 1988 which is Klein's recollection. Baker sent the blood samples to the Arid Zone Research Institute in Alice Springs for testing. One was found to react to the test for brucellosis.

On 6 September Baker advised Klein of the result of the test and told him that he was not to move any breeder cattle from Neutral Junction or Banka Banka except to the abattoir for slaughter. The plaintiffs refer to this as "the first movement restriction".

Statement of Claim - paragraph 16.

The reason for imposing the restriction on Banka Banka as well as Neutral Junction was because the cattle in this particular batch had been previously agisted to Banka Banka and then returned to Neutral Junction because of the dry conditions at Banka Banka. Hence it was felt there could be contamination in both stations.

There are some slight variations in the conversation between Baker and Klein as reported by each of them but no more than would be expected from both endeavouring to recollect conversation some years back. Klein however says that Baker told him "you'll be under quarantine". Although Baker does not recollect saying that he agrees it was what he would have said because it was "standard procedure ... just the normal thing you do if you get a reactor. Obviously you're going to stop the movement of cattle - in this case brucellosis - you're going to stop the movement of females and entire males until situation's rectified one way or another, whether its proved positive or negative".

Baker also agrees (though he does not recollect it) that he would have said that Banka Banka would also be quarantined.

However I am satisfied that Mr Baker did not use the word "quarantine" in the sense of a complete isolation of the stations or that he was suggesting such a thing. He was using the word in the sense of a movement restriction of breeder cattle i.e., heifers and entire males. There was to be no restriction of movement to abattoirs.

Klein told Mengel what Baker had said and Mengel says he had a conversation with Baker on the evening of 6 September. Baker cannot remember this but again agrees that he would probably have said what Mengel says he did say, namely, that there had been a brucellosis reactor at Neutral Junction and that they were quarantined. Mengel says also that Baker said he (Baker) doubted very much whether this was a case of brucellosis.

On the following day Baker, Mengel and Wilson, the Regional Veterinary officer, had a further conversation. Again Baker cannot remember this conversation but both Mengel and Wilson can.

Baker had previously reported to Wilson the presence of the reactor and it was Wilson who advised him to tell the owners not to move breeding stock off the property until the situation was clarified. On his version that instruction applied first only to Neutral Junction but subsequently to both. Wilson also conveyed this information to Mengel. He says Mengel expressed "general dismay" at the situation. As to the meeting on 7 September between Mengel, Baker and Wilson, Wilson gives the following evidence: (Transcript 1975-6).

"Question: All right, so he told you the names of the bores and that they'd come from the southern part of the property. What was the next thing that was discussed?

Answer: Well, I wanted to know what movement there'd been between that area of Banka Banka and other parts of the property; to whether there was grounds for considering only that area under suspicion or whether the whole of the property had to be considered as under suspicion. He said he had moved quite a lot of stock between one part of the property and other parts of the property - between there and other parts - over the last few months. I recall us discussing whether it was feasible to create more than one tail tag for the property; and after that - whether before or after, we talked about the more tail tags, but as a result of that movement of stock, we both agreed that wasn't a practical option because, until we knew more, we'd have to put suspicion over the whole place because of the movement of stock.

Question: All right. Was there any mention of anything else that you can recall?

Answer: Yeah. I can recall also asking him what, if any, other

movement of stock had come out of that area and he said he'd moved about 1000 cows from that area or (inaudible) it for the last few months back to Neutral because of - it had got very dry in Neutral and they'd had - very dry on Banka and they've had some reasonable rain on Neutral, so they'd shifted about 1000 cows back to Neutral. I asked him whereabouts on Neutral they'd gone and he said that as far as he knew they'd been distributed pretty well all over the property.

Question: Was there any discussion about separate tail tags on Neutral Junction as well?

Answer: I've no recollection of talking about that with Rodney. In fact my recollection is because he'd said the cattle had been distributed all over it, I couldn't see any basis for trying to subdivide Neutral.

Question: Is there anything else that you recall being discussed?

Answer: I recollect discussing what was to happen to the reactor. Actually, before that, Rodney - once we'd sorted out where the animals had come from and the movement, Rodney wanted to know what implications this reactor would have for his property because he'd explained to - well, he explained to me as part of this that they were just about to muster cattle and turn cattle off, and they needed to go ahead and do this fairly soon and it was inconvenient not to be able to do so. So he wanted to know what the implications of a brucellosis reactor was, and he seemed to have an idea that, within a week or two, it could all be resolved. So, when he asked me what the implications were, I can remember walking over to the shelf where I kept my manual of procedures and pulling that off the shelf and opening it up - referring to the index and opening up to the section that dealt specifically with brucellosis and action following - following detection of reactors. I remember flicking through the - finding the relevant sections and basically reading out to him what the manual said in regard to the action to be taken following brucellosis reactors."

Wilson later says:

"I recollect saying to him that I thought that was unnecessarily severe but, nonetheless, there it was and I couldn't vary it. I'd have to consult with the chief veterinary officer before I was able to come up with any lesser requirements than that. Then I recall him saying: 'Would it help if I got in and tested all these cattle where this reactor came from?' and I said: 'Well, yeah, that certainly would help'. It would give us more information as to whether there was an outbreak of brucellosis or whether this was a cross reaction or something because obviously if we found more cases it would indicate an outbreak; if we didn't find any cases it would indicate, most likely, that it was just a cross-reaction and not all that significant. So anyway he said; 'Well, I'm just about to muster those cattle anyway and it's no great problem to test them, so if you want to test them we'll test them' and I said: 'Yeah, let's go ahead and do that' and I said to him: 'Well, you work out the arrangements for that with Bob, as far as the actual dates on which you do the testing'. So yeah, I - that was basically agreed, that we do the testing."

Mengel does not disagree with this version but he makes the point that both Baker and Wilson doubted very much whether the reactor was a case of brucellosis. Both Baker and Wilson agree with this.

It is important to note the tone of this and subsequent meetings. This is not a story of officious bureaucrats imposing from afar pettifogging and irrational restrictions; or of purblind property owners obstinately refusing to listen to reason. My assessment of the evidence and the way it was given by all witnesses is that there were conversations between people on friendly terms who knew the country and knew what they were talking about. The officers of the department were field officers who clearly understood the potentially serious consequences that might occur by their actions and were most reluctant to impose movement restrictions. But they saw it as a duty. They asked for co-operation from the plaintiffs. Generally they got it, save for one occasion when Mengel's quite understandable frustration got the better of him and he acted unwisely. More of that

later. The point to be made here is that generally, and save only in certain small issues, there is no problem of credibility. The witnesses gave honest evidence from their particular standpoints.

On 8 September there was a meeting between Klein, Mengel, Mr Mengel senior and Owen Williams, the Regional Veterinary Officer for the Alice Springs region who was also the person in charge of animal health activities within that region and with the responsibility for testing cattle. Williams told the others that "because of the level of the reaction it was a serious reaction which we had to then further investigate but I personally didn't believe the animal had brucellosis. I believed that there would be another organism that had spiked the immunity so that we were getting some sort of blood reaction". (1763).

Wilson gave this evidence: (1764).

"Question: Did you say anything about what course had to be pursued, in your opinion, in relation to this particular reactor? ---  
Based on prior experience ---

It's either "yes" or "no"? - Yes. Good

Question: What was it that you told him?

Answer: Based on prior experience, the advantage in keeping the animal alive for a week or so, so that we could bleed the animal over that week to see what was happening to the blood titre would give us an indication as to the likelihood of brucellosis prior to the animal actually being killed and cultured.

Question: Did you indicate in more detail to those present what the effect of further sampling of the animals would be or why it was that you wanted to do that?

Answer: Yes, I did.

Question: What did you tell them, as best as you can recall?

Answer: The effect of further sampling would be to delay the culture for a period. However, the interpretation of the culture would be easier to interpret; and this was based on the philosophy that I didn't personally believe that we were going to get *Brucella abortus* out, that we were more likely to get some other organism out of the animal.

Question: Now, you mentioned culture. What was said, apart from what you've already mentioned, about the culturing of the animal?

Answer: I don't understand the basis of the question.

Question: All right. As to the reason for the culturing of the animal, if any?

Answer: The reason for the culturing was to determine as best we could what was the cause for this particular animal having a significant level of antibodies to the *Brucella abortus* test; the delay in testing the - the delay in culturing the animal, to my mind, was justified so that we could get more information and for that reason should be carried through. There appeared to be no objection to that from the members in the meeting.

Question: Can I ask you this: leaving aside what you may have explained to those present at the meeting, what is it that you want to culture the animal?

Answer: Well, we have a duty of care to the owners of the property to ensure that the information that they have and we give them is correct. We have a duty of care to the rest of the cattle producers in Australia that the information that is supplied is correct. So the purpose of the culture was to ensure that the information that was given out was as accurate as possible."

Later Williams was asked about movement restrictions: (1766).

"Question: Right. Well now, can I ask you this now, at the meeting was there any discussion between you and the others present at that meeting about the topic of movement restrictions?

Answer: Yes there was.

Question: Who brought the topic up?

Answer: Rodney brought that up.

QQuestion: And what was asked?

Answer: He asked me whether the station would be in quarantine, to which I replied no we didn't need to because the movement restrictions would protect the rest of the cattle industry because the movement restrictions were that store animals are not allowed to be sent off - or store breeders are not allowed to be sent off, whereas there's still access to meatworks for any animals.

Question: Well now, had you prior to this meeting been told anything about whether movement restrictions had been place on the property?

Answer: I can't honestly recall. The normal events would have been that I would have been told, yes.

Question: All right. And did - was there any argument, if I can put it that way, from any of the owners about the movement restrictions that you mentioned?

Answer: No, the meeting was quite amicable.

Question: Did you believe those movement restrictions were necessary? I did believe they were necessary."

Objection was taken to the last question but overruled. The question was repeated in the following form:

"Question: The question was in relation to the movement restrictions that you mentioned, what were your reasons for believing that those restrictions were necessary?

Answer: I'll come immediately to the duty of care. The broad principle is that if you have a reaction that hasn't been determined as to whether it is caused by *Brucella abortus*, then you restrict the movement of potentially breeding animals until such time as you have decided whether that animal has brucellosis or has not got brucellosis. And that's the purpose of the restrictions, is to prevent the spread of *Brucella abortus*."

Mengel's version which does not disagree substantially with Williams is this:

(191B-192).

"Question: All right. And did you have a conversation with Taffy Williams?

Answer: We did.

Question: Was he the district veterinary officer from Alice Springs, at least as far as you knew?

Answer: As I understood, yes.

Question: And can you help us reconstruct that conversation?

Answer: I spoke with Taffy re the implications of the reactor of the heifer that came from Banka Banka. I discussed with him, at length, the testing procedures, what was going to happen to the heifer, and he told me that - or in the words of the effect of the - they were going to keep the heifer alive for a few more days, to take more blood samples. Then she would be destroyed, whereupon certain parts of her anatomy would be cultured, and that in approximately 30 days time we would have an answer to the culture, whether we had brucellosis or not. And that that answer of that culture would be a decisive answer that would be 100 percent true.

Question: Thank you?

Answer: I also discussed with them the fact that we desperately needed to truck cattle to markets; that we needed to truck these cattle because we needed to make payments

back to the bank, emphasising that we - that we wanted to truck cattle. I was led to believe that we had to wait another 30 days before we could move any cattle other than fats or for slaughter.

Question: You said a couple of minutes ago that Baker had also referred to this 30 day business and the conclusiveness of the cultures. That came up again, did it, on this occasion?

Answer: I was led to believe that the - that the culture of that - of that - or the result of that 30 day culture would be conclusive.

Question: Yes, but you've said that Baker said that to you the day before in Tennant Creek?

Answer: Yes.

Question: Was something similar said also in Alice Springs, at this meeting with Taffy Williams?

Answer: Yes.

Question: By whom?

Answer: By Mr Taffy Williams.

Question: Then was there some discussion about you desiring to do your own testing, just to double check this reactor?

Answer: I think Mr Klein asked Mr Williams if he could - or if we could take our own private tests. He had no - he had no objections to that and we also enquired the - the - what was going to happen to the beast and he said the words to the effect that it doesn't belong to us any more. You know: 'Got no more power over it, you don't own it'.

Question: Did you give permission for that beast to be slaughtered?

Answer: I'm not aware.

Question: Well, you yourself?

Answer: No.

Question: Did either of the gentlemen - that's Mr Williams or Mr Bertram - say anything about further restrictions on movement of cattle?

Answer: I was led to understand that - that the restrictions I've mentioned before still stood in place."

As to Mengel's comment that Williams said words to the effect there would be a positive answer within 30 days, Williams does not disagree. (1849).

Question: In fact if the plaintiffs, that's Rod Mengel and Wally Klein came away from that meeting with the recollection of you saying to them that the culture would be conclusive one way or the other after about 30 days that would accord with your recollection.

Answer: That would, yes.

On 3 September 1988 a "Brucellosis Testing and Compensation claim" was completed in respect of the reactor describing it as a "9 month heifer". It purported to be signed by Wally Klein and gave permission for the slaughter of the animal. In fact Wally Klein did not sign the form and the purported signature "Wally Klein" was filled in by Baker - as he freely acknowledges. Although this is somewhat curious I am satisfied nothing sinister was being attempted and that Wally Klein would have signed if he had been asked. It was naivety rather than anything more which led Baker to his action. He has, he says, an aversion for paper work.

It was agreed that Mengel could arrange for separate tests. He approached a Mr Bertram, and together they took blood samples from the animal and they were forwarded to the Institute for Medical and Veterinary Science (IMVS) in Adelaide.

Mengel returned to Banka Banka and continued mustering.

On 11 September Baker and Wilson came to Banka Banka and tested approximately 750 heifers and cows. They found 17 reactors. On 13 September Baker and Wilson tested another 200 heifers and cows and found 6 more reactors. Mengel also took his own samples of 22 of the 23 reactors. There were conversations between Mengel and Baker in which Baker probably said that Banka Banka was "quarantined". The plaintiffs refer to such conversations on or about this date as "the second movement restriction". This is a reasonable enough way of describing it although it was probably put by Baker more as a re-iteration of the previous restriction. Baker says there were several conversations.

Mengel at this stage clearly understood that there were now movement restrictions on Banka Banka not only because of the first reactor but now because of the other 23 (he says 22) reactors (199). He understood also that this did not apply to steers and bullocks or cattle for slaughter (328)(404).

Although Mengel uses the term "quarantine" and although I am satisfied that the defendants' officers also used the term I am quite satisfied that what had occurred was a movement restriction rather than "quarantine" in the statutory sense of ss12 and 13 of the Stock Diseases Act. By the Act, "quarantine" is not defined, but "quarantine area" is defined as "an area in respect of which a declaration under s12 is in force". S12 permits the Minister to declare land to be a "quarantine area" and s13 states that, "A person shall not drive or move

stock into, out of or within a quarantine area, except with the written permission of an inspector". This is a total prohibition of the movement of any stock for any purpose. It is never suggested that that sort of prohibition was imposed on the plaintiffs. They were always free to move stock for slaughter. Throughout the evidence of various witnesses the term "quarantine" is employed in the "movement restriction" sense i.e., allowing some, albeit restricted, movement of cattle rather than a total prohibition on any movement. The word has an elastic meaning in ordinary language and I do not propose to accept it in its more restricted, i.e., statutory, sense unless the context clearly shows it. In my view the conversations between witnesses in which this term was used make it clear that the reference was to movement restrictions.

On about 29 September there occurred an incident, the details of which are one of the few factual matters substantially in dispute between the parties. Baker, instructed by Wilson, arrived at Banka Banka and asked Mengel to release the 22 or 23 reactors so that they could be taken down to Alice Springs to have them cultured. (In fact it turned out that one reactor had been included by mistake so the number was in fact 22.) According to Baker, Mengel refused to give the animals up until the culture results for the first (Neutral Junction) reactor were received by the Department (1440). At this stage Mengel had received information from IMVS that the sample sent to them from the original reactor had tested negative. I am in no doubt that Mengel at this stage refused or made it clear that he was not going to hand over these 22 reactors. Mengel does not really deny this although it is submitted that there is no evidence of an outright refusal. I consider this somewhat casuistical.

The real position seems clear. Baker's evidence is that there were "probably" a

number of conversations about this. He does not give specific dates. He says (1440) "the conversations were about getting the 22 reactors down to Alice Springs to get them cultured so we could prove or disprove brucella on the property". He was asked, "What was the substance of his response?". Baker's answer was "He would not give the cattle up until such a time as we got the culture results back from the Neutral Junction heifer". I accept this evidence from Baker. It is true that Baker often said that he had no recollection of some events and conversations. (He confesses to having had some sort of nervous breakdown after 1988 though it is not suggested that it was caused by these events.) My assessment of him was of an honest witness being frank, at times remarkably frank. Indeed his last answer to his own counsel in re-examination was rather startling. "Was it your intention to achieve those objectives, even if what your practical way may have been unlawful?". "Yes". (The expression "those objectives" in the context meant the BTEC objectives.)

Such an answer may have given one pause if the witness had been a sophisticated witness and the answer had been forced out of him after a great deal of hedging. But Baker was not a sophisticated witness. He was naive. He appeared to me to have no intention whatever of evading any questions even if his answers were not necessarily in his favour. I doubt if he even paused to consider the significance of any of his answers. He just answered directly to whatever was put to him.

In any event there is a great deal to substantiate the fact that Mengel refused to give up the reactors when they were requested. Mengel himself is at pains to give a number of reasons why he did not provide the reactors. He says he was too busy mustering at another part of Banka Banka; he couldn't provide the men to do it at the time; no helicopters were

available (425-8). He says that one request only was made for the cattle on about 28 or 29 September (424). He denies the suggestion that he had decided not to give them up. I do not accept this.

I accept that from about 29 September to 19 October Mengel refused to give these reactors up. I understand his motives. He had received word from his own source that the original reactor had tested negative. He was desperately hoping that that would be the end of it. He had been told by Baker, Wilson and Williams - and this is freely conceded by them - that they thought it unlikely (highly unlikely is not too strong a term) that the reactor had brucellosis. The remaining cattle on Banka Banka were beginning to suffer from drought conditions and he was becoming rather desperate for markets. He impressed me as a man with many admirable qualities but at times impetuous and headstrong. I have no hesitation in finding that he became irrational and obstinate in his refusal to give up the cattle. I think he was also exasperated by first being told that the results of the first reactor would be known in 30 days and he clung to this despite the obvious fact that the discovery of 22 further reactors had altered the position (c.f. Klein (651)(688)). In the result I find that his own actions had the effect of delaying for some 20 days (perhaps more) the testing of the reactors.

Klein, though loyal to Mengel seemed to me distinctly uncomfortable under cross-examination about this topic. He did concede that on about 14 October Wilson had said to him "Rodney was a problem and they're being difficult about the reactors" (692). He concedes that at that stage he decided to do something to resolve the problem and I find that it was because of his mediation that the reactors were eventually handed over.

I accept Wilson's evidence of the events of 19 October: (2019).

"Question: And was there a discussion in which you and Rodney and Mr Klein and Mr Baker participated?

Answer: Yeah. We had an extensive discussion for - that must have lasted a couple of hours, over why we'd taken the action we had, why he hadn't been prepared thus far to comply with the request to provide the reactors. I mean, my recollection is we went round in circles for an hour or two and Wally was actually saying to Rodney: 'You know, we need to get this result. Why don't you go along with this request? It's just silly not doing it. It's just dragging it out'. And eventually after a couple of hours Rodney agreed, yes he would provide the reactors.

Question: All right. Did he indicate to you what his reasons were for refusing to deliver up the reactors previously?

Answer: Well he gave me some reasons. He said that one reason was logistical, which I hadn't been aware of. But he said it wasn't just a little paddock, it was a large paddock. Whereas my impression from him saying the holding paddock was just a tiny little paddock next to the yards, and he said: 'Well actually it's a paddock of 20 or 30 square miles or something'. So there was logistical problems in mustering it. He said another problem was he was not satisfied that reactor compensation values that we had basically as our gazetted rates were adequate for those animals. He thought that the animals were worth more than the reactor compensation rates, and so he wasn't going to give them up for that money, and he said the other reason was he basically got his nose out of joint being sent a fax in the firm of an ultimatum from Doctor Tabrett because up until then he and I had always had, you know, basically reasonable discussions about the matter, and he didn't like being told what to do in that manner.

Question: Well, did you discuss how you would resolve each and every one of those concerns?

Answer: Well, yeah, we - well, two of them we did. The matter

of the valuation for the reactors, I'd had some discussions already about that with the BTEC office in Darwin and we'd agreed that it would be quite appropriate to have an independent valuer, just livestock agent, value the cattle and say what would be their disease free value. So I said well we're prepared to do that if you wish to go that way. So that was one issued we resolved there.

Question: Was he - did he accept ---?

Answer: Yeah, he accepted that that would be appropriate.

Question: Right?

Answer: I said because I authorised the release of those animals into the holding paddock I accept that we should pay the cost of muster - any reasonable cost to must them and transport them out of it, etcetera. So he said: 'Does that include helicopters?'. I said: 'Yes"', and so he said: 'All right, well' - you know - 'that will cover that cost', sort of thing.

Question: And did that appear to satisfy him as far as you could see?

Answer: Well I wouldn't say he was happy, but he considered that that was appropriate and was prepared to go along on that basis.

Question: All right. Was there any further discussion?

Answer: As far as the thing with Doctor Tabrett and the facts (sic), I didn't buy into that. I just left that as - you know, that wasn't relevant. He did, at some stage that afternoon, ask why we wouldn't just de-stock the whole herd for brucellosis. Seeing we wouldn't let him move them why wouldn't we issue an order or whatever and de-stock the whole herd under our controlled de-stocking scheme, and I said we couldn't do that without definite evidence because we'd be spending hundreds of thousands, if not millions, of dollars worth of compensation to do so, and so we'd need culture before we could go that way. But I said if we did get brucellosis confirmed on culture then I would very strongly support that action. I mean, I can't remember

the other things we discussed, because ---

Question: Well, at some stage did you give an instruction to Bob Baker?

Answer: Yeah, that's right. While we were there - when he'd agreed to provide the animals and he was going to - Rodney said: 'Well, I'll organise a helicopter as soon as I can' and so I instructed Bob at that stage, I said: 'Well, Bob, you organise with Rodney the logistics of mustering those animals and getting them to Alice Springs so that we can have them slaughtered and collect samples'.

Question: Was there any discussion concerning expedition of the laboratory processes?

Answer: I assured Rodney that I would do what I could to ensure the lab handled the results with utmost expedition. I recall also saying - we discussed how long it would take to get culture back on them and I said: 'Well, it normally takes about 4 weeks, but because of the large number of animals I would hope that we could give you a definitive result in about 3 weeks and I'll see if I can get the agreement of the relevant people to do that', some words to those effect that I used.

Question: In relation to that undertaking did you carry it out?

Answer: Yes, I can recall ringing the laboratory, probably the next day, and explaining the agreement that had been reached and saying: 'Well, you know, please do everything in your power to handle and process these animals as quickly as you possibly can because of the, you know, situation he's in with lack of feed and needing to move these animals, if it's a negative culture, as quickly as possible' and they said yes, they would."

Finally - and conclusively to my mind, - the sending of a FAX from Tabrett to Baker on 30 September 1988 could only have been inspired by the continual refusal of Mengel to release the reactors. I accept that, throughout, the officers of the department Baker, Wilson, Tabrett and Williams were doing their best to be conciliatory. Their evidence is that

they had no wish to be heavy-handed. They understood the pressures on Mengel and Klein, the disaster which the presence of reactors or even the suspected presence of reactors on the stations would cause, and I am quite satisfied that they wished to proceed co-operatively rather than bring to bear such legislative or administrative powers which they had or believed they had. (See, for instance Baker's evidence at 1517-8.) I am satisfied that the sending of this FAX was thought of by them as a last resort to bring pressure on Mengel to do what he clearly should have done earlier. Whether their solution was a wise one will be considered later. But I acquit them of any mala fides in doing what they did.

#### THE "FAX" OF 30 SEPTEMBER 1988

The refusal of Mengel to co-operate left Baker and Wilson in something of a quandary. They were unwilling to use any statutory powers which they believed they had. They wished to be conciliatory but they also firmly believed that it was necessary to have the reactors brought to Alice Springs for testing. Wilson took the view that 13 of the 22 animals specifically needed further testing by culture including all the pregnant animals from that group. (2012). On 27 September Wilson spoke to Tabrett. This is his evidence.

"Now, did you at any stage have any discussions with the chief veterinary officer, or with Doctor Williams, relating to that decision that you'd reached, concerning culture? --- Well, prior to reaching it, I had discussions with all of them. I don't remember precisely when or the substance as to what we thought we should do. After analysing these specific results, I had a discussion with Doctor Tabrett because I needed his endorsement before I could make that a definitive decision. So I rang him on the - I think it was the Tuesday morning, late in the morning, to seek his endorsement in respect of what I considered appropriate action.

And the Tuesday morning being the 27th; is that so? --- Yes, yes, it would

have been.

Of September. And did you get his endorsement? --- Yes, he concurred. What I wanted to be in a position was to be able to go to Rodney and say - or inform Rodney that if we did this and we got no further - got no brucellosis out of these animals, that once the cultures were done, that would be the end of the - the restrictions. Because, you know, under the manual and all the standard documents it talked about a post-calving test the next year and I was very concerned that that could be a requirement which would have, you know, kept the herd for at least another 12 months before they could sell anything. So, yeah, he concurred with that. He said he was quite happy to support that action; he was quite satisfied with it."

(2013-4)

Wilson then told Baker to contact Rodney Mengel.

"Now did you discuss with Bob Baker anything about this decision? --- Yes. Well, I got back about lunchtime and Bob - - -

And on which day is that? --- That's on the Wednesday.

Yes? --- And Bob had just arrived back from Alice Springs, too. And so I told Bob the decision I'd come to and said: 'We need to contact - what's the name - Banka Banka'. Because it was fairly complicated and Rodney was already - had indicated at some stage a resistance to providing all the reactors - I can't remember when - but I was aware that he wasn't very happy about providing more reactors, I said: 'I think, the best thing is if one of us goes and sees him and explains the decision to him, rather than just ringing him up or something.'

And he said: 'Well, I'm going up there first thing tomorrow morning to do some job' - I can't remember what it was. And I said: 'Well, can you convey the fact that we need those reactors?' Because I'd agreed to the release into the holding paddock, I said: 'Tell him we're quite happy to pay any costs associated with - with that' - getting them back from there."

(2015)

Wilson then left for duties in the gulf country and did not return for a week.

Prior to leaving he had attempted to contact Rodney Mengel but had only been able to leave a message with Rodney Mengel's wife. Mrs Mengel told Wilson that Mengel would be coming to town that afternoon and Wilson asked her to tell Mengel that he, Wilson, wished to see

him. However he could not make contact before he left for the gulf. I don't attach any blame to anyone for this. I accept that the commitments of both Mengel and Wilson meant they could not meet in the short time available to both. However it left to Baker the task of again contacting Mengel. Baker's evidence is somewhat confused about a contact on 29 September but I accept that on about that date he made the last of several unsuccessful attempts to persuade Mengel to hand over the reactors. (Wilson 2016, Baker 1440, Mengel 212, Mengel 424.)

Baker shortly after this had a conversation with Tabrett who had also been in touch with Wilson. As a result of these conversations Tabrett sent a fax to Baker. The date of the fax is 30 September 1988. It must be set out in full.

" TO BOB BAKER

FROM D. TABRETT  
CHIEF VET OFFICER

MESSAGE Necessary 13 head suspects ex Banka destocked to AZR1 to determine status. Compo & transport will be paid. Property quarantine until status determined.

DATE D TABRETT (Signature) 30/9/88."

Tabrett had had a conversation with Wilson before Wilson left for the Gulf and the gist of that conversation was clearly the concern they held about Mengel's refusal. (2261).

Tabrett is perfectly frank about the sending of the fax and the reasons for doing so:

"All right. At some time or other, did you send a facsimile to Bob Baker?---  
Yes.

Could the witness be shown exhibit D page 97, please?

HIS HONOUR: Yes.

MR MILDREN: Is that the document that you sent to - - -? --- Yes. Did  
you compose that document?---Yes.

And did you arrange for it to be faxed to Bob Baker? --- Yes.

And was it sent on 30 September, so far as you knew? --- Yes.

Now, in relation to that fax I want to ask you some questions. What - who was  
the person who - was there any person who contacted you concerning sending  
that fax that led to the sending of that fax? --- Yes.

Who was that? --- Bob Baker.

All right. Now, what was it that he said to you that led to the sending of that  
fax, just in broad outline? --- He felt he wasn't getting much support and he  
wasn't - didn't seem to be able to get through to Rodney that we needed the  
cattle. He convinced me that Rodney wouldn't understand what restriction on  
movement really meant, and he wanted me to use the word 'quarantine'  
because he understood that Rodney understood that. And he felt that he  
needed backing up from the department. He was feeling a bit lonely.

All right. Well now you see there's reference to 13 head? --- Yes.

Are you able to explain how that came about, that there were 13 head? --- I'd  
spoken with Graham Wilson and Bob Baker and the animals where you're  
most likely to get positive culture results are from pregnant animals, and these  
refer to the pregnant head.

All right. Was there any discussion that you can recall now concerning what  
would happen if those animals had cultured negative? --- The station would  
have been regarded as being negative.

And who was that discussion with? --- Graham Wilson, I think, and Bob Baker  
probably.

When you say the station would have been regarded as negative, what  
precisely do you mean by that? --- It would have lost the suspect status and  
returned to its original status.

All right. Did you understand this fax to be shown to anybody? --- I understood it was.

And to who in particular? --- To Rodney Mengel."

Tabrett was then asked whether he believed he was exercising any statutory powers in sending the fax.

QUESTION: At the time of sending the facsimile message, did you believe you were exercising any statutory powers?

ANSWER: Yes.

QUESTION: What powers did you believe you were exercising?

ANSWER: Chief Veterinary Officer.

HIS HONOUR: I'm sorry?

TABRETT: Chief Inspector of Stock.

QUESTION: And what particular statutory power did you have in mind?

ANSWER: Restriction on the movement under s.42.

QUESTION: That's of the Stock Diseases Act?

ANSWER: Yes. (2259)

S42 of the Stock Diseases Act relates to the powers of an Inspector.

"Inspector" in 1988 was defined in the Act as meaning "a person appointed and holding office as an inspector of stock under this Act". By an amendment in 1990 (s4 of 2/90) the words "and includes the Chief Inspector" were added. On Tabrett's evidence in September 1988 he

held the position of Chief Veterinary Officer on a temporary basis pending the appointment of a new Chief Veterinary Officer (2242). At the time however he also held the position of Chief Inspector of Stock (2283) and had been gazetted, presumably many years earlier, as an inspector of stock (2280). I am not sure of the basis of the 1990 amendment because it seems to me that, even without such amendment, the expression "Chief Inspector of Stock" must necessarily mean that the person designated "Chief Inspector of Stock" must by definition be an "Inspector of Stock", as the greater includes the less.

Tabrett was asked whether, by the fax, he was intending to impose a formal quarantine under the Stock Diseases Act of the whole property. His answer was, "No, you can't do that", that only the Minister could. His explanation of the use of the word "quarantine" was "just backing up what - the movement restrictions that Bob had placed on the property and just letting Rodney know that the department was behind this action".

Under cross-examination he gave these answers:

"All right. Let's get back to the end of September, immediately before you sending the fax. Point 1: Baker felt he wasn't getting much support from the department. Point 2: He expressed the view that he couldn't make Rod understand that the department wanted these reactors produced? --- Yes.

Okay, that was the second thing that you mentioned yesterday? --- Yes.

Did he also say to you that he wanted you to give him something that he could give to Rodney Mengel to get the issue resolved? --- He wanted some support, yes.

In fact that he wanted a document that would put pressure on Rod Mengel to move the cattle? --- He wanted a document to - to show that I was supporting Bob to get the cattle, yes.

It was he who suggested that the word 'quarantine' be included? --- Yes.

Because that was a word that Rod Mengel would, in effect, be concerned about? --- No, he - he said he didn't understand what restrictions on movement really meant. He always referred to it as - - -

HIS HONOUR: When you say he didn't understand, do you mean - - -

MR HILEY: Mengel - - -

HIS HONOUR: - - - Baker or Mengel? --- Mr Mengel didn't understand, yes.

Mengel, right.

MR HILEY: At that stage, your understanding was that Mengel and Klein had both been told they were not to move entire cattle off either property - I think with one exception of moving from Banka to Neutral - except to abattoir? --- Yes.

Your understanding also was that they hadn't breached that restriction? --- Yes.

In other words I suggest that there was no evidence to suggest that they didn't understand the meaning of the movement restrictions? --- I was informed that - that Mr Mengel certainly - Mr Klein certainly understood, but Mr Mengel didn't seem to.

But there was no evidence of them having breached the movement restriction? --- No.

And no evidence, therefore, that they were not going to obey it? --- No evidence, no.

That's right. In fact the evidence is the other way, because they were both saying: 'We want to move the cattle, will you remove the restrictions'? --- Certainly I spoke to Wally about that and he was - yes, he felt that.

Well, you'd also received notice of the request from Rod Mengel for permission to move cattle from Banka to Neutral? --- Yes.

In other words, you knew perfectly well that they did understand that they couldn't move cattle, because of the movement restrictions? --- Yes. I'm not sure whether

that came from Mengel or Klein.

So the word "quarantine" was inserted by you with the intention of forcing Mengel to produce reactors? --- No, it was to give Bob support, because - to make him feel that the department was behind him and - that's the words of Mr Klein, Mr Mengel understood a continuation of the - of the quarantine.

So you say the intention of the fax was not to force production of the reactors? --- That's - we wanted the reactors, yes.

Well, that was the intention of the fax, wasn't it? --- To clear up the matter, yes.

The intention of the fax was to force Mr Mengel to produce the reactors? --- Convince him, not force.

Was to force him to produce the reactors? --- No, we can't force him.

No, that's right. But that was your intention, was to force him, wasn't it? --- No.

In any event, your intention was to "convince him", to use your words, that he should surrender up the reactors and this was the means that you tried to convince him - that you used? --- To help Bob convince him, yes."

Later he gave these answers:

"As at 30 September you didn't see any need to quarantine either property ---? --- No.

- - - in a formal way? - - - No.

Or at all? --- At that stage, no.

And in fact you knew that there was no justification for quarantining either property? --- Yes, we could have put them under restriction, declared them as restricted properties, but that would have involved a lot more expense down the line for them.

That's under your section 22A mechanism? --- Yes.

But my question is directed towards quarantining under the quarantine section of the Act. You knew that at that stage there was no justification for quarantining either property? --- Because we hadn't proved an infection."

In an affidavit sworn 17 April 1990 Tabrett had said, referring to the fax, "I admit that my conduct was not authorised by the Stock Diseases Act, but as to the alleged breach of duties of office I say that this does not disclose a cause of action in the plaintiffs against the second defendant. I deny that I have breached any duties of office as alleged as (sic) at all".

He agrees (2278) that it was his belief when he swore that affidavit that his conduct was not authorised though he appeared in two minds when he gave evidence.

QUESTION:           And I suggest to you that's still your belief, can you answer that.

ANSWER:            Yes, I can answer it, but with an explanation.

He was not pressed to give the explanation.

His evidence however seems to indicate that at the time he sent the fax he thought he was authorised. (2277).

The position is somewhat confusing but I take him to be saying that at the time

he sent the fax he thought he was acting correctly (i.e., within his powers), that subsequently he was persuaded that his action was not authorised but that presently he is in some doubt about it.

The plaintiffs' claim that the sending of the fax and the instructions given to them by Baker in purported reliance on it constituted the "third movement restriction".

Mengel's evidence also uses the word "quarantine" in the loose sense. He says "Once we'd turned up the 22 reactors I understood that the whole of Banka Banka was quarantined because those heifers were in actual fact progeny of all the breeders on Banka Banka". (199).

He then gave these answers:

" What led to that understanding, did somebody say something? --- Well, with discussions with Mr Baker we arrived at the possibility that all those heifers were infected and that they'd come from all the breeders, so therefore the whole Banka Banka lease was quarantined."

All right. But still with the exception of steers and bulls - sorry, steers and bullocks? --- Yes, and fat cattle for immediate slaughter."

Later he refers to a conversation with Baker some time in September before the sending of the fax.

" Did you have a discussion as to the restrictions being imposed on you, that is as to whether or not you could then move cattle? --- We once again discussed the fact that we wanted to shift and sell cattle, and Mr Baker pointed out to me that we were still quarantined and that tied the whole herd that were entire

breeders excluding, again, fats for slaughter or steers. We discussed which paddocks to put them into, and for what length of time would he like the cattle held in the paddock, which he indicated to me that he wasn't sure of the amount of time. And we settled on the boxhole being the appropriate paddock.

You've used the word 'quarantine' there. Did he use that word? --- As I'm aware."

After receiving a copy of the fax which seems to have been either faxed to him by Baker or handed to him by Baker on about 30 September 1988 his evidence was that:

" My understanding after reading the fax was that the fact that all cattle on Banka Banka and all cattle on Neutral Junction, were quarantined." (215).

On 7 October 1988 Wilson sent a letter to Mengel which again uses the word "quarantine".

" Department of  
PRIMARY INDUSTRY AND FISHERIES

7 October 1988

Mr R. Mengel  
Banka Banka Station  
Via Tennant Creek NT 0860

Dear Rodney

Following the presence of low titre brucellosis reactors on Banka Banka Station, it has been decided that in order to reach a diagnosis of what is causing this problem on Banka that it will be necessary to acquire those animals which are pregnant or freshly calved and have shown evidence of a serological reaction to brucellosis.

This will allow a bacterial culture to be performed on those animals which reacted, which should make it possible to determine whether brucella or related organisms are present causing the reaction.

The CVO has advised that until such time as this Banka Banka Station will

remain in quarantine for brucellosis. The Department of Primary Industry and Fisheries is prepared to meet reasonable mustering costs to remuster these animals from the holding paddock and also transportation costs to Alice Springs. We are also prepared to have the animals valued as to what their value would be if disease free in Alice Springs (valuation by agents) and pay you this valuation rather than reactor compensation for these animals if you prefer.

Provided no brucella organisms are detected on culture the CVO has indicated to me that he would then be prepared to lift the quarantine on Banka and Neutral Stations.

Please advise me or SI Baker as to how you will proceed with this matter. SI Baker has a full list of those animals which we require.

Yours faithfully,

G S WILSON  
District Veterinary Officer"

On 14 October Mengel sent the following letter to Wilson.

"

Banka Banka Stn  
Via Tennant Creek  
14 October 1988

Dear Graham,

Following a recent phone conversation with Bob Baker this morning he confirmed to me that the one beast (heifer) from Neutral Junction origin Banka Banka was cultured negative. On the grounds of the overwhelming evidence that no brucellosis can be found or proved to be present on Neutral or Banka Banka I ask that your dept revoke the present status on both stations.

I'm prepared to continue with a monitoring progress in all areas. I would like to point out that presently we have about (400) four hundred cows and calves (culls) in a paddock which I plan to sell as soon as possible. They are old cows and very weak, as our present feed situation is not the best you can appreciate that we would like to get them sold soon. We are loosing (deaths) about 8 to 10 cows a day over the whole lease. I would appreciate that you personally could come up to Banka, spend half a day to see this for yourself.

Yours faithfully,

Rodney Mengel. "

On 19 October 1988 Mengel and Klein met Wilson and Baker at Banka Banka and on this date Mengel finally agreed to give up the reactors. This is his evidence: (217-9).

"Did you then go on a tour of the property, or part of the property, anyway? --- Yes.

Did you inspect various carcasses at numbers 8, 10 and 1 bores? --- Yes, we did.

Did you also drive around middle bore paddock? --- Yes.

And pointed out dead beasts there as well? --- Yes.

Did you drive round for about 2 hours? --- Approximately.

Did you have a conversation? --- Yes, we did.

During that conversation was there any discussion about your predicament, namely your inability to sell cattle and your financial situation? --- Yes, there was.

Can you try to tell us the substance of that discussion? --- The discussion was round the lines that you could see that cattle were dying on the property, that we had cattle accumulated for sale and that we had to get them off to other pastures, preferably to sell them because we needed to keep the cash flow up to the bank.

What was said in answer to that? --- When Mr Wilson indicated that that was none of his business and that he didn't really care.

Was anything said about the continued quarantining of the property or the cattle? --- It was indicated to us that unless the 22 reactors were produced that he - the quarantine would remain in force until such time as they'd been killed, cultured, and a result.

So by this stage the 22 reactors still hadn't been produced, is that right? --- No.

So did you agree then to produce these 22 reactors? --- Yes, we did.

And did you seek - you sought some sort of financial assistance for that purpose? I'm sorry, I withdraw that. You already knew, did you not, from your earlier conversations, that the government would assist you for the costs of mustering and trucking those 22 reactors? --- That's correct.

Did you discuss with Mr Wilson a number of options that might be available in relation to the herd in general? --- We did.

And was one of those - what were they? --- There was 3 major resolutions. One was to - to acquire the 400 cows that we had presently available for sale under the destocking scheme. Mr Wilson indicated to us that they could not do that, because Banka Banka was not under a destock. It didn't have a confirmed reactor, therefore it wasn't eligible for any scheme assistance. I commented that was a bit catch-22. Another solution was for the whole of the Banka Banka herd to be destocked under the government assistance scheme. Again, the reply was 'No. Your movements are restricted due to the reactor.' The other option was ---

Sorry, just before you go on: In relation to that option of destocking the whole of the herd - was there any discussion about what it would cost? --- Mr Wilson made the comment that it could cost the government upwards of \$1m.

And did you say anything in response to that? --- I was rather astounded that --  
-

What did you say? --- I said 'Christ Almighty, Graham, we've bloody paid \$3m for this place'.

Okay. And then the third option? --- Was to lift all the movement restrictions so that we could shift what cattle we wanted and shift them on agistment, or to Neutral Junction for example.

And what response did you get to that? --- Well, they said that because we'd had a trace back of disease, that we couldn't shift them.

All right. Did you have a further discussion about the effect on finances? --- Well we discussed the fact that we had to sell cattle to remain viable. Mr Wilson suggested that we do like Mr Sherwyn had been forced to do - or should I say we understood that Mr Sherwyn was forced to sell his clean cattle, and he suggested that the cattle that were on Neutral Junction that weren't theoretically under this cloud of brucellosis that we should sell them if we wanted to keep our cash flow up.

Yes, and what was your response to that? --- Well we were astounded at the fact that we should sacrifice good cattle like that.

Did you say something like that to him? --- Yes, I believe I did.

Okay. All right. Was something said on that occasion by Mr Wilson about the reliability of the testing? --- I'm not sure.

Okay. And was something also said about shifting cattle from Banka to Neutral? --- I'm not sure again.

Okay, and was anything said that you recall about the possibility of selling cattle in November or December? --- Well, I think we assumed that if the 22 reactors were produced that they would have to go under the 30 day culture again, and then once the results of that culture came back that it would be conclusive whether we had brucellosis or not, and then we may be able to shift cattle after that.

So did you expect that it would be least another 30 days after that time when you were talking to Mr Wilson before results would be known to those 22? --- Yes."

(217-219).

As to his interpretation of the meaning of the word "quarantine" Mengel gave this account of a conversation with Dr Williams on 8 September:

" Well, you asked at that meeting, didn't you, 'are we in quarantine?'"? --- I don't recall.

He may have said that? --- He may have said it, yeah.

Certainly your understanding of the restrictions at that time was that you were permitted to take breeders to the abattoir for slaughter; is that right? --- Yes.

There were no restrictions on cattle that were not entire? --- Except for spayed cows.

The only restriction on entire cattle was that they had to be slaughtered? --- Or 'no movement'.

Or 'no movement'. So far as spayed cows were concerned, they could not be slaughtered as well, I suppose? --- Yes."

(404-5)

Mengel was asked his reaction on receiving the fax on 30 September. (435-8).

"You said then, in response to some questions that I put to you, that you understood that this facsimile message meant that the whole of Banka Banka and Neutral Junction were subject to a blanket quarantine until you had renegotiated a movement test, or movements with the DVA? --- DVO.

By the DVO you meant the district veterinary officer, Mr Wilson? --- Yes.

That remained your understanding of that message, did it? --- Yes.

Until the quarantine was lifted? --- Yes.

Now, you said in your evidence in chief, that when the fax came to your attention - when the fax, which is the subject of that document - came to your attention, you had a discussion with Mr Klein about it. Is that right? --- As I recall.

Well didn't Mr Klein tell you that he understood the position to be that you could move cattle, except for entire cattle and females? --- I don't recall the contents of the conversation.

Well, would you have a look at the statement of claim in this matter? That's the latest one, Your Honour, the amended substituted statement of claim.

HIS HONOUR: Do you want him to have a look at that? I'll hand him the court copy.

MR MILDREN: If you have a look at paragraph 30. That's at page 14.

HIS HONOUR: He has it there I think.

MR MILDREN: Have you read paragraph 30, and in particular the particulars under paragraph 30.3? --- Not yet.

Does that assist you in your recollection of what Mr Klein told you? --- Yes.

Well, can you now tell the court what Mr Klein told you? --- Mr Klein told me that he had spoken to Mr Baker, as I recall, that the whole of Banka Banka and Neutral was - Neutral Junction was quarantined.

Did you read in paragraph 30.3, where it is pleaded that the third defendant, that's Mr Baker, told Mr Wally Klein that until the cattle were moved and the post-mortem was done in Alice Springs, there would be no further movement of females or entire males? --- Yes, read that.

So is this your evidence, that notwithstanding that pleading, that's not what Mr Klein told you? --- Oh, you're getting me a bit confused. I don't really understand.

Well you can see, can't you, in paragraph 30.3 that it was alleged that Mr Baker told Mr Klein, at the time of handing the facsimile message, there would be no - that until the cattle were moved and the post-mortems done in Alice Springs, there would be no movement of females or entire males. Do you see that? --- Yeah, I can ready that, yeah.

So it - if indeed that is what was told to Mr Klein, it would appear that the restrictions on Neutral Junction and Banka Banka were not blanket at all? --- Oh well, I understand that as being blanket."

You understand that to be blanket - how is that blanket - in what sense to you say that's a blanket restriction? --- There would be no movement of females or entire males.

But you could still move steers? --- Yes.

Do you understand that you could or couldn't take your females or entire males, even to an abattoir; is that what you're saying? --- I - I understand from this that we couldn't move any cattle at all, other than the steers. But as I said before, with approval from Mr Wilson.

Well this must have - - -

HIS HONOUR: Just a moment, I'm not quite sure - the question Mr Mildren asked you was did you understand that meant you couldn't take any beasts to an abattoir at all? --- As of the date of the fax I understood that we couldn't move any cattle at all unless we had approval from Mr Wilson.

Including moving cattle to an abattoir? --- Yes.

MR MILDREN: Including steers? --- Yes.

So, have I got it right, your understanding from speaking to Mr Klein was that you couldn't move any cattle whatsoever, be it steers, females, hold cattle or any kind of cattle, until such time as you'd renegotiated a movement test, or movements with the district veterinary officer? --- Yes.

There was nothing that happened after that to change your understanding of

the effect of that restriction, until the restrictions were lifted in November? --- No, only that Mr Wilson would - would give us clearance to shift steers, etcetera.

Where did you get that understanding from? --- From Mr Wilson."

Mengel's evidence about this seems rather confused. He seems to interpret the order as a "blanket" quarantine but subject to the fact that Wilson would give clearance to shift steers. He says he knew he was eligible to transport steers under Wilson's directions. It was put to him that other cattle were moved without asking permission and he says he does not remember. He concedes that he cannot recall ever being refused permission to move steers or spayed females. Finally this appears at 449:

" I suggest again to you that you knew all along that you were entitled to move entire animals to abattoir, and spayed females and steers to whichever destination you liked, subject only to any necessary health certificates what needed to be obtained? --- Oh, all, excluding the spayed females - I was under the impression that I had to test them for brucellosis if I was to transport them into Queensland."

In the result I do not accept Mengel's stance that the quarantine was a quarantine in the statutory sense (ss 12 and 13 of the Stock Diseases Act) and I consider it was clearly the type of movement restriction referred to in the evidence of Wilson and Baker. I accept also that throughout the dealings all the parties concerned accepted the meaning of quarantine in this sense. The expression in the fax of "property quarantined until status determined" was meant and was understood to mean "quarantine" in the sense of movement restriction. At all times the plaintiffs could have sold cattle to abattoirs.

It was not until 19 October 1988 that Mengel finally agreed to give up the

reactors. (See Klein's evidence 653). The Fax itself therefore did not have any immediate effect save to irritate Mengel and I am persuaded that Mengel's final decision was arrived at because common sense prevailed and not as a result of the Fax. Mengel's evidence already set out indicates also that the question of compensation was mentioned and it is clear also from Klein's evidence that he and Mengel were informed that compensation could only be paid if the animals were found to have brucellosis.

I propose to mention this further but it is important to note the difficult position all parties were in. There is no provision in the legislation for compensation (other than for individual reactors) if movement restrictions reasonably or unreasonably are imposed on a herd which ultimately is shown not to have brucellosis. Yet the restrictions themselves obviously mean financial loss to the owners of the herd.

#### THE MEETING WITH THE MINISTER

As a result of the discussions between Wilson, Baker, Klein and Mengel on 19 October, it was agreed that Wilson would arrange a meeting with the Minister for Primary Industries & Fisheries. The Minister was in Tennant Creek and a meeting was arranged with him for the next day 20 October. Nothing seems to have come of that meeting save that it appears the Minister was sympathetic with the difficulties which Mengel and Klein related to him. (Mengel 222: Klein 656). The Minister said he would discuss the situation with Tabrett and it seems that he did that and left the matter in the hands of his Department. No financial assistance was forthcoming. At this point the situation was that Mengel had agreed to release the reactors. They were in fact released to the Department on 25 October and it was made clear that there would have to be a waiting period of 30 days thereafter while specimens were

cultured.

### THE LIFTING OF THE MOVEMENT RESTRICTIONS

On 7 November Mengel had information that testing of the animals was such that brucellosis should for practical purposes be ruled out and he wrote to Wilson and Baker that the situation was becoming desperate. The Department itself now formed the same view as the result of testing and on 14 November Wilson write to Mengel (by fax):

"This is to advise you that the quarantine of Banka Banka and Neutral Junction for Brucellosis has been lifted.

The brucellosis status of Banka Bank is now Confirmed Free 2 for Brucellosis and Tuberculosis status is the same.

The Brucellosis status of Neutral Junction is now Tested Negative with TB status the same."

In my view the word "quarantine" in this letter is still being used in the "loose" meaning to which I have referred rather than the stricter statutory meaning.

Mr Hiley submits that the "quarantine" period started on 4 September and closed on 14 November. In my view in real terms the period was interrupted between 29 September to 19 November because the Department was during that time prevented from taking appropriate steps to test the cattle because of the recalcitrance of Mengel - a recalcitrance which I can sympathise with but which in the circumstances was unreasonable and he must bear the consequences of his deliberate failure to co-operate.

I accept that between 4 September and 14 November the plaintiffs were unable

to sell cattle and that by 14 November they had missed some prime selling time and it was not feasible for them to sell the large number of the cattle they had proposed to sell. The cattle were running short of feed, feed had to be imported, some cattle had to be agisted and, to keep up their cash flow, the plaintiffs had to sell a number of steers somewhat earlier than they had contemplated. These were matters of loss to the plaintiffs caused, they allege, by the actions of the defendants. In various forms it now becomes necessary to examine how it is that the plaintiffs allege the actions of the defendant caused that loss and how it is that those actions can be said to create a liability enforceable at law at the suit of the plaintiffs against the defendants. The plaintiffs have framed their case on liability in various ways and it now becomes necessary to examine the basis of those claims as they appear in the pleadings.

### THE PLEADINGS

The original Statement of Claim was amended at various times and the document now before the court is described as the "Amended Substituted Statement of Claim". Nothing in my view turns on the existence of earlier versions save argument as to costs, and it is convenient to refer to this document as the Statement of Claim since it contains in final form all the various ways in which the plaintiff seeks to impose liability of the defendants. Similarly the Defence and Reply now before the court relate to this final document.

I deal first with certain formal matters. The Defence admits that the first defendant is a body politic under the Crown, that the second defendant, Tabrett was at all material times the Chief Inspector of Stock holding such office under the Stock Diseases Act and that the third defendant Baker was at all material times a stock inspector and employee of

the Department of Primary Industries & Fishing. It admits the incorporation in the Northern Territory of the second plaintiff and the fact that the first plaintiffs were at all material times shareholders and directors of the second plaintiff. It admits that Neutral Junction had the status of "Tested Negative" for brucellosis from 1983 and for tuberculosis from February 1985, and that the first plaintiffs had owned Neutral Junction since about 1962.

The Defence further makes the admission that the first defendant is vicariously liable for the torts of the employees and agents of the Department including the second and third defendants although it seems to me that it should have restricted that admission to the torts of the second and third defendants committed in the course of and within the scope of their employment with the Department.

The Statement of Claim then makes a number of allegations purporting to establish liability in the defendants for the period for which the plaintiffs were restricted in the sale of cattle (save for slaughter) and the movement restrictions which resulted and which caused loss to the plaintiffs. The defence denies liability at law for any of these matters. The plaintiffs in reply advert to certain matters pleaded in the Defence. It is convenient therefore to deal with the various heads of claim relied upon and the various defences taken.

#### THE CLAIM FOR MISREPRESENTATION

This claim appears in paragraphs 6, 7 and 7B of the Statement of Claim. It can be dealt with very simply because I see no basis for it and I rather apprehend that the plaintiffs do not put it forward as a significant part of their case.

The claim is stated in this way:

"6. Prior to 5 September 1988 the property Banka Banka was classified by the First Defendant as confirmed free of Brucella abortus and Tuberculosis, that is to say 'CF2'.

7. Shortly prior to the Plaintiffs purchasing Banka Banka the First and Third Defendants represented to the Plaintiffs that the property was CF2.

#### PARTICULARS

7.1 The substance of the words which constituted the representation was that Banka Banka had a herd status of CF2, that it was 'squeaky clean' and that no more testing was required.

7.2 The representation was made at the Department's Tennant Creek office in mid June 1987 when the Plaintiffs were on their way to inspect Banka Banka.

7.3 The representation was made to Wally Klein.

7.4 The Plaintiffs believe they have sighted a document containing representation similar to the oral representations but they cannot presently locate that document despite searches for the same. This document does not appear in the Plaintiffs' List of Documents or Further List of Documents nor in the Defendants' List of Documents.

7.A At the time of making the said representation:

- (i) the Plaintiffs were contemplating purchasing Banka Banka;
- (ii) the Plaintiffs were intending to rely upon the representation in deciding to proceed with the purchase;
- (iii) The First and Third Defendants were aware of (i) and (ii) above.

#### PARTICULARS

The First and Third Defendants were so aware by virtue of the following:

7A.1 The conversations referred to in sub-paragraphs 7.1 and

7.3 of the particulars given in paragraph 7 hereof;

- 7A.2 Conversations between the Plaintiff and officers of the Defendant when the Defendant was carrying out testing prior to Plaintiff's purchase of the property.
- 7A.3 The correspondence between the First Defendant and the Plaintiff's financiers for the proposed purchase of Banka Banka; and
- 7A.4 The First Defendant knew that a property's disease status had a significant bearing upon that property's desirability in the event that it was placed on the market.

7B. The Plaintiffs relied upon the said representation:

- (i) in purchasing Banka Banka; and
- (ii) in conducting their business at Banka Banka (paragraph 10 refers)."

The defence does not admit these matters save to admit that prior to 5 September 1988 the property Banka Banka was confirmed free of brucellosis and tuberculosis. (See paras 3 and 4 of the Defence.) However on the evidence there is little dispute save as to some details of conversations which I do not regard as important. The point is that whatever the defendants said (and the statements come from Baker and a Mr Turner an officer of the Department) I have no doubt that at the time the statements were true and true to the knowledge and belief of those who said it. At the time of the purchase of Banka Bank it was in fact classified CF2, i.e., there was no known case of brucellosis or tuberculosis on the property. Baker was correct therefore in saying that the property was, as he said, "squeaky clean". He had no reason to say otherwise. It is trite law that a misrepresentation is a representation that is not

true. (Cheshire & Fifoot - Law of Contract - 1988 edition - paragraph 710). It is also obvious that Baker and Turner knew that the defendants were contemplating purchasing Banka Banka and knew that the property's status had a significant bearing on the property's market value. That does not take the matter any further, if the statements were true at the time they were made.

Furthermore the defendants were not privy to the contract and in contract a representation is a statement made by one party to the other. (Cheshire & Fifoot - supra - paragraph 709.) If the matter is pleaded in tort then there is no evidence of any breach of duty by the defendants to the plaintiffs. Nor was there any fiduciary relationship between the officers of the defendants and the plaintiffs. (Cheshire & Fifoot - supra - paragraph 729.)

I do not find any basis for liability in the defendants on the ground of these representations which I find were true at the time they were made and made in good faith by officers of the defendant.

#### THE AUTHORITY FOR MOVEMENT RESTRICTIONS

The Statement of Claim sets out the history of the movement restrictions commencing with the discovery of the first positive reactor (paragraph 15) and the oral notice then given on or about 4 September 1988 that the defendants could not move any breeder cattle other than spayed cows or other than to abattoir for slaughter. Paragraph 16 refers to this as the "first movement restriction". It will be remembered that the restrictions were imposed on both stations because the batch of cattle tested in which the reactor was found had

been both at Banka Banka and Neutral Junction.

The Statement of Claim then relates the consequent testing of approximately 1,000 head of female cattle and the discovery of 22 reactors. It alleges a further movement restriction in the same terms was given on or about 13 September and the Statement of Claim refers to this as "the second movement restriction". (Paragraph 27).

Finally the Statement of Claim speaks of a "third movement restriction" on or about 30 September (Paragraph 30). This was the Fax, the contents of which have been already set out. In some parts of these paragraphs the allegation is that the cattle were "quarantined", which certainly was the term used in the Fax. I have already set out the interpretation I consider the word should have in the circumstances of this case.

Paragraphs 41, 42, 42.1, 44 and 45 then set out the allegations that the defendants acted contrary to law. I set these paragraphs out in full.

- "41. The purported imposing of each of the said movement restrictions was unlawful.

#### Particulars of Unlawful Conduct

The Defendants purported to impose the said movement restrictions in circumstances where they had no lawful power to do so. The only relevant powers which the defendants had were those conferred by or under the Stock Diseases Act as in force at the time. None of those powers permitted the conduct complained of.

42. In purporting to impose each of the said movement restrictions the servants and agents of the First Defendant and those other Defendants who imposed them acted without power or authority under the Stock Diseases Act or any other law of the Northern Territory and knowingly

in abuse of their respective offices.

### PARTICULARS

42.1 The Defendants and each of them knew:

- (i) The status of Banka Banka Station and Neutral Junction Station pursuant to the Stock Diseases Act.
- (ii) That each of the above stations were situated within the area declared "Provisionally Free" pursuant to the Stock Diseases Act.
- (iii) The movement restrictions published in the Gazette in force at the time.
- (iv) The requirements pursuant to the Stock Diseases Act and Regulations in the event that the Defendants or any of them purported to exercise powers contained therein.
- (v) That it was extremely unlikely that the reactor heifer was infected by brucellosis.

In the circumstances, the Defendants knew and were aware that they had no power to give binding orders to the Plaintiffs, prevent the Plaintiffs from moving cattle in accordance with the movement restrictions or alter the status of the Plaintiffs' properties under the Stock Diseases Act.

- 43. The economic loss and damage sustained by the Plaintiffs was caused by the abuses of office of the Second and Third Defendants, and servants or agents of the First Defendant referred to in paragraph 42 hereof, for which tortious conduct the First Defendant is also liable.
- 44. Further, the purported imposing of each of the said movement restrictions was intentional.
- 45. As the inevitable consequence of the purported imposing of each of the said movement restrictions the Plaintiffs have suffered loss and damage."

As to paragraph 16 of the Statement of Claim the defendants say by paragraph

6 of the Defence:

"6. As to paragraph 16 the Defendants say

- (a) Brucellosis is a prescribed disease pursuant to Regulation 4 of the Stock Diseases Regulations and for the purposes of the Stock Diseases Act;
- (b) Pursuant to s27(2) of the Stock Diseases Act, by notice in the Northern Territory Government Gazette No. 365 published on 31.08.88 the second defendant in his capacity as the Chief Inspector of Stock for the purposes of controlling (inter alia) brucellosis, specified restrictions which applied to the movement of cattle in and into, and the sale or purchase in the Territory of cattle pursuant to the said notice;
- (c) The said notice incorporated by reference the National Brucellosis and Tuberculosis Eradication Campaign and in particular the disease status applicable to such campaign;
- (d) The said notice prescribed (inter alia) that where cattle are from a herd with a disease status "suspect" in accordance with the National Brucellosis and Tuberculosis Eradication Campaign, entire cattle belonging to that herd could not be moved in and into the Territory except for the purpose of immediate slaughter provided that the said cattle are moved directly to an abattoir;
- (e) Pursuant to s27(4) of the Stock Diseases Act it was an offence for a person to move cattle in contravention of the restrictions specified in the said notice.
- (f) At all material times the plaintiff's herds were subject to an eradication program approved for the purposes of the National Brucellosis and Tuberculosis Eradication Campaign.
- (g) In 1984 the first defendant entered into an agreement in writing with the Commonwealth of Australia pursuant to which the national Brucellosis and Tuberculosis Campaign was formulated and pursuant to which the parties thereto approved the National Bovine Brucellosis and Tuberculosis Eradication Campaign Standard Definitions and Rules (hereinafter called "the Rules") as an integral part of that campaign.
- (h) At all material times between 4 September 1988 and 14 November 1988 all the cattle depastured on both Banka Banka and Neutral Junction stations comprised a herd within the

meaning of the Rules.

- (i) As a result of the testing carried out and referred to in Items 1 and 2 of the Schedule on or about 5 September 1988 the cattle depastured in both Neutral Junction and on Banka Banka at the date became "suspect" within the meaning of the rules and subject to the said notice pleaded in paragraph (b) hereof, and as a result thereof, entire cattle could not be moved except for the purposes of moving them directly to an abattoir for immediate slaughter."

As to paragraph 26 of the Statement of Claim the defendants say by paragraph 7 of the Defence:

- "7. As to paragraph 26 the defendants admit that on 11th and 13th September 1988 the first defendant by its servants and agents bled the cattle on the dates itemised in items 4, 5 and 6 of the Schedule and obtained the results of tests carried out in respect thereof on the dates therein specified. The defendants further admit that the cattle referred to in the Schedule were all female cattle, and the results obtained were as set out in the Schedule. Save as is aforesaid expressly admitted the defendants deny each and every of the facts and allegations pleaded in paragraph 26 of the second further amended statement of claim."

Paragraphs 27 and 30 of the Statement of Claim are denied (see paragraph 2 of the Defence). Insofar as the denial is that movement restrictions were not imposed I find to the contrary.

The plaintiffs join issue in Reply and as to paragraph 6 say:

- "2. As to the allegations in paragraphs 6(b), (c), (d), (e) and (i) of the Defence the Plaintiffs say that:
  - (i) The said notice is ultra vires the Stock Diseases Act and is

ineffective to the extent that it purports to:

- (a) extend beyond the scope of s27(2);
  - (b) refer to and apply to a disease status not included within s27(1) or otherwise contemplated by the definition of 'disease status' in s5;
  - (c) refer to and apply to a 'herd' as distinct from a 'holding';
  - (d) incorporate and depend upon an undefined national brucellosis and tuberculosis campaign;
  - (e) apply to cattle which became 'suspect' within the meaning of the Rules.
- (ii) Further and alternatively to (i), the said notice only applied to the Plaintiffs in relation to their holdings as classified under s27(1) namely 'confirmed free' in relation to Banka Banka, and 'tested negative' in relation to Neutral Junction.
3. The Plaintiffs deny that at any material time their herds were subject to the eradication program alleged in paragraph 6(f) of the Defence.
4. The Plaintiffs say that the allegations in paragraphs 6(c), (d), (e), (g), (h) and (i) of the Defence are irrelevant in that they do not affect the Plaintiffs or their cattle by operation of statute contract or other legal means.
5. If as alleged in paragraph 6(c) of the Defence the said cattle 'became suspect' as alleged the Plaintiffs say that such event:
- (i) did not enable the Defendants or any of them to impose any of the movement restrictions alleged in the statement of claim;
  - (ii) did not bring into operation the said notice;
  - (iii) was not communicated to the Plaintiffs in such a way as to lawfully restrict movement of the cattle;
  - (iv) did not alter the classifications of the Plaintiffs holdings under s27(1) as described in paragraph 2(ii) hereof.
6. Further, the Plaintiffs say that the oral advice referred to in paragraph 6(j) of the Defence did not and could not lawfully prohibit the Plaintiff

from moving their cattle as alleged."

In summary the argument here relates to the validity of the powers of the defendants in imposing the movement restrictions.

### THE VALIDITY OF THE MOVEMENT RESTRICTIONS

It is the contention of the plaintiffs that the imposition of the movement restrictions were not a valid exercise of the statutory or regulatory power given to the Minister or various officers of his department.

The argument is first based on the Stock Diseases Act as it applied in September-November 1988. The Act has since been amended. The references I give will refer to the Act as in force at the relevant time.

The Act is intituled "An Act relating to the Control of Diseases in Stock and for other purposes".

### INTRODUCTION TO THE ACT

S5 contains various definitions, the relevant ones being:

" 'diseased' means infected with a prescribed disease."

By Regulation 4 and the Schedule there applicable both brucellosis and tuberculosis are listed as prescribed diseases.

" 'Disease status' in relation to a holding means the classification given under

s27(1) to the holding."

" 'holding' means land held by a person under any form of tenure and, in respect of the disease status of a holding, includes part of a holding."

There is no doubt that Banka Banka and Neutral Junction stations are "holdings".

"Infected" is defined in various ways which I think I can summarise by saying that, in relation to stock, (which is defined, inter alia, to include cattle), "infected" means that the stock are diseased, or the stock are part of a flock or herd in which diseased animals have been present in the last preceding 6 months or the stock are, or have been, depastured or have travelled on land upon which, within that period, diseased stock have been depastured or travelled.

It is necessary also to note the definitions of "inspector" and "chief inspector".

"Inspector" is defined as "a person appointed and holding office as an inspector of stock under this Act". "Chief Inspector" is defined as meaning "the Chief Inspector of Stock holding office under this Act and includes a person exercising powers or functions delegated to him under this Act".

Ss 7 and 8 provide for the appointment by the Minister of a Chief Inspector or acting Chief Inspector.

S9(1) provides that the Chief Inspector is subject to the direction and control

of the Minister.

S9(2) provides that the Chief Inspector has all the powers conferred on an Inspector by the Act.

S10 provides that the Chief Inspector, by instrument in writing, may delegate his powers and revoke such delegation.

S11 provides for the appointment of inspectors by the Minister and s11(2) provides that "An inspector shall perform such duties and functions as he is directed to perform by the Chief Inspector".

The substantive parts of the Act must be examined in the light of these introductory matters. I turn to the submissions made on behalf of the plaintiffs.

#### THE SUBMISSIONS OF THE PLAINTIFFS BASED ON THE ACT

Mr Hiley submits that there is no source of power in the Act from which the actions of the defendants in imposing movement restrictions can be warranted.

It is agreed by counsel on both sides that certain sections of the Act are not applicable to this argument, although if properly applied they may have been a source of power.

Thus S12 - Declaration of a Quarantine Area - is a power only exercisable by the Minister and, if not exercised by him, cannot apply. Furthermore, ss13 and 14 indicate, that if an area is declared to be a "quarantine area", very drastic restrictions apply (e.g. no person shall drive or move stock into, out of or within a quarantine area except with the written permission of an inspector; a person shall not enter or leave a quarantine area without written permission etc.).

It is not suggested that such restrictions ever applied here. The very nature of the restrictions, and the fact that "quarantine area" is defined in S5 as meaning "an area in respect of which a declaration under S12 is in force", adds strength to the defendants' contention that the use of the word 'quarantine' by witnesses on both sides does not mean that the statutory meaning was used or implied in the movement restrictions. I agree. Finally s12 requires notification by Gazette and it is conceded that no such notification was ever given by the Minister. Insofar as it is submitted that the defendants exceeded their powers by imposing a "quarantine" within the meaning of the statute I reject the submission. A "quarantine" in that sense was never imposed or meant to be imposed.

It is conceded that S17 - Declaration of Protected Areas - does not apply. Again it is a ministerial power and no such power was ever exercised.

Nor do the defendants rely upon S22A which permits the Chief Inspector to declare "restricted areas". The defendants concede the drastic nature of the consequences which flow from such a declaration (e.g. S22G) and concede further, that to operate under the section the Chief Inspector must be "satisfied" that "stock on a holding are or are likely to be diseased or affected with a prescribed disease" (emphasis added). They also concede that the

Chief Inspector could not have been so satisfied. (c.f. *George v Rockett* (1990) 93 ALR 483 at 490-1.). Virtually all the evidence from the defendants on this subject is to the effect that they did not think the existence of brucellosis was likely but they did suspect that it might have been present because of the first reactor and the later ones. Mr Mildren QC, who appears for the defendants, has at no time resiled from this position. His point, as will be examined later, is that whatever their own personal beliefs, the defendants were in a position in which they had no choice but to act as they did.

S23 - Prohibition against or Restriction of Importation of Stock clearly has no relevance here as it relates to importation of stock where the Minister has reasonable cause to believe that a prescribed disease exists outside the Territory.

Closer to the point are the cluster of powers of an inspector contained in S42(1). Subs 42(1)(l) permits an inspector to order the owner of land, on which are depastured stock which the inspector has reasonable cause to believe are infected, to prevent any stock from entering or leaving a specified area. Subs 42(1)(o) allows the inspector similar powers against any person in charge of stock. But the defendants now disclaim any authority for their actions arising from such subsections, accepting that the expression "reasonable cause to believe" involves likelihood rather than suspicion. Tabrett, however, does say that at the time he considered it a source of power to him.

The defendants put their source of power squarely upon S27(2). In order to follow the argument it is necessary that S27 should be set out in full:

"27. CLASSIFICATION OF HOLDINGS IN RESPECT OF  
PRESCRIBED DISEASES

(1) The Chief Inspector may, by notice in writing to the owner of a holding, in relation to a prescribed disease, give the holding one of the following classifications:

- (a) accredited free;
- (b) confirmed free;
- (c) tested negative;
- (d) monitored negative;
- (e) provisionally clear;
- (f) restricted;
- (g) infected; or
- (h) not assessed.

(2) The Chief Inspector may, for the purpose of controlling a prescribed disease, by notice in the Gazette, specify the restrictions which shall apply to and in relation to the movement in, or into, or the sale or purchase in, the Territory of stock, or a class of stock, and, for such purpose, the restrictions may be expressed to relate to the disease status of a holding.

(3) Without limiting the generality of sub-section (2), the restrictions specified in a notice under that subsection may include -

- (a) a total prohibition on the movement; and
- (b) a total prohibition on the sale or purchase,

of stock or a class of stock.

(4) A person shall not move, sell or purchase stock in contravention of the restrictions specified in a notice under subsection (2).

**Penalty:** \$1,000 or imprisonment for 6 months."

Mr Mildren first argues that there is no reason for restricting S27(2) to circumstances where there is a likelihood as distinct from a suspicion that cattle may be infected. No such restriction is suggested by its terms and c.f. S12 where the "suspected presence" of a disease is sufficient (if the Minister so "considers") to establish a quarantine area. Furthermore, the purpose of S27(2) is for "controlling" a prescribed disease, which seems to indicate something wider than necessarily having "reasonable cause to believe".

Mr Mildren submits that S27(1) and S27(2) deal with different subject matters. S27(1) refers to "holdings" (see definition previously set out. S27(2) refers to "stock" (as defined).

Therefore, says Mr Mildren, there was a power in the Chief Inspector, both from S27(2) and S27(3), to gazette restrictions on movement of cattle and this was in fact done by notice published in the Government Gazette on 31 August 1988. The relevant parts of that Notice are as follows:

"                   Stock Diseases Act

**RESTRICTIONS ON MOVEMENT OF CATTLE AND BUFFALO  
TUBERCULOSIS AND BRUCELLOSIS**

I, DAVID ALAN NEWTON-TABRETT, the Chief Inspector -

- (a) in pursuance of section 27(2) of the Stock Diseases Act and section 43 of the Interpretation Act, revoke the notice restricting the movement of cattle and buffalo dated 16 May 1986 and published in Gazette No. S28 of 3 June 1986; and

- (b) in pursuance of section 27(2) of the Stock Diseases Act, for the purpose of controlling the prescribed diseases of tuberculosis and brucellosis, specify, in the Schedule the restrictions which shall apply to and in relation to the movement in and into the Territory of cattle and buffalo.

Dated this fifteenth day of August, 1988.

D.A. NEWTON-TABRETT  
Chief Inspector

.....

## BRUCELLOSIS

### Movement in and Into The Territory

Where cattle or buffalo are from herds with a disease status, in accordance with the national brucellosis and tuberculosis eradication campaign, of -

- (a) infected, suspect, restricted or provisionally clear where herds subject to an eradication programme approved for the purposes of that campaign and are -
- (i) spayed females or steers - no restrictions and no test required; or
  - (ii) entire cattle or buffalo - movement permitted for the purpose of immediate slaughter provided cattle or buffalo moved directly to an abattoir;
- (b) tested negative, monitored negative, or confirmed free where herds not previously infected - no test required;
- (c) confirmed free where herds previously infected but have undertaken whole her confirmatory testing not less than 18 months after attaining a confirmed free disease status - no test required; or
- (d) confirmed free where herds previously infected but subject to an eradication programme approved for the purpose of that

campaign but where herds have not been subjected to whole herd confirmatory testing not less than 18 months after attaining a confirmed free disease status and are -

- (i) spayed females or steers - no restrictions and no test required.
- (ii) entire males or females which have borne one or more calves - no restrictions if moved directly to an abattoir for immediate slaughter otherwise one clean test within 30 days prior to movement;
- (iii) cattle or buffalo, other than referred to in subparagraph (i) or (ii) - movement permitted for purpose of immediate slaughter provided cattle or buffalo moved directly to an abattoir.

Cattle or buffalo (other than for slaughter) are not to be moved from a herd with a disease status of confirmed free, tested negative or monitored negative if the cattle or buffalo have, within 12 months, been introduced to the herd from a herd with a disease status of infected, suspect, restricted or provisionally clear.

In this Schedule, unless the contrary intention appears - "clean test" means, in respect of -

- (a) brucellosis - a test in which all cattle or buffalo comprising the group under test have been subjected to a definitive brucellosis test with negative results; "

.....

"negative test" means a test in which all reactors in a tested group have been removed from the group."

Mr Mildren must remove two hurdles, one of nomenclature, and one of grammar, before relying upon the terms of this Gazette. The first hurdle is that the reference under the heading "Brucellosis" is to herds "with a disease status in accordance with the national brucellosis and tuberculosis eradication campaign". The proper name of the national campaign is "National Bovine Brucellosis and Tuberculosis Eradication Campaign". See

Standard Definition and Rules which I consider to be part of the Campaign and to which I will later refer. I have no difficulty here. The campaign is described by its correct title by Mr Rolfe (1351) and there is no evidence of any other national campaign called the "National Brucellosis and Tuberculosis Eradication Campaign". Neither is there evidence of any other national campaign which has the categories referred to in the Gazette e.g., "infected", "suspect", "restricted" etc. (See definitions passim in pp1-6 of SDR.) The inexactitude is to be regretted as a matter of draftsmanship but it is no more than that - an inexactitude appearing in a Notice where every other indication points to a reference to the National Bovine Brucellosis and Tuberculosis Eradication Campaign.

The second hurdle, to which Mr Mildren draws my attention, arises from a regrettable example of poor grammar, making it more difficult than it should be to ascertain meaning.

The words under "Brucellosis" and under the heading "Movement in and Into the Territory" are these:

"Where cattle or buffalo are from herds with a disease status in accordance with the national brucellosis and tuberculosis eradication campaign, of -

- (a) infected, suspect, restricted or provisionally clear where herds subject to an eradication programme approved for the purposes of that campaign ....".

(Then, follow the movement restrictions).

Mr Mildren submits that clearly some words are left out and it is difficult to know what is meant. The alternatives are

"and" where the herds are subject to an eradication programme approved ..."

OR:

"or where the herds are subject to an eradication programme approved ...".

There may in fact even be further alternatives e.g. using the past tense of the verb "to be" in the examples.

The closest construction must, I think, be the first because the word "where" implies that the category to follow is to be found in the earlier categories. That seems to me rather to rule out the second, although I agree with Mr Mildren that the first construction involves a failure to deal with the subject of infected cattle unless the cattle are subject to an approved eradication programme. This does seem to be against the policy of the Act, and contrary to the broader provisions later appearing after subsection (d), i.e., "Cattle ... are not to be moved from a herd with a disease status of CF, TN or MN if (the cattle) have --- been introduced to the herd from a herd with a disease status of infected, suspect, restricted or provisionally clear". Nothing is said there about the need for a herd to be subject to an eradication programme.

However there are limits to imaginative interpretation of poor draftsmanship and I think one transgresses those limits by using the "or" construction, however sensible that may be. There is really no warrant for "or" grammatically, and the syntactical indications point the other way. Subclause (d) provides some further but not conclusive evidence that the class of "infected, suspect, restricted or provisionally clear" cattle must be included within the class of "herds subject to an eradication campaign" to come within the subclause. For

subclause (d) speaks of herds "confirmed free where herds previously infected but subject to an eradication campaign ..... ". The conjunction "but", implies that you contemplate something within, not without, the classification from which you commence. It does not imply the disjunctive i.e., that the first classification mentioned can be separate and different from the second classification governed by the "but" clause.

I draw the conclusion therefore that in sub-clause (a) cattle must be in one of the categories set out, and also subject to an eradication programme approved for the purposes of that campaign.

I accept the criticism of Mr Mildren that the interpretation which results is very restricted, but it seems the only one legitimately possible.

This leads to an investigation of the meaning of "eradication programme approved for the purpose of that campaign", but I will defer consideration of that until later.

Whatever the interpretation of subclause (a) may mean, there seems no doubt of the interpretation of the final clause which follows (a), (b), (c) and (d) but which is not itself sub-headed; which infers that it stands apart. That involves a restriction on movement of cattle from CF, TN and MN herds if the cattle have within 12 months been introduced to the herd from a herd with a disease status of infected suspect, restricted or provisionally clear.

I return therefore to the argument of the plaintiffs that the powers contained in

s27(2) are not sufficient to support the powers assumed by the Gazettal. As has been pointed out, the defendants do not point to any other head of statutory power. This is confirmed by the defendants' answer to the plaintiffs request for Further and Better Particulars of paragraph 6(c) of the Defence. The request in paragraph 1(b) was:

- "1. As to paragraph 6(c) of the Amended Defence;
  - (b) What was the statutory basis for the National Brucellosis and Tuberculosis Eradication Campaign?"

The answer given in the defendants' Further and Better Particulars is:

"1 (b)(1) The Northern Territory statutory basis has already been pleaded in paragraph 6 so far as it is relevant to this action. In addition there were other powers under the Stock Diseases Act and under the Stock Routes and Travelling Stock Act able to be used where appropriate to carry out the objects of the Campaign." (Emphasis added).

The particulars then refer to certain legislation of Queensland, South Australia and New South Wales.

Paragraph 6 of the Defence has already been set out.

Leaving aside for the moment the question of what constituted the National Bovine Brucellosis and Tuberculosis Eradication Campaign (BTEC), the plaintiffs argue that S27(2) does not permit restrictions unless the restrictions are expressed to relate to the disease status of a holding in accordance with S27(1). The argument runs as follows:

1. S27(1) relates to classifications of "holdings".

2. The classification "suspect" (and certain other classifications mentioned in SDR) does not appear in S27(1).
3. S27(2) gives the Chief Inspector powers for "controlling" a disease. The "Campaign" is fundamentally different and its purpose is "eradication"; hence the name. The notion of "eradication" as distinct from "control" was not incorporated into the Act until Amendment No. 80 of 1989 which came into force on 1 January 1990. (See new S.28 which contains the phrase "to control eradicate or prevent").
4. The system of the Act before amendment in 1989 was to control disease by the use of areas, e.g. quarantine areas (s12), protected areas (s17) or restricted areas (s22A), and the consequent control of movement of stock in or out of such areas.
5. In S27(2) the Chief Inspector may for the purpose of controlling a prescribed disease specify restrictions (by Notice in the Gazette) on movement of stock and for such purpose the restrictions may be expressed to relate to the disease status of a holding.
6. "Disease status" defined in s5 is, "in relation to a holding means the classification given under s27(1) to the holding".
7. In the context the word "may" in the phrase "the restrictions may be expressed to relate to the disease status of a holding" means "must".
8. The heading of s27 e.g. "Classifications of Holdings in Respect of Prescribed Diseases" can, and in this case should, be used as an aid in interpretation.
9. If status could be given to both a herd and a holding considerable confusion would result. E.g. would a pastoralist be committing an offence if he acted contrary to the restrictions imposed on his "herd" status but in accordance with those imposed on his "holding" status?
10. S27(2) is not intended to confer the broad power contended for because:
  - (a) The Act (apart from the minor restrictions referred to in s42(1)(h)) does not permit restrictions to be imposed on mere suspicion except by S12 or S22A.
  - (b) The last two lines of S27(2) would be superfluous.
  - (c) S27(1) would have no particular purpose.

- (d) Many other provisions in the Act would be unnecessary (e.g. S22A).

I am not convinced by these arguments for the following reasons:

- 1 & 2 I see no reason why S27(2) should be read down by S27(1). S27(1) applies to holdings, S27(2) to stock.
3. While "control" may not be the same as eradication it can be regarded as a step towards it. The Macquarie Dictionary defines "control", inter alia, as "to hold in check; curb" and "eradicate" as "to remove or destroy utterly; extirpate". In any event the argument is not pertinent since the Gazette provisions must surely be regarded as a form of controlling and as such within the meaning of the word given in S27(2). The fact that a later amendment widened the "control" provisions is not relevant if the Gazette provisions are within the original power.
4. While some parts of the Act refer to control by areas there seems no reason to assume that other parts should not refer to control by stock movements.
- 5, 6 & 7 The words "for such purpose" in S27(2) seem clearly to refer to "controlling a prescribed disease" and do not necessarily infer that the method must be in accordance with S27(1). No such restriction appears in subsection (2) save that the Chief Inspector "may" express the restrictions to relate to the disease status of a holding. As to the word "may" the general rule is expressed in Ward v Williams (1955) 92 CLR 496 at 505:

"... it is necessary to bear steadily in mind that it is the real intention of the legislature that must be ascertained and that in ascertaining it you begin with the prima facie presumption that permissive or facultative expressions operate according to their natural meaning".

Of course the word "may" can sometimes connote the imperative but I see nothing in the context to import that meaning here. The plaintiffs refer to certain dicta of Lockhart J. in *Re Wamba Wamba Land Council* (1989) 86 ALR 161 at 169, but his Honour was there doing no more than stating the general rule. Indeed his Honour commences with

the citation from Windeyer J in *Finance Facilities Pty Ltd v FCT* (1971) 127 CLR 106 at 134, "While Parliament uses the English language the word 'may' in a statute means 'may'.". His Honour Lockhart J then goes on to say "the word 'may' is generally an empowering word which imports a discretion to do or not to do something. The particular context in which it appears may confer a power, but not a discretion, a power which must be exercised if the circumstances call for its exercise. In that event it connotes an imperative. The cases touching this question are legion."

With respect I entirely agree with his Honour's remarks but I can see nothing in the context of the Act or S27(2) which "confers a power but not a discretion". The fact that the Chief Inspector here "may" express the restrictions in relation to the disease status of a holding does not mean that he must. It seems to me that he is clearly empowered to use other means.

8. Headings of a statute may be taken into consideration where the provision is ambiguous, but not where the provisions are clear and unambiguous. *Silk Bros Pty Ltd v SEC (Vic)* (1943) 67 CLR 1: Pearce & Geddes - Statutory Interpretation - p91. Acts Interpretation Act s55(3). There is nothing ambiguous in S27(2).
9. The confusion which the plaintiffs refer to might be possible by some improper or misunderstood exercise of separate powers. That is not a reason for holding one head of power invalid as against another. Furthermore there seems no reason why movement restrictions could not, in an appropriate case, apply both to holdings and stock provided that they did not appear mutually exclusive, and there is no reason why the provision would necessarily be confusing.
10. (a) The argument could be reversed by noting that the fact that the Act recognised in one section that restrictions could be imposed on suspicion is a reasonable argument that suspicion might be an operative cause in other sections. In other words the very terms of the Act do not

negate suspicion as a possible head of power in appropriate circumstances.

(b) The last 2 lines of S27(2) are not superfluous. They recognise one way in which the Chief Inspector could act.

(c) I cannot understand why S27(1) should have no effect or purpose. It creates certain classifications which can be given to holdings. Those are not rendered ineffective by S27(2).

(d) This does not seem to be so. S22A is one method of control; S27(2) is another. In any event sections of an Act are not rendered ineffective by pointing to other sections which might cover the field. Regrettably many Acts are repetitious or overly prolix, e.g. the ancient criminal statutes which used every possible synonym or similarity to create an offence. Such a situation may call for judicial censure, but not for summary sectional execution.

Mr Mildren also puts forward some other arguments which I think assist the view I take that s27(2) gives the Chief Inspector powers within which the Gazettal can be justified.

1. He points out that apart from the word "infected" none of the other expressions in s27(1) are defined in the Act. One can, in fact, find definitions for these expressions in the SDR, albeit tangentially for "accredited free" (SDR 2.1.1 "Free Area"), and "Confirmed Free" (SDR 4.2.2 "Confirmatory"). For "tested negative", see SDR 5.6; "monitored negative" (SDR 5.7); "provisionally clear" (SDR 5.5); "restricted" (SDR 5.4); "infected" (SDR 5.3); "not assessed" (SDR 5.1). One can however also find in the SDR definitions of other expressions e.g. "suspect" (SDR 5.2). Given the powers of the Chief Inspector under s27(2) there is no reason why he should not import into

the classifications those given in the SDR. Indeed the strong inference is that the Stock Diseases Act, by using terms appearing and defined in the SDR and not defined in the Act, is looking to the SDR for elaboration and there is no reason why the Chief Inspector should not import other definitions in the SDR under the powers given to him by s27(2). The SDR were approved by the Standing Committee on Agriculture in 1986. The SDR were well known by 1988.

2. Mr Mildren notes also that the Act is not confined to brucellosis or tuberculosis as the only "prescribed" diseases. Schedule 1 of the Regulation 4 sets out numerous diseases. Nor does the Act apply only to cattle. (See the definition of "stock"). Under s27(1) the classification of a "holding" might take considerable time for testing and clarifying and the system would not be able to deal with the sort of emergency when a particular infectious disease is detected or, more importantly suspected. The imposition of movement restrictions might be needed immediately for the safety of other stock in other areas. Hence the purpose of s27(2) is to enable the Chief Inspector to act speedily in such cases. This is in line with the general policy of the Act to prevent the spread of disease in stock.

So there are obvious policy reasons why the procedure under s27(2) can be understood as part of the statutory plan.

Mr Mildren cites the remarks of Gibbs CJ in *Cooper Brookes (Wollongong)*

*Pty Ltd v FCT* (1980-81) 147 CLR 297 at 304-5:

"It is an elementary and fundamental principle that the object of the court, in interpreting a status, 'is to see what is the intention expressed by the words used': *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 763. It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what they say: cf *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 648. Of course, no part of a statute can be considered in isolation from its context - the whole must be considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking 'nothing remains but to give effect to the unqualified, words': *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) (1925) 35 CLR 449 at 455. There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case: see per Lord Reid in *Connaught Fur Trimmings Ltd v Cramas Properties Ltd* [1965] 1 WLR 892 at 899; [1965] 2 All ER 382 at 386. Examples of that sort of case may be found in *Maxwell on the Interpretation of Statutes*, 12th ed., (1969), at p228 et seq., and *Craies on Statute Law*, 7th ed., (1971), at p520 et seq. However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature. The danger that lies in departing from the ordinary meaning of unambiguous provisions is that 'it must degrade into mere judicial criticism of the propriety of the acts of the Legislature', as Lord Moulton said in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 130; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute. On the other hand, if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice. Since language, read in its context, very often proves to be ambiguous, this last mentioned rule is one that not infrequently falls to be applied."

Similarly Mason and Wilson JJ said at 321:

"Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended."

In my view there is no reason why the power given under s27(1) must govern the power given under s27(2), save to the extent that one of the ways in which the Chief Inspector may act may relate to holdings as classified under s27(1). Otherwise they seem to me two separate and distinct heads of power for the purpose of effectively controlling diseases in stock. The interpretation contended for by Mr Mildren has, in my view, that "powerful advantage in ordinary meaning and grammatical sense" which Mason and Wilson JJ mention above.

#### THE GAZETTE DID NOT COVER THE SITUATION

In my view therefore the Chief Inspector had the power to impose movement restrictions on stock under s27(2) absent reference to holdings. But it is equally clear from what I have set out that the power was not conclusively and clearly exercised in the Gazette. It is not unlikely that the Chief Inspector's intention was to allow emergency control over "suspect" cattle and I have no doubt that the cattle in question could properly be described as "suspect" within the meaning of the SDR. The definition given clearly covers the situation. "A herd in which monitoring information or testing suggests that the herd may be infected but further evidence is required to classify the herd as infected or otherwise ...". That seems to be precisely what the situation was in this case. But the wording of the Gazette does not cover

that situation. Even allowing for the absurdities suggested by Mr Mildren, the words "subject to an eradication programme" seem only susceptible of interpretation in the context of being conjunctive with the words "infected, suspect, restricted or provisionally clear". Reverting again to the remarks of Gibbs CJ in *Cooper Brookes*, which in my view must apply equally to subordinate legislation or decree, if the expression can be "intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient and unjust". To the extent that I feel legitimately able to add words obviously omitted I can add only the conjunctive for the reasons already set out. For that does not make the expression devoid of meaning. It merely makes subclause (a) restricted to herds subject to an eradication programme. Certainly it makes the final clause (where the words eradication programme are not mentioned) very restricted and somewhat impractical in its operation but there is not ambiguity as distinct from impracticality.

WERE HERDS ON BANKA BANKA AND NEUTRAL JUNCTION  
SUBJECT TO AN ERADICATION PROGRAMME?

Paragraph 6(f) of the Defence states:

"At all material times the plaintiffs' herds were subject to an eradication programme approved for the purposes of the National Brucellosis and Tuberculosis Eradication Programme."

The plaintiffs sought Further and Better Particulars of the eradication programme referred to.

Paragraph 2 of the defendants Further and Better Particulars state:

"The defendants rely on the Approved Programme entered into by the plaintiffs in respect of Neutral Junction. Such document has been discovered. There is no other relevant programme that could be described as an eradication programme."

Mr Hiley further assures me, without contradiction from counsel for the defendants, that counsel for the defendants had in earlier interlocutory proceedings (6/12/90) conceded that there are no approved programmes documents in respect of Banka Banka. Mr Mildren (at 2725) refers rather vaguely to a "contract" with respect to Banka Banka by the previous owners, but I can find no evidence of an approved programme concerning Banka Banka in 1988.

The basis for claiming Neutral Junction as subject to an approved programme in 1988 seems to be two documents, Exhibit 24 and Exhibit T. Exhibit 24 was put to Klein (779) who identified the signature on the document as signed by Mengel senior. It is headed "Neutral Junction - Approved Programme - NT Brucellosis and Tuberculosis Eradication Campaign". It is signed by the District Veterinary Officer of Tennant Creek on 15 November 1984 and by Mengel senior on 27 November 1984. It gives a description of the property and recites that "Neutral Junction remains tested negative for Brucellosis. Check testing for all breeders for Brucellosis will be undertaken in 1987." It refers to some suspicion re Tuberculosis, arising from the discovery of two "tracebacks" in 1983, although the report considers the authenticity of information to be "questionable to say the least". Presumably this is why the classification "SU" (suspect) is given for tuberculosis, but the Report adds, "Because there is more than a little doubt over the authenticity of the tracebacks, these will be

disregarded if a clear whole herd TB test is achieved in 1984. Status would revert to tested negative in this case". Later the report states:

"Neutral Junction remains tested negative for Brucellosis. Check testing of all breeders for Brucellosis will be undertaken in 1987. Check testing for TB will also be required in 1987 if status reverts to tested negative in 1984."

It may be relevant to refer also to the remarks under the heading "Disease Situation".

"Neutral Junction is a well run property with regular branding rounds and an annual turn off. Testing has been in progress in 1977. No disease was ever found on the property or from the meatworks until 1983. Two rounds of testing are being conducted in 1984 and the first one has nearly been completed and no reactors have so far been found."

The only pointers I can find in the document to suggest it was still extant in 1988 is a heading "Future Surveillance". Under that there is the remark "Check test every three years and meatworks traceback"; and a page headed "Financial Data" with columns headed Year 1 to Year 5 respectively. There are no entries on this page.

Exhibit T is an earlier document signed by Mr Mengel senior on 30 May 1983 and by the Tennant Creek District Veterinary Officer on the same date. It is also headed as an "approved programme". It contains "Anticipated Target Dates for the Whole Property" as "Provisionally Clear" in 1983 and "Confirmed Free" in 1985. In this case there is a heading

"Programme Dates and Numbers" and the dates given range from 1982 to 1992. No details however are filled in after 1988.

While it is possible that these documents might indicate a continuing programme still extant in September 1988, it is equally possible to assume that the programmes had concluded by then. Mr Mildren does not seem to make much of these documents other than the bald statement arguendo at 2725 that "There is evidence that in the case of both properties, dealing with Neutral Junction to begin with, there was such a contract".

The evidence of Wilson on this aspect is significant: (2056).

"If I could refer you please, Mr Wilson, to page 20 of exhibit D; I take it that that's a form in general terms of which you're familiar? --- Yeah, I have seen them before.

Sorry? --- I have seen that form before.

That form specifies does it not, is a declaration of status under the Stock Diseases Act? --- Yes, that's correct.

And that was the status tested negative in respect of Neutral Junction of course comes from the Act? --- That's as stated there, yes.

On that declaration that refers to the designated tail tag number of Neutral Junction Station? --- I couldn't say that from memory but I presume it does.

Right, and it's given there in that declaration? --- Yeah, well, there's a stated tail tag number there, yes.

In respect of the prescribed disease bovine brucellosis and tuberculosis it has a status under the Act of tested negative? --- That's correct, yes.

That was so as of the declaration date of 21st day of February 1985? --- That's correct, yes.

And so far as you're aware it's always been the case since then? --- Well, there's been no action that I'm aware of taken to amend that under that Act.

As of September 1988 there was no approved program currently in place with Neutral Junction; that activity had finished had it not? --- Well, it held the status of tested negative. I believe there was in existence an approved program which had covered previous activity.

And that had come to an end of the BTEC activity--? I don't know if it was formally terminated but there was no scheduled BTEC activity from then under it.

Under the approved program? --- Yeah.

And the same was the case for Banka Banka as of September? --- Yeah, well, I - that's my belief at this stage, yes."

On the evidence I am unable to find that either Banka Bank or Neutral Junction were in September 1988 "subject to an eradication programme approved for the purposes of that (BTEC) campaign".

The Gazettal did not therefore give the power to impose movement restrictions on stock in Banka Banka and Neutral Junction in September 1988. I accept Mr Hiley's submission (2977) that by September 1988 "there was no approved programme still in force for either property and that both properties had completed their BTEC activity".

The only other head of power relied on by the defendants is some sort of administrative power or discretion. Thus Wilson in his evidence says: (2078-9).

"Now as of that day that Mr Baker spoke to you - the 4th or 5 September - what was the status of Neutral Junction holding? --- When he conveyed it to me - the information?"

Yes, that day, yes? --- Well, I regarded it as confirmed free up until the point that I'd communicated to the owners that there was suspicion of brucellosis and then I regarded it as being suspect.

now that's Neutral Junction you're talking about? --- Yeah.

Right, and what was the status of Neutral Junction holding as at that particular time? --- Well, I wouldn't have ---

Sorry, herd? --- Well, I mean, I think, it's outside of my jurisdiction to comment as to legally ---

No, I'm not - I mean, you're the person who --- ? --- Yeah, I regard - what I regarded the status as, was the status was - had tested negative until we had suspicion of brucellosis and then the status became suspect.

Right, and is that in respect of a herd and a holding for Neutral Junction? --- Yeah, in - in respect of both until we - unless we had information to allow us to further split.

Now what was the status of Banka Banka as of that day, the 4th or 5 September when Mr Baker ---? --- It was confirmed free, too, because there was no suspicion.

And is that the case in respect of herd and holding? --- Yes.

And, of course, the status that's assigned to a station is important to the station owners, is it not, for commercial reasons? --- Oh - yeah, certainly.

And, of course, from your point of view it's important for administrative reasons? --- Yeah.

Now, did the status of Neutral Junction change in respect of the holding, from your understanding? --- Do you mean legally, or do you mean administratively?

No, no. Well, I'm just saying in terms of - at the time, going back in time, did the statuses of Neutral Junction Station, in respect of the holding, undergo a change? --- I believe it underwent a change under the BTEC program, yes.

Right. In respect of the herd? --- Yeah, both the herd and the holding.

What was that change of status to --- ? --- To "suspect".

Right, and can you recall when that change of status occurred? --- I would regard it as occurring on the notification to the owner, by one of our officers.

That 'we have suspicion of brucellosis, your herd is suspect'. But, from an administrative point of view, I had to formally change the status on our record system; which would have been done - I can recall amending the computer sheets later that week. I couldn't say what date.

So, the mechanism of change - the formal mechanism of change, as your understanding, was the application by you of the change of status in the computer that was installed in Tennant Creek? --- Yes.

That would have been later that week? --- Yes

Some other day, but later that week? --- Yes.

All right, and that's the computer who's graced with the name of ERIC in these proceedings? --- That's correct, yes.

I think he's referred to as - I shouldn't say he, but it is referred to as ERIC in the manual? --- Yes."

Baker's evidence is this (1505-6):

"I think, in fairness there to you, in relation to the status suspect, when you put that - you write that up and you put that in the compensation forms. And, I think whilst that document is there, if you turn to page 96 please? Exhibit D, yes. To highlight the point that you were making, Mr Baker, is that a brucellosis testing and compensation form? I think it's dated the 29/9/88? Yes. "Present disease status" you've got SU? --- Yes.

Is that the suspect that you referred to before? --- Yes.

Right. And that would mean that as of - from your practice and procedure, that as of 29/9/88, the present disease status was suspect, in respect of that holding, which was Banka Banka? --- I think right through I've used CF question mark and SU.

So, I've got here - sorry, in relation to - mine's faded. It may be Neutral Junction. Is that - "bullock, Neutral Junction, present disease status, SU"? Right? --- Yeah, I've got that there.

It was your practice that when you thought that a holding was suspect, that you wrote it SU? --- Either that or whatever the present status was with a question mark.

Yes, and the question mark, of course, was that there was a status but you didn't know what the true status was? --- Well the status would be determined

by the results from the laboratory.

Yes, sure. But you yourself didn't know what the status was, if you put a question mark? --- Yes. Sorry, if you could say that again?

What I'm saying is that if you put - you've said, in that document that's there, at page 96 you put 'SU'. That means it's suspect. That's your terminology - it's a terminology you understood. Correct? --- Yes.

If you put a question mark, it means that you were waiting for a clarification from the technical people in Alice Springs. Correct? That's what you said just a short moment ago? --- Yeah, that'd be right, because I wouldn't be able to make the clarification.

So it had a status and the question mark would mean that you were waiting for clarification from the technical people, whom you assumed the knowledge, in Alice Springs? --- Yes.

I take it, from what you say, you wouldn't be able to make a change of the status yourself? --- No, that's from the regional veterinary officer.

The regional veterinary officer, that's Mr Wilson? --- That's correct.

And I think he does so on ERIC the computer? --- The computer, that's correct.

That's the - he would - Mr Wilson was responsible for the change of status of the holding, by use of ERIC, on the computer records, for the particular holding? --- He was.

That would cover the - we're not talking about just a particular herd, but we're talking about the whole holding? --- He was.

That would cover the - we're not talking about just a particular herd, but we're talking about the whole holding? --- For the whole of the Barkly Tablelands, for the matter."

The defendants' Further and Better Particulars are to this effect:

" 6(b) Clause 5.2 of the Standard Definitions and Rules refers to testing. Testing is defined by clause 4 which refers to official tests for brucellosis, the normal tests for scientific purposes and the interpretation of these tests. The definition of suspect refers to the need for "further evidence is required to classify the herd as infected or otherwise". Clause 5.3 refers to infected and the other provisions of Clause 5 referred to the other statuses a number of which refer to negative tests. Clause 4.4 refers when tests are positive,

negative or inconclusive.

The Defendants say that the obtaining of a positive test result on Neutral Junction station in relation to the heifer on the 5th September 1988 resulted in the herd at Neutral Junction status being changed to suspect as a matter of interpretation of the Standard Definitions and Rules.

Similarly Banka Banka status became suspect as a result of positive tests being obtained on 12 September 1988.

The computer kept by the Defendants was also changed and the relevant print-outs have been given."

.....

The defendants say that the obtaining of a positive test result on Neutral Junction Station in relation to the heifer on 5 September 1988 resulted in the herd at Neutral Junction status being changed to suspect as a matter of interpretation of the Standard Definition and Rules. Similarly Banka Banka status became suspect as a result of positive tests being obtained on 12 September 1988."

It is unnecessary to examine here the argument as to whether the defendants believed they were changing the status of the herds or the holdings or both. In either event they were acting without legal authority since the only document importing the SDR was the Gazette which did not apply to the case.

Mr Hiley sets out a number of possibilities as to when the status was changed (assuming that to be a lawful exercise). He enumerates no less than 14 different possibilities. Again that becomes irrelevant (save for a matter of comment as to bona fides) because of the findings I have made.

Mr Hiley does, however, stress one point, that if the Further and Better

Particulars are to be accepted as to the correct date then, at least in the case of Banka Banka, the first movement restriction (6/9/88) was not made with any lawful authority.

Before examining further heads of claim it may be convenient to sum up my findings to this point.

1. No "quarantine" within the meaning of the Act was imposed.
2. Movement restrictions were imposed.
3. There was no legal authority for the imposition of movement restrictions in the way they were imposed.

#### KNOWLEDGE OF THE DEFENDANTS : ABUSE OF OFFICE

The plaintiffs in the Statement of Claim plead:

- "42. In purporting to impose each of the said movement restrictions the servants and agents of the First Defendant and those other Defendants who imposed them acted without power or authority under the Stock Diseases Act or any other law of the Northern Territory and knowingly in abuse of their respective offices.

#### PARTICULARS

- 42.1 The Defendants and each of them knew:
- (i) The status of Banka Banka Station and Neutral Junction Station pursuant to the Stock Diseases Act.
  - (ii) That each of the above stations were situated within the area

declared "Provisionally Free" pursuant to the Stock Diseases Act.

- (iii) The movement restrictions published in the Gazette in force at the time.
- (iv) The requirements pursuant to the Stock Diseases Act and Regulations in the event that the Defendants or any of them purported to exercise powers contained therein.
- (v) That it was extremely unlikely that the reactor heifer was infected by brucellosis.

In the circumstances, the Defendants knew and were aware that they had no power to give binding orders to the Plaintiffs, prevent (sic) the Plaintiffs from moving cattle in accordance with the movement restrictions or alter the status of the Plaintiff's properties under the Stock Diseases Act.

- 43. The economic loss and damage sustained by the Plaintiffs was caused by the abuses of office of the Second and Third Defendants, and servants or agents of the First Defendant referred to in paragraph 42 hereof, for which tortious conduct the First Defendant is also liable.
- 44. Further, the purported imposing of each of the said movement restrictions was intentional.
- 45. As to the inevitable consequence of the purported imposing of each of the said movement restrictions the Plaintiffs have suffered loss and damage."

I deal first with the phrase (in paragraph 42) "knowingly in abuse of their respective offices".

The plaintiffs lay great stress on the possession by the second and third defendants, and indeed by other officers of the first defendant who gave evidence, of a Manual of Procedures (Exhibit AAA - Exhibit 45). There are some differences in the two exhibits explicable merely by the fact that Exhibit 45 is the more recent containing certain

amendments. There is no doubt that the Manual was readily available to Tabrett and Baker and to other officers of the first defendant. The plaintiffs case is basically that the defendants realised that there were in difficulties in acting under s27(1), that they were reluctant to put into operation the wider powers of s12 (which could only be achieved by Ministerial declaration), or (in relation to "clean" properties) s22A, and they deliberately sought to circumvent the Act by misuse of their powers.

The tort alleged therefore is misfeasance in a public office.

Balkin & Davis - Law of Torts (1991) at 779 refer to:

" An ill defined but, by now, established tort of misfeasance in public office whereby an individual may recover for loss or damage suffered consequent upon administrative action taken by a public officer, where the officer is acting maliciously or where he has taken that action knowing it to be unlawful."

Smith J in *Farrington v Thompson & Bridgland* [1959] VR 286 at 293 put it

this way:

" In my view, therefore, the rule should be taken to go this far at least, that if a public officer does an act which to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person."  
"

It can be seen that Smith J is concentrating on knowledge that what is being done is an abuse of office. That may not necessarily go as far as acting maliciously and it seems that either alternative is sufficient as set out by Balkan & Davis (supra). So Slade LJ in *James v Swansea City Council* [1989] 3 All ER 162 at 173 says:

" The recent decision in *Bourgoin SA v Ministry of Agriculture Fisheries & Food* [1985] 3 All ER 585; [1986] QB 716 has reaffirmed the existence of the tort and made it clear that malice, in the sense of intent to injure, and knowledge by the doer that he has no power to do the act complained of are merely alternative, not cumulative, ingredients of the tort. "

See *Bourgoin* at 624 per Oliver LJ; *Farrington* (supra) at 298; *Little v Law Institute of Victoria* [1990] VR 257 at 270 (per Kaye and Beach JJ); *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172.

I do not find malice proved here. The defendants or other officers had no intent to injure the plaintiffs. Quite the contrary. The evidence establishes in my mind a desire to act with the least harm to the plaintiffs consonant with what they believed their duty: to prevent or contain a possible outbreak of brucellosis. Nor does malice in this sense appear to be pleaded unless the phrase "knowingly in abuse of their office" can be said to import it. The real question here is whether the defendants knew that what they were doing was invalid and that the plaintiffs would be injured. (See Hogg - Liability of the Crown - 2nd Ed. - 1989 - 111-2.)

Invalidity, without more, does not constitute this tort. (Hogg - 111-2.) *Dunlop* 172. *Takaro Properties Ltd v Rowland* [1978] 2 NZLR 315; *James v The Commonwealth* (1939) 62 CLR 339 at 372 per Dixon J.

What constitutes "knowledge" that a person is doing an act without authority, has been the subject of various dicta. Smith J in *Farrington* (supra) at 293 considered, "it is

sufficient to show that he acted with knowledge that what he did was an abuse of his office". Mann J in *Bourgoin SA v Ministry for Agriculture* [1986] 1 QB 716 at 740 considered the tort established "where the officer actually knew that he had no power to do that which he did and that his act would injure the plaintiff". (Affirmed (1986) 1 QB 749) and see 777, 780 and 790.) Some decisions look at mala fides e.g., Viscount Simonds in *Smith v East Elloe RDC* [1956] AC 736 at 752 comments that "knowingly acting wrongfully and in bad faith ... is a claim which the court clearly has jurisdiction to entertain". Conversely there is authority for the view that in some cases it is sufficient to show that the act even done without knowledge of invalidity and done without malice can be actionable. See *Brasyer v McLean* (1875) 6 PC 398. That case however seems to depend upon the special character of a Sheriff's duties in that he makes a return at his peril. (See 401 *arguendo*) and 405-6. It was cited by Smith J in *Farrington* at 293 but not applied by him. Similariter *Little v Law Institute* (*supra*) at 270.

I would with respect adopt the test propounded by Smith J in *Farrington* at 293 "acted with knowledge that what he did was an abuse of office". This seems to me to demand actual knowledge and it gains strength from his Honour's earlier comment in the same case at 291, "intentionally purporting to exercise a power ... which they were fully aware, at the time, that they did not possess". And see *Dunlop v Woollahra* (*supra*) at 172 where their Lordships comment that "in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such 'misfeasance' as is a necessary element in this tort".

The plaintiffs argue that "knowledge" here embraces constructive knowledge but they concede that the point has not really been decided. They submit, however, that the

dicta of Wells J in *Wooley v Dunford* [1972] 3 SASR 243 at 271 must be read as a strong pointer, although his Honour was at pains to say that he did not decide the question.

His Honour was there commenting on remarks by Lord Russell of Killowen in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 at 483. The tort involved was not that of misfeasance in a public office but rather inducement to break a contract. I am not sure therefore that the case is necessarily on all fours with the present one.

In *British Industrial Plastics v Ferguson* (supra) the trial judge had found that the defendants "honestly, though stupidly" had taken a certain course. (See Lord Romer at 483.) Lord Russell of Killowen commenting on the finding said:

" Those being the facts, it would be in my opinion, impossible to hold that the respondents possessed constructively or otherwise, the knowledge which is an essential ingredient to the cause of action."

It was this comment which occasioned the remarks of Wells J in *Wooley* (supra) at 271-2:

" Now, it must be conceded that his Lordship did not explicitly lay it down that constructive knowledge, in the sense in which he used those two words, was sufficient for the purposes of the tort alleged. I find it difficult to suppose, however, that the penultimate sentence in the passage quoted above would have been drafted as it was if his Lordship considered that constructive knowledge, in that sense, was not sufficient. If his Lordship had entertained any doubts on the matter, he would (it seems to me) have spoken with reservation. I must confess that I should be surprised if constructive knowledge is insufficient. If it is, then the common law on this point would, I think, have developed in a manner inconsistent with one of its basic tenets: it has never encouraged a wilful forbearance to inquire on the part of someone who has been clearly put on his inquiry. I do not, however, propose to reach a

decision on the matter unless, in the circumstances, I am left with no alternative."

In my view the cases can be reconciled by recollecting the use of the word "malice" employed by their Lordships in *Dunlop v Woollahra* as already set out. One sense of constructive knowledge is embodied in the phrase "knowing or ought to know". That does not imply malice or lack of bona fides and in my view the "ought to know" does not apply to this tort. Otherwise the respondents in *British Industrial Plastics v Ferguson* (supra) who had an "honest though stupid" belief would have been at risk. The other form of constructive knowledge implies malice i.e., a wilful closing of the eyes, a specific intent to avoid knowing something which might be to one's disadvantage. That, I think, is the sense in which Lord Russell of Killowen used the phrase "constructive knowledge". He speaks of "closing their ears to anything which might turn their suspicion into a certainty and so being fixed with constructive knowledge". (See p483.)

I find that the defendants did not have constructive knowledge in this latter sense. I find that, insofar as they were purporting to act under authority rather than seeking to persuade, they had a bona fide though mistaken belief in their authority.

Baker certainly conceded this in his answers in cross-examination. (1570).

" In relation to the Act, however, the situation was that you had BTEC objectives to achieve on the ground? That's so, is it not? --- That's true.

It was your job to try and reach, in accordance with those practical objectives, practical results? --- It was.

Causing the least amount of anxiety and upset as possible? --- It was.

And that irrespective of what may have been formally in the Stock Diseases Act, it was your intention to achieve those objectives for BTEC in a practical way? --- It was."

And at 1578 he gives a somewhat startling answer:

" QUESTION: Was it your intention to achieve those objectives even if what your practical way may well have been unlawful?

ANSWER: Yes. "

Frank though that answer is I do not think it goes to the extent that Baker did in fact act knowing that he was acting unlawfully. It may indicate an excess of zeal if the situation had come to that but the whole tenor of his evidence is that he believed he had the appropriate authority for what he did though I emphasise, as he emphasised and I accept, that his basic intention was to get the plaintiffs to act voluntarily without resort to legalities.

At 1576 he reiterates that he was trying to be diplomatic. In any event he was somewhat low down in the hierarchy (c.f. Wilson's evidence 2045) and it is plain that he left the higher negotiations, and, for that matter, decisions as to legality to his superiors.

At 1516-1518 there appears some evidence by him (rather colourful at times) which I accept sets out his attitude.

" No, I'm not saying about your problems, but in terms of touchy situations or developments where you queried - or you might have had doubts as to whether you were exercising appropriate power? --- No, there was hardly ever any doubt ever come into my mind.

What happens, though, if you struck the occasional pastoralist who didn't co-

operate? What would you do then? --- Well, if it looks like going to be a political football - bear in mind every pastoralist's got his pet politician so to speak - well, I've been - - -

Not all of them, Mr Baker? --- It's been said to me that I'm about as subtle as a kick in the guts, so they used to just want me to sort of leave it with Wilson.

But if you met a stropky pastoralist and you're down there on the ground, you're hands on, you're on the coal face, what do you do? --- Well, sort it out then and there if we could.

And if you --- ? --- Ninety-nine percent of the cases would be sorted out.

But if you were sent down there to muster a particular group of cattle or to seize or to test some cattle and the pastoralist, for some reason or other, he may have been totally unreasonable, said: 'No', what did you do? You were sent down there for a purpose. Would you, at the end of the disputation say: 'Well, look, I'm requiring you to get that beast there, I want to have a look at it'? --- Well, the only mob I ever mustered was that one mob, and that's in 17, 18 years, whatever.

Right. But you did, from time to time in your activities as a stock inspector, request or order pastoralists to do some things between the years 1974 and 1988, did you not? --- I would have, yes.

And the - because, I mean that's - in terms of the presence of the department, you're the relevant person there in respect of quite a number of holdings, and not all of those persons - that's the case, is it not? --- The thing is, it was rare to have an argument, because basically it's their cattle, it's their disease problem; they're the ones that don't sleep at night, not me. If they don't want to play ball, well the problem's still there for them tomorrow till they do.

All right. And in relation to the - ultimately the problem is solved by giving orders to them, is it not? --- Well ultimately - - -

They may not be dramatic orders, and they may be just requests as requirements, but ultimately you knew you had the source of power to say, 'look, I have the authority to do that'? --- Well I've sort of never talked along those lines.

No, you don't have to talk along those lines, but you knew that you had - ultimately you had the upper hand; I mean, they could carry on as much as they liked, and maybe they'd have countless sleepless nights, but they had to face reality one day? --- Yeah, and then the job would get done.

Then the job would get done. And what you'd do is, you'd exercise the powers that you knew you had; correct? --- Me not personally, not exercise them - - -

You, or Mr Wilson, or a combination of you? --- No, no, they'd sort of work out that, 'well it's no good bucking the system, they've got the power', eventually everything falls into place.

Right. And that was something that in their ignorance they didn't appreciate, and you just waited until the penny dropped? --- Yeah. Let them get the ulcers rather than me.

And I take it - I mean, you knew you had the power, but you weren't one to get yourself involved in a great heated altercation. You'd wait until it had calmed down, until they realised, 'look, he's got the power'. and then get the job done? --- That is correct.

The - because the bottom line is that you were the stock inspector under the Act, and you could use the powers given to you by your Act in your work, correct? --- Yeah, but you tried to be diplomatic about it. You didn't, sort of, run around playing Hitler.

No, and no-one is suggesting - and indeed, no-one's suggesting that's the case. Life would be pretty unbearable if you did, wouldn't it? --- It would, yes.

But - and in any event - so the situation was that whilst you knew you had the powers under the Act in relation to your work, and in relation to BTEC, you tried to be diplomatic about how you used them? --- You let common sense prevail.

Right. And the common sense, of course, is that the pastoralist would ultimately realise that he would lose by being obstructive? --- Yes."

The Plaintiffs however rely on the following passages in cross-examination:

"In relation to that, you - what I'm saying is this; that you used your practice, as distinct from formally using a power that you had under section 42 of the Act? --- I did.

In this particular case the - and in relation to that, the formal statutory powers given to inspectors are, of course - you know, are set out in section 42 of the Act? --- Yes.

Those are the powers? You weren't purporting to use those formal statutory powers on that day, were you?---I was not.

What you were doing was trying to carry out instructions from Alice Springs and in terms on a hands-on - personal practice, if you will - just to get the beast down there in a conciliatory environment to AZRI?---That is true.

Indeed, if you wanted to be formal about it, what was being done was that there was a movement restriction being imposed by you but, from your point of view, trying to be in a conciliatory sort of way?---There was.

In relation to that, section 42 itself, in terms of your powers - perhaps if I just show the witness his powers. Section 42, Mr Baker, I suggest, doesn't formally give you under the statute any powers in respect of imposing movement restrictions. You may know that yourself but if you want to check that, please be at liberty to do so by reading the section?--- Well, I would've found it somewhere if I - if I - if that was my intentions, to do it in writing.

But it wasn't your intention on the day to do it in writing. You prefer to opt for your personal practice?---That's true.

You could've but you chose not to?---I chose not to.

Perhaps if exhibit 45 could be kindly shown to Mr Baker, Your Honour, if I may tread the well-worn path back to the witness box?

HIS HONOUR: Yes.

MR McDONALD: Mr Baker, if I could refer you to (b) 5.2.

MR MILDREN: Is that the one 'Preparing a report'?

MR McDONALD: Sorry, yes. I thank you for reminding that. I'm actually wanting the opposite page - 4.3.5. You distracted me from having so much fun, Your Honour?---Which one are we looking at?

4.3.5; sorry, Mr Baker, that was - just over page? ---  
Four ---

MR MILDREN: Is that the powers of the inspectors, is it?

MR McDONALD: Yes. Here we are. Yours is on another different page to mine but under 'Powers of Inspectors' - this is in your manual and this is the manual that you've read from time to time over the years. Correct?

Would you just refer to 4.3.5. then read out what's said there under 'Powers of Inspectors'? --- 'Under section 42 stock inspectors are

legally empowered to take such actions or to have them undertaken, as they may reasonably consider necessary to confirm the presence of a prescribed disease in stock on any holding and to prevent the causative organisms from spreading outside that holding. Those powers include the authority to enter any place, facility or holding carrying stock and to muster, test and/or destroy any stock which the inspector reasonably believes to be infected or diseased or to cause those actions to be done. Where stock are known or reasonably suspected to be infected inspectors are also authorised to place stock and/or land under a standstill or quarantine order for up to 40 days.

Thank you. So from the manual that you had and from your knowledge of the section, I mean you knew you had the formal power, but you adopted your, by practice, more successful conciliatory approach; is that not so?---Yes, I had never made reference to that, as you say.

And of course in terms of the formal statutory powers, section 42 is the most important section in relation to stock inspectors, under the Act anyway; correct?---Can you run that past me again please?

I'm just saying to you that section 42 is the section under the Act that is the most important section and I suggest that manual is a reference to that in relation to stock inspectors?---No, there's other sections, I think, stronger than this in the Act.

In terms of powers given to other people, you're suggesting?---Well when - when I made my decision, I didn't make it on any - any section of the Act. I mean I use this thing like a telephone directory, if I need it I'll look up the appropriate part. If I need assistance to come up with the right part, whether it's 28B or 46B or whatever, it's just that at that time I said: 'Right, the animal's got to go to Alice Springs, it's going there'. I wasn't wasting time looking up any - any specific part of any Act or regulation.

No, I appreciate that. But all I was saying is that you knew where to find things in the manual if you had to, on this occasion you didn't have to?---True. Yes, as I say, I use it like a telephone book, it's - it's something you just can't memorise the whole lot and carry with you.

So, in a formal sense, you knew on the day that you weren't exercising formal statutory power; correct?---I was exercising co-operative power between me and the management of Neutral Junction.

But not a statutory power formally, as such?---No, I - I never put down any - any section or power or whatever.

That's the co-operative power in the sense that you described it earlier?---Yes. I mean we had a problem, we wanted to get an answer. It's in everyone's interest to go the way we did."

I do not consider that these passages show that Baker at the time was knowingly exercising a power which he was fully aware he did not possess. Rather my interpretation, having regard to my assessment of Baker in the witness box, was that he believed in the ultimate he had the power but was not going to bother himself to check it because he preferred the "conciliatory" approach and was conscious of the urgency of the situation. It must be remembered that Baker took his orders from higher up. He was a "hands on" man and if told to do something he did it. His belief would have been in any event that his superiors had the power to allow him to do what he was told to do.

Obviously the cross-examination was directed to proving that Baker knew he did not have certain powers but was nevertheless prepared to say falsely that he had. I do not accept that his answers ever established that position. Nor do I consider him capable of telling lies in the witness box. He was an extremely frank witness.

Wilson says he consulted the Manual (1977). That says under the heading "Brucellosis",

at 2.7.1

CFT REACTOR EQUAL TO OR GREATER THAN 16

The tailtag will be considered infected except with RTO approval and the property must be restricted for brucellosis if not already under brucellosis

restriction

## 2.7.2

### CFT4 OR 8 IN UNVACCINATES AND CFT8 IN VACCINATES

The tailtag will be considered to be suspect. The property should be Restricted if not already under Brucellosis restriction.

(CFT here refers to "Complement Fixation Test" - a biological test to which I will later refer. The significance is that certain cattle of the plaintiffs under the test showed CFT4, 8 or 16.)

He amended the computer ERIC on about 9/9/88 so that the status given to both properties was "suspect" (1981-2). He did not amend other forms until about 29 September 1988. (2094). And see 2200. He says he considered it the appropriate status under the SDF. (1982). He, too, wished to be conciliatory. (2019). (2030). (2034). At 2036 he says:

"MR McDONALD: So following upon that, in the operation - the technical operation of BTEC - or in activity as a veterinary officer, what power do you have over movement restrictions in respect of a herd? --- Are you asking in general, or are you asking about at that time?"

Sorry, at the time, yes? --- Right. Well, my belief at the time was that a suspect status meant that that herd was not permitted to move, and that - I mean, that was certainly the BTEC administrative rules. I hadn't thought, in any serious nature or really considered whether that was formally tied to legislation. I mean, with the benefit of hindsight, it appears it wasn't; but at that time I just believed that that was legally tied to the Stock Diseases Act in some fashion. I didn't consider how.

With the benefit of hindsight, you have a different view today? --- Well, I'm much more aware of the legislation as a result of this and various other cases which I've become involved in.

Of course, you were aware that you could impose special movement

restrictions, as a veterinary officer? --- At that stage, I was generally aware of the provisions of section 42. I couldn't have recited what they were.

No, but as the regional veterinary officer, it required you to have a working familiarity with that Act, of course?--- Yes. I mean, I'd never made use of that Act at any stage, as a regional veterinary officer, in the whole time of my employment or as any other veterinary officer. But I had, on one or two occasions, read through provisions in that Act, so I had - what would you say - a vague general knowledge of what was contained in it.

In terms of the - if reports would come in from individual inspectors of stock, you knew, at the time, that you could impose special movement restrictions that may be tailored to a particular issue or - - -? --- Well, I don't recall having the need to do so.

No, but you were aware that you could, if you needed to do so, to achieve an appropriate end for control of disease, or advancement of animal health in your region? --- I was aware of the general provisions of those powers. I wouldn't claim any other awareness than that."

Again at 2013 his attitude is sufficiently set out:

" Well I believed there would be power under S42 to do that if it was appropriate, but I had no intention of exercising that power, if they were submitted voluntarily. I mean, if he agreed to give them, that would've been it."

At 2144 appears the following:

" Now, if I could refer you to exhibit D, page 117. Do you identify that particular document? --- Yes I do.

And what is that document? --- That is a copy of the fax that I sent to Rodney advising him once the cultures are finally negative and he could return to confirmed free 2 status.

Was that sent pursuant to any particular power that you were exercising? --- I didn't think of it in those terms, but it was - well it was pursuant to my power to amend statutes under the BTEC Act, which I understood I had.

Under the BTEC Act? --- No, under the BTEC administrative scheme."

Wilson's cross-examination was also directed to his knowledge of the procedures. As with other witnesses (and I make no criticism of plaintiffs' counsel about this) he was taken in great detail through the Manual of Procedures. I am not at all concerned or surprised that, although he conceded that the Manual of Procedure was in effect the "Bible" with which every officer had to be familiar, he was not precise on all matters. One glance at the Manual (either Exhibit AAA or Exhibit 45) makes it quite understandable that even an experienced officer would not be familiar with all its terms even conceding the various conferences which were held from time to time to familiarise officers with procedure. I am certainly not satisfied that Wilson knowingly exceeded his powers and still less that he deliberately ascribed to himself powers which he knew he did not have.

Similar comments can be made of the evidence of Williams. It would be tedious to set out his evidence at length but I refer to his evidence at 1786 (with regard to the SDF) and his reliance on the Gazette (1788). I can find nothing in the cross-examination which suggests any admission that he did not believe that he was justified in acting as he did save for an admission (1942) that one particular document - an order by Inspector of Stock to Mengel to remove 21 head of cattle on Banka Banka to Wamboden with amounts for compensation payable and dated 26 October - was not issued pursuant to the powers of an Inspector of Stock. I do not consider this admission affects the general tenor of his evidence.

I am equally satisfied that Tabrett believed he was acting within power. His attitude so far as the Fax was concerned may well have been an admission that he now knew

his conduct was not authorised by the Stock Diseases Act but I am satisfied that that was not his state of mind in 1988. This is his evidence at 2277-8:

"Now, I'll go back to my question about authorisation under the Act. In relation to the sending of the fax, which we now know to have been sent by you to Mr Baker, with the intention that it be shown to Mr Mengel, I put this to you. That it is your present belief that that conduct was not authorised by the Stock Diseases Act? --- I felt it was.

Beg your pardon? --- I felt it was authorised, yes.

No, I'm sorry. I used the word 'present'. That your present belief is that that conduct was not authorised by the Stock Diseases Act? I'll make it a bit easier for you if you like, if you can't answer that. Can you answer that question? --- With difficulty.

Yes, all right. Well, do you recall swearing an affidavit in April of 1990, which was prepared by a solicitor employed by the Department of Law? --- Yes.

And swearing it in the presence of a solicitor, one Mr Shane McGrath, in which you swore that insofar as paragraph 9 - this is of the statement of claim - refers to paragraph 8 of the statement of claim - I'll show it to you if you like, but I can tell you that paragraph 8 refers to the fax of 30 September? --- Yes.

'I admit that my conduct was not authorised by the Stock Diseases Act'. Do you recall swearing --- ? --- Yes.

--- such an affidavit? --- Yes.

And so, that was certainly your belief as at April of last year, was it now? --- Yes.

That your conduct, in sending the fax, was not authorised? --- Yes.

But see the earlier answer at 2275 albeit unresponsive to the question, "I did believe I was acting properly". And see 2258-9:

"MR MILDREN: At the time of sending the facsimile message, did you believe you were exercising any statutory powers? --- Yes.

What powers did you believe you were exercising? --- Chief Veterinary Officer.

HIS HONOUR: I'm sorry? --- Chief inspector of stock.

MR MILDREN: And what particular statutory power did you have in mind? --- Restriction on the movement under section 42.

That's of the Stock Diseases Act? --- Yes."

Also 2440-1: (cross-examination).

"Thank you. And in fact, I suggest that you prepared this fax because at that stage you realised that the restrictions imposed by Baker were unlawful? --- No.

In that they weren't in writing? --- I didn't know they weren't in writing at that stage.

But you'd expect to know that if - surely if they were in writing you would have looked, would you not, at whatever orders had been given in writing before sending this fax? --- Yes.

So it's safe to assume that if they were in writing you would have known about it? --- I didn't assume that.

But it's safe for us to assume that now, isn't it? --- If - if they'd come to me I would have seen them.

But surely - I mean you've told the court that it's fairly unusual for written orders to be written, to be made - that is under section 42? --- Yes.

At least for the purposes of forcing something on an owner? --- Yes.

That's fairly unusual? --- Yes.

If a stock inspector had written out such an order with a view to forcing an owner to do something surely you'd come to know about it? --- I assumed he had because he - he said, you know, he'd run into these problems, so that was

the step that I assumed he'd taken.

That's just not right, is it? --- Yes.

You, as chief veterinary officer - and you were based in Alice Springs at the time - surely if there was a written order in existence you would have known about it? --- If there had been but I didn't assume that.

Well, can I suggest you probably just didn't turn your mind to it? --- Yes."

He concedes he was aware that he did not have the power to quarantine (2293). I have already made findings on the use of that word in these events. I accept that his memory was confused on some issues e.g., (2266-8) but again there is nothing to show that he knowingly exceeded his powers. His explanation for the fax has already been set out. He believed he was acting under s42(o). (2279)(2288). He was wrong.

Mr Mildren submits that the sending of the fax was "at worst the tort of intimidation which is not pleaded". Even were it pleaded I could not find it established since I could not find that Tabrett "intentionally compelled (Mengel) by means of a threat of an illegal act, to do some act whereby loss accrued to him" (*James v The Commonwealth* (1938-9) 62 CLR 339 at 374). As Mr Mildren points out Mengel was not influenced by the fax; he did not give up the reactors.

The situation was brought about because neither the Act, nor the Regulations nor the Gazette properly incorporated into Northern Territory legislation the BTEC Scheme. But it is not surprising that the inspectors were unaware of the ramifications of something which it has taken lawyers some pains to discover, and which is, at least initially, open to different interpretations.

Consequently I find this ground of misfeasance in public office not proved.

### **DUTY OF CARE**

Paragraph 50 of the Statement of Claim reads as follows:

"50. Further and alternatively, the circumstances set forth herein gave rise to a duty of care on the part of the First Defendant by its servants or agents and/or the other defendants not to purportedly restrict movement of cattle from either of the Plaintiffs' said properties without first ensuring that a reactor beast was subsequently confirmed positive by irrefutable and unmistakable scientific process, and in any event without first ensuring that there was a real possibility that any remaining cattle or class of cattle at Neutral Junction intended for immediate sale were infected with Brucellosis."

The allegation is denied. Paragraph 2 of the Defence.

This claim is in negligence. The duty pleaded is "not to purportedly restrict movement of cattle ... without first ensuring that a reactor beast was subsequently confirmed positive by irrefutable and unmistakable scientific process". An alternative breach is pleaded as follows:- "and in any event without first ensuring that there was a real possibility that any remaining cattle or class of cattle at Neutral Junction intended for immediate sale were infected with brucellosis".

In *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 at 88-89 Lord

Atkin said:

" 'But apart from the existence of a public duty to the public, every person

whether discharging a public duty or not is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. This duty exists whether a person is performing a public duty, or merely exercising a power which he possesses either under statutory authority or in pursuance of his ordinary rights as a citizen.'. "

Although those remarks were made in the course of a dissenting judgment they were adopted by Gibbs CJ in *Sutherland Shire Council v Heyman* (1984-1985) 157 CLR 424 at 436 where his Honour remarked that "that statement is supported by the authorities which his Lordship cited and is not contrary to the views expressed by those of their Lordships who were in the majority".

In my view the test reduces itself to the simple question whether the defendants acted with reasonable care.

In my view and as a question of fact they were not in breach of such duty.

Much has been made of two matters:

1. The numerous statements from the defendants or other officers of the department that they considered the presence of brucellosis unlikely, or, even further, that they did not believe the first reactor or the subsequent reactors had brucellosis. (Baker 1526: Wilson per Mendel 336: Williams 1802, 1848, 2428-9. 2430: Wilson 1991, 2000 et passim).

2. The scientific evidence.

As to (1), it is perfectly clear that the "field officers" considered that whatever their own views, they were obliged to check them with scientific assessments. For instance Baker's evidence at 1526:

"So you didn't have a belief at the time that it was infected - that this particular beast was infected, did you, you just had a - you weren't sure what the situation was? You had a suspicion? --- Yeah, that's why I put 'suspect' on it.

But you had a suspicion, correct, about what the status of the beast was? --- Yes,

But you didn't believe at that stage that it was infected? --- Well, it wasn't up to me to ---

No, but insofar as you - it was - I appreciate that and that's perhaps a valid point, but insofar as your own personal belief at the time, you didn't have any belief that it was infected, did you? --- I put "suspect" on it waiting for clarification.

Yes? --- Whichever way it would've gone from that.

What I suggest - and what follows from that is you didn't have a belief there and then that that was definitely infected, correct? --- I suppose - yeah, I - I'd have to say that, yes; pending clarification from Alice Springs."

Williams at 1802:

"I told him (Tabrett) that I believed that it probably wasn't brucellosis but we were duty bound to establish that it - and prove that it wasn't brucellosis."

Wilson at 1991:

"I discussed them (the results) with Frank (Shiel) when he rang me through, and asked what his opinion was because he was very experienced at doing those tests, and I can remember his comment was he didn't really think it was brucellosis, for the reasons I've just said but nonetheless those were the results and that was it."

Williams at 1848:

" I had formed the opinion that I expected the animal would - would not have brucellosis, yes, but that was my opinion."

Tabrett at 2430:

"Question: And their further results (from IMRS) were also consistent with brucellosis being unlikely; you become aware of that?"

Answer: There was still a possibility on those results."

It seems clear to me that while there was a duty in the defendants to take reasonable care in dealing with the scientific results, the duty was not that stated in paragraph 50 of the Statement of Claim. Indeed the duty of care to the plaintiffs themselves (and leaving aside any question of an overriding duty to other pastoralists) was to ensure that there was no reasonable possibility of brucellosis being present in their herds. The position can be simply stated by putting the converse of what the plaintiffs plead. Suppose the defendants, believing that, because of the presence of a reactor, there was a reasonable possibility (albeit unlikely) of brucellosis in the plaintiff's herds and without waiting for scientific confirmation, had allowed the plaintiffs unrestricted movement of their herds or failed to warn them of the possible consequences of unrestricted movement. Suppose the herds had then been proved to

be infected with brucellosis? That, in my view, would have been a clear failure in the defendants to act with reasonable care to the plaintiffs, for which an action would lie against them by the plaintiffs.

### THE SCIENTIFIC EVIDENCE

As to (2) the defendants rely upon the evidence of testing of specimens from the reactors at the Arid Zone Research Institute (AZRI) at Alice Springs. Mr Shiel, a technical officer of the Institute, gave evidence that he was in charge of serology and bacteriology at AZRI, and that his work was mainly on brucellosis. Although he does not possess a degree or diploma from a University or College of Advanced Education, he undertook 3 years of a 6 year diploma course at the Queensland Institute of Technology concerned, inter alia, with laboratory technology, and from 1967 onwards he has been engaged in laboratory practice relating to veterinary research. He is familiar with the various accepted tests for brucellosis and I find him properly qualified to give evidence on this aspect. Indeed he gives evidence that he was involved in the actual development of one of the accepted tests, the complement fixation test (CFT). The various tests are set out in detail in the SDR (Volume 2 pp. 11-44). It is not necessary in my view to describe the technical aspects of these tests although evidence was led in that respect. I am satisfied that all the witnesses on either side were competent to perform these tests and competently performed them.

Shiel performed a number of tests and retests on samples obtained from the reactors. The retests showed similar results. The results were checked by Dr Williams

(1648) and retested (I assume a second retest) by a Mr Lee, the laboratory manager. Shiel checked by using not only the CFT but two other tests known as the "Rose Bengal" test (RBT) and the Standard Agglutination Test (SAT).

I was give a thorough indoctrination of these tests and a number of videos were made available to me explaining them. While I do not profess to have gained a full grasp of the technology, I can at least make the pronouncement that on the evidence before me there is nothing to show that the tests were not performed competently or the readings were inaccurate. For some elucidation of the process and the approach of the Northern Territory authorities I append a summary from Exhibit 87 - a pamphlet headed "Brucellosis Eradication in the Northern Territory" prepared by Dr Williams and a Mr McPherson of AZRI. (Exhibit 87). Though somewhat out of date (June 1981) I think it summarises the general approach in 1988.

#### "4. RELIABILITY OF TESTS AND TITRES: NT EXPERIENCE

During the formative stages of the Northern Territory's brucellosis eradication campaign, which preceded the commencement of the National Campaign, a considerable amount of time was spent in background research as to the best testing methods available. At the time there were 3 recognised procedures, the standard agglutination, the Rose Bengal and Complement Fixation tests. All workers in the field recommended the complement fixation test as the procedure of choice while bemoaning the difficulties inherent in the procedure. We considered these difficulties to be overrated and elected to use this test as our diagnostic tool. The procedure has proven reliable and all stations that we have declared free have retained that status. There were some early problems in large scale testing but with the introduction of different quality control procedures those have been overcome.

A serologist uses the word titre to explain the strength of a reaction or in effect a measure of the antibody content of the serum under test. In an unvaccinated herd (and we are referring to brucellosis here) any antibody present in an

animal indicates that that animal has in the past been in contact with brucellosis. It is true she may not have contracted the disease but there is no sure way of being certain of this and she is therefore classified as a reactor. Unfortunately an owner or others inexperienced in serology may see these lower titre reactors (the 4's, 8's and 16's) as probably not infected while cheerfully accepting the 128's and 64's as genuine reactors. When first presented with this unfortunately incorrect view we composed a limerick we public again:

Our titres consistently four  
Our calving persistently poor  
We never lactate  
We're micromamate  
Conception is rather a bore.

Not great poetry but have you seen any big healthy breeders that never seem to have calves. At the beginning of the eradication campaign there were many such cows and people who should have known better actually believed they were good breeders.

In a vaccinated herd the situation is indeed different. The low titre recently vaccinated animal is probably not infected (ie the 4's and the 8's). Indeed we have never isolated B. abortus from such animals.

It must be borne in mind that some countries have taken years to eradicate brucellosis (Tasmania for example took 40 years) and we are aiming to do it in less than 1 generation. For this reason we are deliberately interpreting our serological titres very conservatively. At this stage of the campaign cattlemen are receiving compensation for reactor animals: in the foreseeable future this compensation may be withdrawn and if the disease is not eradicated from a property that owner will bear the cost of the lost animals.

The antigen test refers to a different complement fixation test aimed at detecting antibodies formed by the 45/20 vaccine. We use this test when interpreting results from stations which can provide us with good records. That is, they know the history of the animal and that of its parent group and the full vaccination status of the animal and the group with which she is running. The procedure is relatively straightforward but in some cases it could delay results by 24 hours."

On the evidence of Shiel the CFT was basically used but also RBT and SAT

(1615). Furthermore all inter-laboratory controls were checked at the insistence of

Dr Williams (1620). Positive results were obtained in various numbers (e.g., 1629, 1630, 1640, 1642, 1648). There seems to have been some confusion in positively matching the animals to back tags since these are only designed to stay on for 3 days and most of the animals had lost them by the time they were tested (1657). But I find no great difficulty in this since those animals which gave positive results obviously came from the herds under question.

I am satisfied that proper checking of equipment occurred (1680-1).

Under cross-examination Shiel was prepared to concede that positive results for brucella abortus may ultimately be found not to show that the animal had the disease. Some explanations would be prior vaccination (1691) or the presence of brucella suis (a different strain and not possessing the dangerous qualities of brucella abortus). None of this however established in my mind that the tests had been done incorrectly, the results misread or that there was no reasonable cause for suspecting the presence of brucella abortus, despite the general opinion that it was not likely (1697). Shiel was perfectly frank about this (1600). By 26 September he believed it was unlikely. But again he wanted to check (1707).

Question: By this stage - and we're looking now at about 26 September it appeared to you more unlikely still that these reactors actually had brucella abortus?

Answer: Certainly at that stage it was very unlikely.

Question: You were still, however, anxious to know what it was that was causing the readings, particularly the readings that you got in Alice Springs?

Answer: I was extremely anxious to know because of the BTEC situation.

He said this was why he checked his laboratory controls (1708). But in order to culture for brucella suis he needed 4-5 weeks to check (1709). He was then asked these questions.

" In any event, I think yesterday in your evidence you said that a Doctor Williams prefers a period of 3 weeks before announcing a decision as a result of a culture, is that right; whereas your preference is to wait a bit longer? --- My preference is to wait longer. That was his decision and his decision only.

It's fair to say that perhaps in that regard you'd prefer a more conservative approach, you'd rather wait a little bit longer just to see what else might come up? --- Yes, we had quite an argument about the situation at the time.

In any event you'd disagree with the proposition that even 3 weeks is too long a period to wait before being able to tell whether or not the Brucella organism appears to be present in the culture? --- I prefer to wait 4 weeks in any situation. The principal reason for that is from my own experience I've cultured a brucella that took 25 days to grow before it started to appear. It's from personal experience - that's why I wait that long.

In any event it wouldn't surprise you if the plaintiffs were told by somebody in the department - perhaps Mr Baker or Mr Wilson - that they'd have to wait about 30 days to get results from the cultures - that would be consistent with -- - ? --- That's consistent with the way I normally work, yes."

During his evidence Shiel was asked about an undated note he had sent to Tabrett some time probably shortly after 30 September 1988. That note indicates the strong suspicion that the reactors may have had brucella suis. But it still indicates the feeling of his superiors that they should make further tests. The note reads:

" Dave (i.e., Tabrett)

Further update on Banka situation. Apparently Banka bought cattle from TRPHINIA View Stud near Rockhampton in November 1987. This station has had a major problem with pigs and brucella suis to the extent cannot carry out brucellosis testing with any accuracy because of cross reactions.

Also an article published in the A.V.J. Nov. '79 shows results from

experimental B. Suis infection to be consistent with our results.

Taffy (Williams) still wants to culture these animals but Banka has refused to let us have the cattle. He advised Kieth (sic) Hill yesterday that with your okay either we acquire the cattle or we declare Banka infected.

Frank Shiel" .

Someone then crossed out the word "infected" and wrote "suspect and ..(sic) Restricted under Stock Diseases Act". Tabrett denies that he did this and I accept that. However he signed the note as altered.

I cannot find anything sinister in this. Tabrett may or may not have been correct in considering he had the power to declare the animals "suspect" although for reasons already given I consider he did not have that power. But the question here is whether he acted reasonably and I am satisfied he did. "Infected" under the SDR is defined as "A herd that is determined to be infected with Brucella abortus". Clearly that could not be said. "Suspect" however is defined as "A herd in which monitoring information or testing suggests that the herd may be infected but further evidence is required to classify the herd as infected or otherwise ...". That was not an unreasonable analysis of the situation.

The question really becomes one of degree. At what point did it become clear that without any real risk to the owners or neighbouring owners the herd could be released. I do not consider Tabrett acted unreasonably at that point and in breach of his duty of care to the owners. Whether or not the cattle could have been released a little earlier than 14 November is again a question of degree but I am not satisfied that there was undue delay

or lack of care in so doing.

Williams agreed (1800) that the information of the testing from IMVS (Exhibit CC) showed that the samples sent to them had been "negative or basically negative". But his evidence (at 1801-2) is to this effect:

" Having regard to the information that was being passed to you from IMVS in Adelaide, what weight were you able to give that information in forming a view as to whether or not the animals needed to be cultured? --- The information that we'd - we'd got from the vet lab indicated that there were still some antibodies that were active by the time they tested it. The antibodies that we had detected in our laboratory were still there and we were still getting a consistent result. The antibodies that were detected in the vet lab in Adelaide were at a lower level but were still fair. It was still not sufficient evidence to be able to rule out *Brucella abortus* as a cause of the - the reaction that's being present and that - that was the - the task that we were duty-bound to do.

Did you consider, in the light of the results from Adelaide, whether or not there may be something wrong with the controls in the Alice Springs laboratory? --- Yes. We certainly did - you always blame yourself first. We certainly had a very hard look at what controls we had in place, how those controls performed and made sure that the controls we had in place met the Australian standard requirements.

Whose responsibility was it to physically check those controls? --- To physically check the controls, Frank Shiel. It was my responsibility to - to ensure that those controls were in place and to - to double-check him.

Did you say anything to Mr Sheil about those controls? --- Most definitely, yes.

And make enquiries of him? --- Certainly, yes.

Was there anything that he said to you that raised any doubt in your mind as to the controls within your own laboratory? --- No, no.

Were you satisfied that he had adequately checked the controls within your own laboratory? --- I certainly was, yes."

The evidence of Dr Barton, called by the plaintiffs, again suggests that the question was one of judgment and degree. I accept her impressive qualifications and experience. She is employed at the Central Veterinary Laboratories, Department of Agriculture, Adelaide as the Chief Veterinary Microbiologist. She was familiar with a test not employed at AZRI which she described as a "more recent development than the CFT".

(930) She described the general procedure thus (at 930-1):

" Right? --- And we would probably - the test that we pin most on, really, is the ELISA test, which is a - a more recent development than the Complement Fixation Test. It's not as well standardised and it's not yet recognised as a standard diagnostic testing method in Australia but it's moving in that direction. And usually we find that there's very good correlation between the Complement Fixation Test and the ELISA test. And if we had a sample that gave both a - a positive Complement Fixation Test and a positive ELISA test, we'd then start to have concerns that - that the animal probably was a genuine *Brucella abortus* reactor. If the animal gave a Complement Fixation Test on 1 in 8 but was negative in the ELISA test we'd start to think that it was probably cross-reacting with something else. The other test that we could do is the Rose Bengal Test which is a - a much cruder test, really, and it - it's strength is - is that it's been very useful as a screening test and - and, again, it - you know, if you got a positive - it's a screening test that has a lower specificity than the Complement Fixation Test. But I - I guess it's just an extra test that adds to the armamentarium. There's some thought that - that you're just - you're detecting slightly different antibodies in these tests and that sometimes is - is a - is a bit of a help in - in putting together a picture of - of what's happening in the animal.

Was the Rose Bengal test a test used more in previous years? --- Yes. In the early days of the eradication campaign when all laboratories were faced with testing, you know, thousands of samples, the Complement Fixation Test, really, was a little too time-consuming to - to enable the samples to be put through. So the practice was to screen samples with the Rose Bengal Test and then confirm any positive Rose Bengal Test with a Complement Fixation Test.

So hence your reference to it being a screening test? --- Yes.

Can I take you back, please, to your comments about the ELISA test. You've said that it's apparently still developing to some extent? --- Yes.

How does it rate with the Complement Fixation Test in terms of specificity -

or whatever it is? --- Specificity?

HIS HONOUR: Specificity? --- I - I think it's probably about the same specificity and it may be slightly more sensitive. But it really does depend on - on - I mean, I think different labs would have different opinions because we're still really at the stage of getting the test completely standardised.

Now, if - all right, thank you. And in terms of those two things, specificity, sensitivity, how's the Rose Bengal Test rate against the CFT tests or the ELISA Test? --- It's probably the same, or a bit more sensitive, but it's much less specific.

Thank you. So if one obtained a positive result from a Rose Bengal Test, but the results obtained from say, CFT or ELISA Test? --- It's probably the same, or a bit more sensitive, but it's much less specific.

Thank you. So if one obtained a positive result from a Rose Bengal Test, but the results obtained from say, CFT or ELISA Test was negative, which result would prevail? --- Well, the Complement Fixation Test is really the sort of legal test, I guess, and that's the test result that would prevail."

She described the titres she would regard as significant at 935-6:

" In some situations, titres of 4 are significant and - and that's as far as you need go. But in the brucellosis system, up until current times, really, a titre of 4 has been not regarded as being of any significance. It's, perhaps, been thought to - due to non-specific complement binding. And titre of 8 is really a low suspicious positive that you would want to do further work on. But a titre in 64 or 128 or greater would be regarded as a fairly high titre.

At what stage would you begin to suspect actual presence of the Brucella abortus organism? --- Well, you'd be suspicious of 1 in 8 titre - well, it depends on the nature of the herd; if you've got a herd that's clear of - clear of brucellosis and all you've got are 1 in 8, or one or two animals reacting 1 in 8, you'd probably try to just make sure that they're not brucellosis, but you wouldn't be highly suspicious. But if you had titres of 16 or 32 you'd really start to be thinking that brucellosis is a distinct possibility.

That would warrant further testing? --- Yes, and that's when you go through this process of repeating and following up using ELISA and other test systems."

She first tested samples from the individual animal and her comments were

this (944-5).

" All right. So on the basis of those results, what's your conclusion about the likelihood of that animal having Brucellosis abortus, based on those results? --  
- Okay. Well, I mean, taken on face value, the animal is negative, but I think I go back to what I said before, that - that - that you might make some comment about the individual animal, but you'd be very cautious about the herd, and the fact that the animal has given a positive Rose Bengal Test, normally you'd not be too concerned about either. But you'd - the inclination always is to look at the herd, and not just the individual animal."

On 15 September she received 17 specimens for brucellosis testing. She tested and commented (947-8).

"Okay. Thank you. Now, under CFT appears the letter 'N'? --- Yes.

What does that signify? --- Negative.

Thank you. In the case of some of the CFT results I think you'll find in brackets s/u? --- It means slightly anticomplementary, which means that they are giving a slight reaction in the complement control, but it wasn't strong enough to make it difficult to read the end result.

Also, if we look under the ELISA column 'N' signifies negative, does it? --- Negative, yes.

In the right-hand column opposite sample number 65HN? --- Yes.

And also 67HN? --- That's a high negative. That means that they're below the cut off point but they're higher than we normally see with negative samples.

Under the RBT column, again 'N' stands for negative, does it? --- Yes.

Some of them, I think there were three, 'pos'? --- Yes.

That stands for what? --- Positive.

And again where you have a positive RBT but a negative CFT and ELISA, would you be concerned? --- I guess the thing is that you wouldn't be too

concerned because the - you're getting - you know you've got - Complement Fixation Test is negative and that's really the linchpin of the thing. It's confirmed by negative ELISA. But laboratory people are very cautious and our focus is really to try to be sure that the animal doesn't have brucellosis and we're really looking on a herd basis rather than individual animal basis. And I guess I might be feeling a bit uncomfortable that we've got a couple of high negatives and we've got some positive RBTs they're not the same - not corresponding samples but I'd really be wanting to be knowing more about the herd."

A third batch of 23 sera were sent on about 21 September. Her comments were as follows (951-3):

"MR HILEY: All right. Well again, looking down the results column, those samples appear to be numbered 1 through to 23; is that right? --- Yes.

And then under the heading 'CFT' we have 'N' for negative? --- Yes.

For all except for samples 19 and 23; is that the case? --- Right, that's correct.

And then under the ELISA tests all negative except again for those same 2, that's 19 and 23, and also number 5? --- Number 5, yes. No, sample 19 was negative in the ELISA. Sample 20 ---

I beg your pardon. I'm sorry, I'm looking at the wrong column. Yes, and sample 20 was positive for ELISA, negative for CFT? --- That's right.

And then we can see the RBT and the SAT. Just in relation to the SAT results? --- Yes.

You've told us the cut off for SAT is 50? --- Yes, they're all less than 50.

So would you regard those as positive or negative? ---- I'd regard the SATs as negative.

Okay? --- But again, you tend not to look at one test in isolation when you've done more than one test.

Which of those results, if any, concern you? --- Well, I guess in particular the results of 19 and 23 concern me, but again if you look at the whole group there - this is the sort of situation where I'd really be asking questions of the field guys, and in particular about samples - the animals from which samples labelled 19 and 23 came.

Would you turn over then to page 3(c); 3(c), the report.

HIS HONOUR: Just excuse me.

MR HILEY: Yes, Your Honour.

HIS HONOUR: One and 8 wouldn't concern you? --- Well, I'd be - I mean I'd - that's what I mean by be concerned about the whole herd. Samples - sample number 19 is give - admittedly it's - it's stopped at 1 in 4 but it's given a 4 plus reaction at 1 in 4 and sample 23 has given a 1 in 8 Complement Fixation reaction, so sample 1 in - sample 23 is positive but not a strong positive, and just taking into account the fact that we've got other samples that have give positive ELISAs and others that have given positive Rose Bengals the whole herd would- wold be of some -I'd be having some question marks.

Sort of be adding some sort of suspicions to you? --- Yes. I mean, not ---

To your ideas? --- Not comfortable to write them off as completely negative.

Right.

MR HILEY: Well, if it transpired that sample 23 was simply not from this herd at all? --- I'd be a lot happier.

Would that mean you could ignore it? --- I'd ignore sample 23, but sample 19, I guess I'd still be wanting to know about and I'd again be looking at the whole herd.

If you became aware that sample 19 and a 9 year old cow with 2 previous vaccinations of 45/20 what effect would that have on your views about the results in respect of sample 19? --- I'd be happy just to say that that - yes, that history would account for those reactions."

Finally on 28 October she received a fourth batch of 21. It would appear they were probably tested on 2 November.

Her comments are these:

" All right, thank you. In any event, in respect of those 21 samples, apparently one was lost in transit, number 2? --- Yes.

And the others CFT negative, is that right? --- Yes.

And Rose Bengal test? --- One plus suspicious.

Well it's three plus --- ? --- It's one plus.

Sorry, I beg your pardon, but there are 3 in the category? --- Yes.

Samples 9, 17 and 18. In respect of the ELISA Tests, all negative? --- All negative, yes.

Turn to document 14, is that a report setting out those results? --- Yes.

Yes indeed there is written under the heading 'suspicious' opposite RBT3 in that category? --- Yes.

The pathologist Poynton is that somebody working under your control? --- Yes.

That document has a date on it I think - it's got a couple of dates but is there a date ---? --- Well, the second of the eleventh - presumably the report was finished. Now whether - there's no indication of whether it was phoned or not, I mean that's our usual procedure and they - they're supposed to tick the box, and the hard copy would have been sent out on the 10th.

Assuming that those 20 samples are from the same herd as 22 of the 23 of the previous batch? --- Yes - yes.

And also from the same herd as the 17 in the second batch, what conclusion would you reach as to the likelihood of cattle in that herd carrying brucellosis abortus? --- Well, if - if these samples all came from the same animals and what we in fact have seen has been a sequence over a period of - of 4 to 6 weeks, I'd - I'd be starting to feel quite comfortable that the initial reactions were in fact non-specific reactions due to - to whatever, and that as often happens in this situation, by a passage of time, that whatever it is that's causing the problem settles down and you - and the samples become - you can run them through the test and they're negative, and - suggesting that it's not brucellosis, that there's been - been some other non-specific thing that's just interfered with the testing that occurred earlier.

So would you have any suspicion that there was any brucellosis abortus present? --- No, if they were the only - if they were - you know, if all the other

animals in the herd were negative and that's what - that's what we were sort of coming through with, I'd - I'd be starting to feel quite comfortable that it wasn't bovine brucellosis."

Her attention was then again directed to the third

batch (c. 21 September) and she gave this evidence (957):

" Now, I asked you before what conclusions you would have reached after the third batch was tested, had you known that sample 23 wasn't from this herd and that sample 19 was a 9 year old cow with 2 previous vaccinations of 45/20, and you've told us that. At that stage would you have felt confident to be able to express a view as to whether or not the herd had brucellosis abortus? --- No, I - I think, with those sort of scrappy reactions and - and the fact that there's some history of contact with *Brucella suis* animals in the Territory and that's an undesirable situation, I think I'd be suggesting that at least some of the animals would be slaughtered and their lymph nodes cultured. Perhaps not all of them, but - but that some sort of stay be put on the - on - on - on movements off the property. I mean it's not - I mean I'm just a lab person and I mean this is sort of the - the conversation I'd be having with the field people ---

I'm sorry, perhaps I'd better get back to the question, which was what sort of confidence would you have as to whether --- ? --- I wouldn't - yes ---

--- or not the herd had *brucella abortus*? --- Look, I'd be feeling uncomfortable. I mean I guess my feelings would be that it's probably not *brucella abortus*, but it's not clear cut and - and I'd be looking to do further things."

In cross-examination she conceded that differences in laboratory tests could be caused in various ways (1007). She says she would not have been categorical in saying that there was no evidence of brucellosis until the results of the fourth tests on 2 November (1022). At 1024 she gave these answers:

" But if for some reason the animals weren't made available to you until 25 October for culture? --- Look, I'd probably - on the basis of the last lot of serology that we did in Adelaide, I'd be happy to say that there are no evidence of *Brucella* infection in that group of animals.

Can I suggest though, that wouldn't - you might be - but it wouldn't be wrong for some other scientist to take the view ---" --- The field officers can make what decisions they think are justified in the light of all the knowledge that they have. I'm only providing them with a segment.

Yes. What I'm suggesting, though, it wouldn't necessarily be scientifically wrong if you'd started to culture animals from 26 October to wait a little longer to see the results of the culture? --- There must - really it depends on - I don't think that would be my decision. I mean, we abandon the cultures halfway through if other information - in other situations where other information becomes available that there's no need to pursue that line any more. So I'm happy to abandon things if I think that there's sufficient evidence to do so.

I appreciate that, but what I'm getting to you is that it wouldn't necessarily be wrong for another scientist to take a different view? --- Well, there's no right or wrong, I don't think.

And as a scientist, until such time as you'd decided that the animals weren't infected in this situation, as a scientist you'd be recommending that the animals be placed under movement restrictions, wouldn't you? --- Well, again it's not my place to make those sort of recommendations, but I would anticipate, from my knowledge of brucellosis, that is what the field people would be doing."

In summary therefore her evidence is that even after the third batch (21 September) she had the feeling "its probably not brucellosis but its not clear cut", and it was only after the fourth batch (2 November) that she felt she could be categorical that it was not brucellosis but she would not be critical of a field decision to delay a little further.

In the light of all the evidence I cannot be satisfied that the defendants or their officers acted negligently. This conclusion necessarily embraces the duty alleged in paragraph 51 of the Statement of Claim as well as paragraph 50, because paragraph 50 relates the duty to the first defendant and paragraph 51 relates the same duty to the second and third defendants.

## DUTY TO REVOKE MOVEMENT RESTRICTIONS

Paragraphs 52, 53 and 54 allege a duty to revoke movement restrictions as soon as responsible officers of the first defendant formed the view that the reaction to testing was not caused by brucella abortus or received expert advice that the reactions were not caused by brucella abortus. The allegation is that the officers of the first defendant failed to revoke the movement restrictions on this information.

It is suggested that the results obtained by the plaintiffs from their independent sources (IMVS and Berrimah) and known to the defendants should have indicated to them much earlier than 14 November that the restrictions should be lifted. There are certainly differences in results; but no particular reason why the results of IMVS or Berrimah should be preferred to AZRI. In any event there were still grounds for suspicion in the results from all laboratories.

Wilson at 2006-7 gives this evidence:

"Did you attempt to work out something from all of these results?---Yes, well, I had to make a decision or a recommendation for a decision to the CVO on what was to be done about the situation once we had the results in. So I put all the results on the table and went through them and basically compared results from one laboratory with another and compared all the different tests that were done at Alice Springs with one another, just to try and see if there was any clear pattern. I spent several hours doing that. I can remember using a highlighter pen on, I think, a copy of Bob's list, marking out those animals that I considered most significant because they were coming up repeatedly in different tests, and ultimately as a result of it all, I formed a view that we should acquire those animals which were most likely to recover brucellosis from being the pregnant and freshly calved animals, plus a couple of the other ones with particularly constant titres.

And at that stage why did you form the view that it was necessary to acquire those animals?---Well, what I had to decide myself was whether Alice Springs - because there was a lot of controversy over whether the Alice Springs results were significant, because they were saying that other laboratories aren't getting any test reactions at all. They - I recall them saying at some stage about them to me that they tested all the animals at IMVS and got nothing out of them; they'd all come up clean. So, I wanted to see whether the other labs did find anything. They did, and it wasn't consistent with AZRI in terms of the animals, but out of that group they still got reactors. So once it was clear that all labs were finding some reactors which gave suspicion of brucellosis it became clear in my mind that we had to investigate the matter further, whereas if the other two labs had found nothing at all, got complete clean results, then I would have recommended to the CVO we disregard all the Alice Springs results completely."

And note 2187:

"So what I'm saying to you is this, that had you realised that at the time, that this number 19 had that particular history, and that number 19 wasn't number 153, age 1 year with nil 45/20 history, as you assumed it to be, your conduct in pursuing further investigations, on our own evidence, was likely to have been different?---No. I accept that I may well have misread which of those 2 animals was which, as we've just been through. The facts still remain that there were ELISA reactors and that was also considered a specific and diagnostic test as well. So I still had supportive evidence for the AZRI results from other labs in respect of other tests."

Much of what I have previously said applies here. These paragraphs of the Statement of Claim are, I think, based on a misconception. There was, I consider, certainly a duty in the defendants to revoke the movement restrictions once they were satisfied that the reactions were not caused by brucella abortus. But the misconception is in the implication that there was some positive date when that satisfaction could be established when, in fact, there was rather a series of events which gradually built up to a point where it could confidently be said that there was no reasonable possibility of brucella abortus. That was a

matter of judgment. The question as to whether the defendants acted reasonably in choosing one date rather than some earlier date can only be tested by bearing in mind the serious results that would ensue if they were wrong. Those results might affect not only the plaintiffs but many other pastoralists. Even assuming the duty to be owed only to the plaintiffs the fact that the defendants acted cautiously does not mean they acted unreasonably. If the test of reasonableness is the defendants' own belief, then it might be suggested they should never have acted at all since the defendants and their officers all felt brucellosis unlikely. But that would be a clear misconstruction of their duties. It was a matter of degree. Theoretically the point could never be reached that the defendants were 100% sure that there was no brucellosis. But there had to be a point of reasonable satisfaction based not only on their own judgment but fortified by the scientific tests. No doubt a point could be reached where it could be said that it would in all the circumstances be unreasonable for the defendants to continue the movement restrictions. But in my view it is not established that that point was reached before 14 November. The plaintiffs, in paragraph 53, give an ascending order of dates at the end of which they say the restrictions should have been revoked. They acknowledge thereby the need for various events to have occurred before that could be done. The dates given by the plaintiffs are:

- "(a) The defendants' responsible officers formed the view that *Brucella abortus* did not cause the reaction in the first reactor heifer (about 13 September).
- (b) Experts retained by the plaintiffs advised the first defendant that their testing of the reactors had found no trace of *Brucella abortus*.
- (c) The defendants' responsible officers formed the view that the likely cause of their reactions was *Brucella suis* not *Brucella abortus* (about 27 September 1988); and

- (d) an autopsy of the first reactor revealed no Brucellosis (about 14 October).

The problem is that it seems to me to be a matter for individual judgment and there was a period after 14 October when it could not be said that the failure to revoke the restrictions was unreasonable. On the evidence and bearing in mind the responsibility cast on the defendants, it could not, in my view, be said that on 14 November a point had been previously reached after which it would have been an unreasonable and negligent action in the defendants to fail to revoke the restrictions.

#### DUTY TO ENSURE "UTMOST EXPEDITION"

Paragraphs 55 and 56 of the Statement of Claim allege a duty to ensure that the ongoing testing of the reactor cattle be undertaken by or on behalf of the Department with the "utmost expedition", "in order that the movement restrictions should remain in force for such minimum time as was reasonably necessary to minimise economic loss to the plaintiffs".

I think the short answer to this is that, while I might query the term "utmost expedition", I would not quarrel with the term "in as short a time as was reasonably possible in the circumstances", but I can find no evidence that the defendants were in breach of this duty if they were charged with such a duty. Scientific testing necessarily taken time and there is no doubt that a great deal of retesting was properly and reasonably called for. I can find no evidence of undue delay or failure to take all reasonable steps in as short a time as possible.

#### THE "BEAUDESERT" PRINCIPLE

Paragraphs 44 and 45 of the Statement of Claim are:

"44. Further the purported imposing of each of the said movement restrictions was intentional.

45. As the inevitable consequence of the imposing of each of the said movement requisitions the plaintiffs have suffered loss and damage."

The plaintiffs here rely on the principle stated by the High Court in *Beaudesert Shire Council v Smith* (1966) 120 CLR 145. In that case a person held a licence under the Queensland Waters Act to install a pumping plant to take water from a river for irrigation purposes. The Shire Council, in the course of road construction, took gravel from the bed of the river and, in doing so, destroyed the waterhole from which the licensee pumped the water. The Council did not have the requisite statutory permit for the removal of gravel. The licensee failed in an action for damages against the Council for negligence and nuisance. He succeeded in an action on the case thus stated by their Honours Taylor, Menzies and Owen JJ at 155-6:

" There is therefore a solid body of authority which protects one person's unlawful activities from the deliberate, unlawful and positive acts of another. It is not, however, possible to adopt a principle wide enough to afford protection in all circumstances of loss to one person flowing from a breach of law by another, for regard must be had to the limitations which the law has placed upon the right of a person injured by reason of another's breach of a statutory duty to recover damages for his injury. Bearing this in mind, it appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other. It may be that a wider proposition could be justified, but the proposition

we have stated covers this case and leads us to the conclusion that the appellant is liable to the respondents for loss occasioned by its unlawful trespass in moving gravel from the river bed."

In *Elston v Dore* (1982) 149 CLR 480 at 491 their Honours Gibbs CJ, Wilson and Brennan JJ described this case as "much criticised". See, for instance, Fleming - 6th Edition - 661-662. The House of Lords in *Lonrho v Shell Petroleum No 2* [1982] AC 173 at 188 refused to follow it. Balkin and Davis - Law of Torts - 687, go so far as to say that "The Beaudesert principle is historically inaccurate, has been distinguished (if not impliedly rejected) in Australia and is not accepted either in New Zealand or England. The time would appear to be ripe either for a Full Bench of the High Court, or the various legislatures in Australia, to declare that the decision was wrong and to abrogate it". The learned authors go so far at 684 to suggest that the proposition stated was given per incuriam. That is not a luxury permitted to me.

These criticisms are of no assistance to me whatsoever. The case is binding upon me as it is for every court in the land save the High Court. In *Elston v Dore* (supra) their Honours stated at 492 that when the question of whether *Beaudesert Shire Council v Smith* should be followed arose for decision it would be desirable that a court of seven justices should consider it. Those very remarks make it abundantly clear that their Honours were not then overruling the decision and regarded it as still binding. See also the remarks of Mason J. (as he then was) in *Kitano v The Commonwealth* (1973-4) 129 CLR 151 at 174.

The difference between the *Beaudesert* case and the misfeasance claim which I have already dealt with is that in the former there seems no necessity to establish any knowledge in the defendant that he was acting unlawfully or that he intended to cause harm to the plaintiff. As Mason J says in *Kitano* at 174:

" It is enough to found liability provided that the other elements are present, that the act was intentional and its inevitable consequence is to cause loss to the plaintiff."

In *Kitano* the facts were as follows:

"The plaintiff, M. and two others left Japan on a round-the-world trip in a yacht in which each of them had a one-quarter interest. M. was the captain. On arrival at Bowen the yacht was entered for home consumption under the Customs Act 1906-1968 (Cth), and at Darwin became subject to the control of the Customs. At Darwin a dispute arose between the four owners: the plaintiff wanted to continue the voyage and the others to return to Japan. On 20th August 1971 the plaintiff obtained export documents for the yacht, completed them and retained them pending the grant of an export licence under the Banking (Foreign Exchange) Regulations, without which export was prohibited. The plaintiff purported to dismiss M. as captain and made arrangements for his return to Japan. The Customs authorities were informed of these events. The plaintiff was then granted an export licence. The day after the purported dismissal of M. as captain, he completed export documents, but he was not able to obtain an export licence in respect of the yacht. The plaintiff then requested a certificate of clearance, and was informed by Customs that directions were being sought from Canberra and that if he returned at a particular time that afternoon, he would be told what had been decided. He did not return on that day, and a certificate was granted to M. notwithstanding that M. had not obtained an export licence. M. and the others then sailed away."

Mason J held that although the issue of the certificate of clearance was an intentional positive and (since it contravened s122 of the Customs Act) an unlawful act the plaintiff did not suffer loss as the inevitable consequence of the issue to M. Accordingly the

plaintiff's action on the case failed.

Mason J put it this way at 174:

"It may be that the plaintiff's loss (deprivation of possession of the yacht) was a consequence of the issue of the certificate to Matsushita but it was not a consequence which was 'inevitable'. Nor was the issue of the certificate itself an act which was 'calculated in the ordinary course of events to damage' and which did in fact. In the *Beaudesert* case it was the plaintiff's intentional act in removing gravel which destroyed the plaintiff's waterhole thereby preventing the exercise of his rights under his licence. Here it cannot be said that the defendant intended that which brought about the plaintiff's loss, namely his exclusion by his companions from possession of the yacht. Certainly the defendant intended that that the certificate should issue, but that act did not deprive the plaintiff of possession."

His Honour takes the phrase "calculated in the ordinary course of events to damage" from the remarks of Bowen LJ in *Mogul Steamship Co Ltd v McGregor Gow & Co* (1889) 23 QBD 598 at 613.

It seems to me that there is not the distinction in this case which Mason J was able to find in *Kitano*. In my view there is no escaping these propositions:

1. The imposition of movement restrictions was intentional.
2. That act was unlawful i.e., as having no lawful authority. I cannot see any relevant distinction here between a contravention of the law (as in *Kitano*) and an act done without lawful authority (which was the case in *Beaudesert* itself).
3. The act was "calculated in the ordinary course of events to do damage".
4. If it is a necessary element in this tort that the defendants foresaw the damage and the type of damage which did occur then clearly on all the

evidence the defendants did foresee it.

5. The damage can only be seen as an inevitable consequence of the defendants' acts.

In these circumstances it seems to me that there is no escaping from the Beaudesert principle and it must be followed.

On this point the plaintiffs succeed.

#### UNLAWFUL INTERFERENCE WITH PROPERTY RIGHTS

Paragraphs 46 and 47 of the Statement of Claim read:

"46. Further the defendants owed to the plaintiffs a duty of care not to cause them loss or damage by acting unlawfully.

47. The defendants breached the said duty by acting unlawfully (as particularised in paragraph 41 herein) as a result of which the plaintiffs suffered loss and damage (as alleged and particularised in and under paragraph 34, 35 and 35A herein).

I agree with Mr Mildren that the pleading is defective. Absent negligence there is not a duty of care not to act unlawfully provided that the unlawful act was not knowingly or maliciously done. Dixon J (as he then was) says in *James v The Commonwealth* (1938-9) 62 CLR 339 at 372-3:

" There was, in other words, an appeal to the law as it was conceived to exist.

The threat or inducement consisted in a tacit or implied intimation that the claims of the Government might be enforced by resort to legal process. I think it would be an extension of the principle upon which the procurement of breach of duty is made a tort to hold that it covers a mistaken assertion on the part of the Executive Government or its officers that under the law, as they understood it, it is the third party's duty to refrain from compliance with the obligation upon which the plaintiff insists. The ground upon which I decided this part of the case against the plaintiff is that the Commonwealth incurs no liability for tort merely because A is induced to refuse performance of what turns out to be in fact a civil duty to B by an intimation made to A by the officers of the Commonwealth that, under the law of the Commonwealth, A is not merely absolved from the performance of the duty but is forbidden under penalties to do what would amount to performance and, by doing it, would expose himself to prosecution; provided that the officers act honestly in the purported execution of their duty to maintain and enforce the laws of the Commonwealth and, perhaps reasonably, as for instance, on the faith of a statute not yet held to be invalid. Even if the plaintiff overcame the other difficulties I have mentioned, this ground would be fatal to his claim for wrongful procurement of breaches of duty by common carriers. I do not think that a bona-fide assertion as to the state of the law and an intention to resort to the courts made known to the third party can be considered a wrongful inducement or procurement. The situation is simply that the Executive, charged with the execution of the law, under a bona-fide mistake as to the state of the law, proposes to proceed by judicial process. The courts are established by and under the Constitution for the purpose, among others, of determining whether the Executive is or is not mistaken in its view of the law which it seeks to enforce against the individual, and judicial process is the appointed means for bringing the question up for decision. To treat a proposal or threat to institute proceedings as a wrongful procurement of a breach of duty is to ignore the fact that, assuming bona fides, the law always countenances resort to the courts, whether by criminal or civil process, as the proper means of determining any assertion of right. In all other cases of procurement to be found there has been an element of impropriety, or of reliance upon some power or influence independent of lawful authority. An intention to put the law in motion cannot be considered a wrongful procurement or inducement, simply because it turns out that the legal position maintained was ill founded."

As Malcolm CJ says in *Warwicker Assessments v Zadow* [1989] 1 WAR 307 at 311, "There is no duty to be right. Where a duty exists it is only a duty to be careful". He cites the comment of Lord Salmon in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 231.

I do not find that Tabrett even if mistaken as to his source of power acted mala

fide. The other officers of the first defendant acted bona fide in misinterpreting the Gazette.

### CONVERSION

By paragraphs 48 and 49 of the Statement of Claim the plaintiffs allege that the defendants committed the tort of conversion by an "unlawful interference with the plaintiffs' rights as owners of the cattle".

It can be readily conceded that the plaintiffs were in possession and entitled to possession of the cattle and that the cattle were property which could be the subject of conversion. It can also be conceded that it is no defence that the defendants acted under a mistaken belief however honestly held. *R.H. Willis & Son v British Can Auctions* (1978) 2 All ER 392 at 395 (per Denning MR).

According to Balkan & Davis - Law of Torts - 1991 Ed. "Conversion may be defined as the intentional dealing with goods which is seriously inconsistent with the possession or right to immediate possession of another person. The tort protects the plaintiff's interests in the dominion and control of his goods; it does not protect his interest in its physical condition. It follows therefore that the tort is much concerned with problems of title to personal property. Indeed, many cases of conversion are in essence disputes on title ...".

It seems to me that the expression "dealing with" connotes some positive act of dominion over them. That indeed is what the plaintiffs allege. Their submission is that while the movement restrictions remained in force, the use to which the plaintiffs could put the

cattle was so limited as to effectively deprive the plaintiffs of any commercial interest in the cattle during that period. The submission is that during that time the defendants exercised dominion over the cattle to such an extent that they had the de facto effective control over the use to which the cattle were put.

Mr Hiley relies upon the case *Oakley v Lister* [1931] 1 KB 148. That was a case where the plaintiff had placed on land, which was subsequently purchased by the defendant, certain hard core and tar macadam which was the plaintiff's property. When the defendant became the owner of the property, he claimed the material as his own and stated that if the plaintiff attempted to remove any of it he would become a trespasser. The facts therefore consisted of a deliberate claim of ownership and therefore a denial of any right in the plaintiff to deal in the goods. In fact it was subsequently admitted that the defendant was not entitled to the ownership of the land on which the goods were stacked at the time he made his claim since the lease of the previous occupant had not then expired. But the defendant still maintained he was not guilty of conversion.

In those circumstances the Court of Appeal had little difficulty in concluding that the tort of conversion had been made out, and, with respect, it would have been surprising if they had found otherwise. The defendant had clearly, even if mistakenly, dealt with the goods in a manner inconsistent with the rights of the true owner. The plaintiffs here submit that the case is analogous because the Court of Appeal found that the defendant had "interfered with rights of property and those rights included rights of possession, and if the defendant is proved to have prevented the true owner from exercising his rights it is quite

clear there is a cause of action" per Greer LJ at 155. But the basis of that case was that the defendant claimed to exercise as against the plaintiff the rights of owner. See Greer LJ at 155: Scrutton LJ at 154: Slesser LJ at 156.

In the present case it could not, I think, be suggested that the defendants ever made any claim to the ownership of the cattle. The plaintiffs say, however, that they exercised control and that is sufficient. It does not seem to me that a restriction on movement of cattle, in the circumstances set out here, is in any way an assertion of possession or ownership of the cattle. There was no "dominion" over them, in the sense of preventing the plaintiffs from their day to day care and control and whatever the defendants did there was no restriction on certain dealings e.g., selling to abattoirs, nor was there any denial of the plaintiffs' rights ultimately to deal with the cattle as they wished i.e., after the lifting of movement restrictions.

The plaintiffs rely on a passage from the judgment of Dixon J in *Penfolds Wine Pty Ltd v Elliott* (1948) 74 CLR 204. In that case Penfolds made wine and sold it in bottles over which they asserted and maintained the property. The respondent sold bulk wine to customers who provided bottles in which to carry it away. Some of these bottles were the property of Penfolds. The application before the Court was for an injunction restraining the respondent from allowing Penfolds' bottles to be used in this manner.

Two of the majority of the High Court held the application had been rightly dismissed on grounds which might fairly be regarded as de minimis so far as the injunction was concerned. Dixon J however at 224 said:

" What wrong to possession or property on the part of the respondent do these facts disclose? I know of none. It cannot be trespass because there is, on the part of the respondent, no infringement upon the possession of any one. It cannot be conversion, because, on his part, there is no act and no intent, inconsistent with the appellant's right to possession and nothing to impair or destroy it." See also 229.

Mr Hiley lays stress on the word "impair". He submits that the defendants plainly "impaired" the way in which the plaintiffs could deal with their cattle. But, as I follow his Honour's remarks, he was directing them not to possession but to the right to possession. It does not seem to me that the defendants here were claiming or asserting any right to possession, and it seems to me that it is the assertion of the right which is the essence of the tort.

In my view the claim for conversion fails.

#### DUTY NOT TO CONVEY WRONG INFORMATION

The plaintiffs' Statement of Claim makes the following allegations at paragraphs 57-61:

- "57. Further and alternatively, by reason of inter alia being the Government of the Northern Territory of Australia and/or by reason of its authority and responsibility to act in the area of primary industry and/or by reason of its purported conduct of the BTEC Campaign, the First Defendant through its servants and agents including the Third Defendant came under a duty of care in all of its dealings with the Plaintiffs not to convey wrong information or to make false representations.

58. In imposing the said movement restrictions the Defendants:
- (i) conveyed wrong information in that they advised the Plaintiffs that movement of their cattle was restricted; and
  - (ii) falsely represented that such restrictions were lawfully imposed.
59. By reason of the aforesaid, the Defendants breached their said duty of care and the Plaintiffs suffered loss and damage.

#### PARTICULARS

See paragraph 35A

60. The circumstances were such that the Defendants knew or ought to have known that in purporting to impose and/or imposing the said movement restrictions ("the said conduct") the Plaintiffs would act upon and rely upon such conduct as:
- (a) actually imposing such restrictions against movement of its cattle;
  - (b) representing that the Defendants were entitled to impose such restrictions.
61. The Plaintiffs did so act and rely upon the said conduct, to their detriment, as a result of which they suffered loss and damage.

#### PARTICULARS OF RELIANCE

In reliance upon the said conduct the said Plaintiffs desisted from moving any cattle from Banka Banka or Neutral Junction, and from preparing any such cattle for sale, and from selling any such cattle.

#### PARTICULARS OF DAMAGE

See paragraph 35A.

Although this claim may be said to open up the complicated question of the

duty of care of public authorities in use of their powers (as to which see *Rowling v Takaro Properties* [1988] 1 AC 473 at 501-503. Balkin & Davis 446-8), the question here is resolved in my view on the basis that no breach of duty is shown.

The starting point is *Caledonian Quarries Ltd v Spiers* (1956-7) 97 CLR 202 where it was held that "when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could with reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered". See at 220.

The duty as pleaded is "not to convey wrong information or to make false representations" which in my view is too wide and if accepted would be imposing an absolute liability inconsistent with the concept as stated in *Caledonian Quarries*. In *L Shaddock & Associates v Parramatta* (1981-2) 150 CLR 225 Gibbs CJ said at 235.

"From the standpoint of principle there is no difference between a person who carries on the business of supplying information and a public body which in the exercise of its public functions follows the practice of supplying information which is available to it more readily than to other persons whether or not it has a statutory duty to do so. In either case, the person giving the information to another whom he knows will rely upon it in circumstances in which it is reasonable for him to do so, is under a duty to take reasonable care that the information given is correct."

Similarly Brennan J in *Sutherland Shire Council v Heyman* (1984-5) 157 CLR 424 at 485 says:

"But the 'normal' duty of care cannot be a duty to exercise a statutory power to prevent injury to another, or otherwise to act in such a way as to prevent injury to him, unless Parliament has imposed such a duty or unless the authority has itself created or increased the risk of injury of that kind. In the absence of a statutory duty, a 'normal' duty to exercise care cannot arise unless the acts actually done in exercise of a statutory power create or increase a risk of foreseeable injury to another, and then the duty is to do those acts with reasonable care and to take 'reasonable precautions' to prevent that injury occurring."

The duty in my view was to take reasonable care to see that wrong information was not conveyed. The only "wrong" information of which the plaintiffs complain is that of "advising the plaintiffs that movement of their cattle was restricted".

Insofar as the defendants relied on the SDR and the Manual it was not wrong information. Indeed it would have been "wrong information" had the defendants in the light of their duty to the plaintiffs and in the light of the information they had, had told the plaintiffs they were free to move their cattle anywhere they wished. One can test this by asking what would have occurred if the defendants had done this and the plaintiffs' cattle had subsequently been found to be infected? That may well have given the plaintiffs a cause for damages at common law against the defendants as persons who had failed to inform the plaintiffs of the dangers of moving cattle when they, the defendants, were well aware of those dangers from their expert knowledge and the information they had.

The defendants in my view did not act unreasonably despite a mistaken idea of the validity of the Gazette or, in Tabrett's case also, a mistaken view of his powers under the statute. Alternatively, and to put it in more classical terms, the plaintiffs have failed to discharge the onus of proving on the balance of probabilities that the defendants were in

breach of their duty to inform.

The allegation of false representation does not in my view take the matter any further. I reject any suggestion of deliberate or fraudulent representation and the question then reverts to the reasonableness or otherwise of the defendants' statements. I do not consider them unreasonable in the circumstances.

Furthermore, although I find it unnecessary to discuss in detail, it would seem to me that the duty suggested would not be actionable on a consideration of all the wider circumstances. This is the gist of the discussion in *Rowley v Takaro Properties* (supra) where the Judicial Committee notes that the liability of public authorities in negligence is a continuing and somewhat confusing state of development.

Their Lordships set out certain factors to be considered, of which the following are in my view relevant here:

"The second is that, in the nature of things, it is likely to be very rare indeed that an error of law of this kind by a minister or other public authority can properly be categorised as negligent. As is well known, anybody, even a judge, can be capable of misconstruing a statute; and such misconstruction, when it occurs, can be severely criticised without attracting the epithet 'negligent'. Obviously, this simple fact points rather to the extreme unlikelihood of a breach of duty being established in these cases, a point to which their Lordships will return; but it is nevertheless a relevant factor to be taken into account when considering whether liability in negligence should properly be imposed.

The third is the danger of overkill. It is to be hoped that, as a general rule, imposition of liability in negligence will lead to a higher standard of care in

the performance of the relevant type of act; but sometimes not only may this not be so, but the imposition of liability may even lead to harmful consequences. In other words, the cure may be worse than the disease. There are reasons for believing that this may be so in cases where liability is imposed upon local authorities whose building inspectors have been negligent in relation to the inspection of foundations, as in *Anns v Merton London Borough Council* [1978] AC 728 itself; because there is a danger that the building inspectors of some local authorities may react to that decision by simply increasing, unnecessarily, the requisite depth of foundations, thereby imposing a very substantial and unnecessary financial burden upon members of the community. A comparable danger may exist in cases such as the present, because, once it became known that liability in negligence may be imposed on the ground that a minister has misconstrued a statute and so acted ultra vires, the cautious civil servant may go to extreme lengths in ensuring that legal advice, or even the opinion of the court, is obtained before decisions are taken, thereby leading to unnecessary delay in a considerable number of cases.

Fourth, it is very difficult to identify any particular case in which it can properly be said that a minister is under a duty to seek legal advice. It cannot, their Lordships consider, reasonably be said that a minister is under a duty to seek legal advice in every case in which he is called upon to exercise a discretionary power conferred upon him by legislation; and their Lordships find it difficult to see how cases in which a duty to seek legal advice should be imposed should be segregated from those in which it should not. In any event, the officers of the relevant department will be involved; the matter will be processed and presented to the minister for decision in the usual way, and by this means his mind will be focused upon the relevant issue. Again, it is not to be forgotten that the minister, in exercising his statutory discretion, is acting essentially as a guardian of the public interest; in the present case, for example, he was acting under legislation enacted not for the benefit of applicants for consent to share issues but for the protection of the community as a whole. Furthermore he is, so far as their Lordships are aware, normally under no duty to exercise his discretion within any particular time; and if, through a mistaken construction of the statute, he acts ultra vires and delay thereby occurs before he makes an intra vires decision, he will have in any event to exercise his discretion anew and, if his discretion is then exercised in the plaintiff's favour, the effect of the delay will only be to postpone the receipt by the plaintiff of a benefit which he had no absolute right to receive."

At 501 their Lordships comment that the question (whether a duty of care should be imposed) is "of an intensely pragmatic character". On this basis one has regard to the policy of the Stock Diseases Act, which is plainly to control or prevent the spread of diseases in stock in the Northern Territory. That is, equally plainly, for the welfare of all

pastoralists. From a pragmatic standpoint the duty not to give wrong information, if there is such a duty, would not apply in the circumstances set out here where the overriding considerations of policy were to do what the defendants did and, had they not done it, they may not have discharged their overall duty not only to the plaintiffs but to other pastoralists in the Northern Territory.

See also the remarks of the Judicial Committee in *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 171 where their Lordships said they share the "considerable doubt", which Yeldham J at first instance, had expressed, in relation to a somewhat similar duty which was alleged to be that the defendants owed a duty to take reasonable care to ascertain whether a certain resolution was within their statutory powers. See Yeldham J in *Dunlop v Woollahra* (1978) 40 LGRA 218 at 239. See also *Murphy v Brentwood DC* [1990] 2 All ER 908 at 923 (per Lord Keith of Kinkel: and *Sutherland Shire Council v Heyman* (supra) at 481 (per Brennan J)).

The grounds alleged here are not made out.

#### CAUSATION

The arguments of the parties can be briefly summed up:

The Plaintiffs: The cause of the damage to the plaintiffs was the imposition of movement restrictions.

The Defendants: The cause of the damage to the plaintiffs was the discovery of reactors.

Both cite the case of *March v Stramare* (1990-1) 171 CLR 506. The headnote to that case reads:

" Where negligence is in issue, causation is essentially a question of fact to be answered by reference to common sense and experience and one into which considerations of policy and value judgments necessarily enter. The 'but for' or causa sine quo non test is not a definitive test of causation."

So held by Mason CJ, Deane, Toohey and Gaudron JJ.

McHugh J preferred the causa sine qua non test as the exclusive test of causation.

Both Mason CJ and Deane J cited and approved the remarks of Lord Reid in *Stapley v Gypsum Mines* [1953] AC 663 at 681-2.

"The question must be determined by applying common sense to the facts of each particular case ... I doubt whether any test can be applied generally."

At 524 Deane J, after referring to these remarks, comments:

" ... the question whether conduct is a 'cause' of injury remains to be determined by a value judgment involving ordinary notions of language and common sense."

At 522 Deane J, while deprecating a universal reliance on the "but for" test, does allow its utility in many cases.

"In particular the test will commonly exclude causation for the purposes of the law of negligence if the answer to the question it poses is that the accident which caused the injuries would have occurred in the same way and with the same consequences in any event."

It is the submission of the defendants that the damage to the plaintiffs, alleged to be caused by the movement restrictions, would have occurred "in the same way and with the same consequences in any event " because of the discovery of the reactors.

Mr Mildren sets out a considerable body of evidence which he submits supports that claim. (411, 413, 415, 418, 419, 595, 671-6, 680). All this comes from the plaintiffs themselves and I think it quite plain that the plaintiffs freely acknowledge that the knowledge that they had reactors would have seriously impaired their ability to sell cattle during the movement restriction period. Furthermore there is strong evidence from a Mr Simpson, a stock salesman, that the cattle became unmarketable once knowledge of the reactors got around. (351, 353, 355, 357, 361, 365, 367, 375). However the plaintiffs maintain that they could still have sold their breeding cattle albeit at a reduced price were it not for the movement restrictions. Mengel emphasised that the worst damage would have been if the reactor had been proved. (413,424). See also Klein (680), although at 682 he concedes he would not take the risk himself. ;But at 772 he gives this evidence:

QUESTION: Tell me: Why is it that you were unable to get the freight costs for these cows that you've told us about?

ANSWER: ... because the price of our cattle had reduced owing to the fact that we had been quarantined and we might've had a disease problem; some people weren't prepared to

buy the cattle.

QUESTION: What really happened is that because you'd had a reactor and everybody knew that you'd had a reactor, they were using that to force your price down in some cases?

ANSWER: No.

QUESTION: That's the position isn't it?

ANSWER: No it isn't. A lot of people had had reactors continually. It doesn't force their price down.

I have some difficulty with the last answer but I accept Klein as saying there were two causes - the presence of the reactor and the movement restriction. Even Simpson, although his evidence is very strong about the disastrous effects of a reactor does appear to acknowledge the two causes. (357).

QUESTION: Did the sale to Mr Ben Davis of those cattle take place?

ANSWER: No.

QUESTION: Why did it not take place?

ANSWER: Well for a start he wouldn't want them because of disease; that's one thing; and another thing; they weren't allowed to be shifted. The place was quarantined; they could not be shifted".

As Mr Hiley submits, even Simpson left open the alternative that buyers might purchase Banka Banka cattle for a discount of \$30-\$50 per head plus transportation costs (361) although he says that he would not recommend buyers to buy breeder cattle from Banka Banka. "Not really, if we could find somewhere else I'd sooner buy them somewhere else".

There is evidence that serological reactors were not unusual (Tabrett 2427: Baker 1544) and indeed that during August and September there were two other stations whose blood tests were tested by the Alice Springs Laboratory that had reactors. (Williams 1812, 1878), though Williams described them as "one offs".

Mr Hiley has also referred me to a list extracted from the evidence supporting a Northern Territory market for store cattle both before and after the movement restrictions.

" SUMMARY OF SALES TO LOCAL MARKET  
BEFORE AND AFTER QUARANTINE

a) Neutral Junction

Pre-quarantine sold breeders to buyer within NT

- See sales book Ex. 22.
  - 14/7/88 - 152 cows Willowra
  - 15/7/88
- Many sales Alice Springs e.g.
  - 7/3/88 - 46 bulls - 74 cows
  - 10/3/88 - 152 cows
  - 30/6/88 - 98 cows
- Sales in S.A. north of dog fence e.g.
  - 440 cows Tieyon Station
  - 56 cows Marla Bore

Post-quarantine - Ex 00

- Many sales through Elders in Alice Springs e.g.
 

4/12/88	123 heifers	Elders
12/4/89	210 mixed stores	Elders
12/4/89	225 mixed stores	Elders
12/4/89	227 mixed stores	Elders
17/5/89	383 heifers	Elders
6/7/89	75 cows	Elders
6/7/89	75 calves	Elders
6/7/89	121 heifers	Elders
- Sales to NT properties
 

Milton Park and Stirling e.g.		
9/8/89	413 cows	Milton Park
	105 calves	
10/9/89	10 bulls	Stirling
29/10/89	40 cows	Milton Park
	18 calves	

b) Banka Banka

- Pre-quarantine - Ex. F

16/7/87 - 352 cows - Brunette  
16/7/87 - 96 cows - Alice Auction  
30/7/87 - 28 cows - 64 bulls - Alice Auction  
6/8/87 - 28 bulls Alice Auction  
27/8/87 - 67 cows - 40 bulls - Alice Auction

- Post quarantine - Ex. F & J

9/6/89 115 heifers - Alambi  
7/5/89 145 heifers - Napperby  
28/2/89 18 cows - Pine Hill  
12 calves  
17/11/89 227 breeders - Tarlee  
1/8/90 19 bulls - Stirling  
2/10/90 7 bulls - Stirling  
15/9/90 10 bulls - Murray Downs."

Furthermore there was a reactor on Banka Banka in August 1987 although it seems most likely that a reaction was caused by vaccination. (Exhibit D - p41). There is no suggestion that the presence of the reactor affected sales of the plaintiffs' cattle.

I accept Mr Mildren's submission that the presence of a reactor would have prevented entire animals entering other States and the Australian Capital Territory. I append my analysis and observations of the interstate and Territory legislation. See Appendix.

Nevertheless the fact remains that sales of breeder cattle in the Northern Territory albeit at drastically reduced prices could have been affected and the cause of the reduction in sales was twofold - the movement restrictions and the knowledge of the reactors. As a matter of commonsense both could be regarded as causative. I cannot therefore accept the submission of Mr Mildren that because of the presence of the reactors the damage to the plaintiffs would have occurred

"in the same way and with the same consequences in any event".

#### OTHER FACTORS AFFECTING CAUSATION

The plaintiffs put certain other effects down to the imposition of movement restrictions. They are:

1. Cattle deaths
2. Agistment Costs
3. Other costs - agistment
4. Carcass tow away
5. Additional testing costs
6. Additional wages
7. Personal costs
8. Additional property valuation
9. Rangeland degradation.

I am prepared to find that causation is established between the movement restrictions and these items and I will consider the quantum of damages for these.

#### DAMAGES

I propose to deal with the separate heads of damage separately. The methodology generally accepted by both parties has been to work out certain figures before the imposition of movement restrictions and then at a stage after. The plaintiffs submit that the result of the figures show considerable losses to the defendants, losses which will have a continuing effect for years to come, if not indefinitely.

On the basis of this submission a host of figures and calculations were put before me, many dependent on complicated computer analyses. That in itself would not have been an insuperable obstacle except that the figures themselves changed, sometimes dramatically, in the course of the trial and in a way which led one to the belief that even the final figures must be under suspicion; since further calculations were at least conceded as possible. The most remarkable instance - and an example of the difficulties one is faced with - was in the evidence of one witness (Mr Hanlon) where his calculations under the heading "Reduced Value of Herd" fluctuated between \$292,000 and \$762,864 and it seemed clear to me that he was still calculating at the conclusion of his evidence. I appreciate his position, faced from time to time with changes in his data, and being required to make almost instant calculations as the case went on. But I am afraid, with all respect to his considerable expertise, that at the end of the day I just cannot place reliance on that sort of evidence. There are other instances of this, not only from Hanlon, but from other witnesses. Even the highly competent counsel who appeared before me, seemed at times somewhat at a loss as to how to handle the mass of material and I note without criticism that, precise as were their addresses to me on other matters, they were disposed to generality when it came to assessing the methodology and the calculations said to flow from it. I acknowledge that difficulty in calculation is not ordinarily taken as a ground for either reducing or increasing the award (see

Luntz - 3rd Ed. - 1.9.30) but I would find it impossible here to do more than take a global figure despite the plausible preciseness of the computer. Computers are ultimately only as good as their data and computer operators themselves acknowledge this with the phrase "garbage in garbage out".

I propose therefore to examine the heads of damage and attempt various calculations. Necessarily, if regrettably, this will have to be very much a "broad axe" approach but I can only reply in the celebrated words of Bairnsfather's Old Bill, "If you knows of a better 'ole go to it".

The two principal witnesses, on the issue of damages were Mr Hanlon for the plaintiffs and Mr Dewsbury for the defendants. I say at the outset that I accept the qualifications of both witnesses to give the evidence they did. Mr Dewsbury eschewed any expertise in 2 items "rangeland degradation" and "other considerations". On the whole I accept the evidence of Dewsbury where it conflicts with Hanlon. This is not said in any criticism of Hanlon but rather because Dewsbury had the advantage of checking the reports of Hanlon and pointing out certain errors. Furthermore, as will be seen, Hanlon seems to have made a number of significant errors due to the changing data he was given and the pressures he was under to produce the figures on time. Without being overly critical of Hanlon I think, as an expert witness, he should have insisted on proper opportunities to check his work properly. No doubt he had a laudable desire not to delay proceedings but the result was that he was often in considerable confusion. He himself frankly states (at 1211), "to tell you the honest truth, this is the first case we've ever been put to - that we've been involved as expert witnesses". I think the transcript will show that I was not over-censorious of delays or

requests for adjournments and, had he sought an adjournment to ensure his calculations and methodology were accurate, I am sure it would have been granted. No such applications were ever made and his calculations have all the signs of being done "on the run".

### LOSS OF INCOME

Hanlon's methodology is explained by him at 1049-50:

"Is there a standard methodology in use for the purposes of considering the economic effect of an event such as a quarantining or some other event like that? --- Well, there is. There's numerous ways of looking at things but the most commonly adopted process is to take a situation that has happened - and in this case I've called that the 'with' situation - and then to look at the probably path of what was most likely to occur, and that is called the 'without' situation. So what you're in fact doing is you're preparing - or comparing, I should say - 2 scenarios, and I perhaps should point out that it's important to note that you're comparing them along a continuum because if you start from any point you're measuring the incremental differences all the way along in that and it depends how the 2 lines go, the 'with' and the 'without' situation, to make - you need to have those along the continuum to work out the difference, and that's what we've done.

When you prepared that report, exhibit KK, as you've said you were given a certain amount of information, some from Cridlands, some from Messrs Mengel and Klein; did you also have other information, for instance that you'd obtained from Mr McCosker? --- Perhaps if we go back to the start. The first thing is comparing the 2 - the 'with' situation has been taken from actual data so that is - we've taken from 4 September sales and other information that has actually occurred. To reconstruct, or construct, if you like, the 'without' situation required firstly modelling a hypothetical herd and to model that hypothetical herd one had to do 2 things. Firstly, the biology had to be set in place and secondly instructions had to be given as to what would have happened in terms of sales in the 'without' situation. So to answer your question, Mr McCosker provided us - provided me with the biological data necessary to set the parameters for the model.

I think you also obtained some other information from Mr Camens; is that right? --- Mr Camens provided financial data where appropriate, yes.

Well, just back to the methodology. What you've called the 'without' approach, that is the approach that assumes that - I think you've called it a quarantine, so if we can perhaps use that quarantine - assuming that there had been no quarantine or restriction on movement for that 10 weeks or so you've performed this 'without' exercise; is that right? --- Correct.

And that has necessitated you, as you say, making certain assumptions which include biological assumptions, herd structures, likely sales, likely additions and so on; is that right? --- Yes; yes. The - - -

I haven't covered them all, but --- ? ---No.---it includes all of those things? --- It includes the herd numbers, so at any particular point in time it gives you the herd numbers, it gives you the numbers that are sold during that period, and that's basically all that the model per se will do."

One can see immediately as frankly stated by Hanlon, that "certain assumptions" must be made. For the calculations he relied on Mr Camens for valuations and a "Rangeapak" computer model with a "Herdecon" module. See 1054-5:

" In any event, you have, in this case, not used the manual approach; you've used the computer and you've used the HERDECON program, have you, on the Rangeapak model? --- I've used the HERDECON module or Rangeapak, correct.

That's version 1.51, whatever that means? --- Correct.

Now, in terms of the herd structure, as at 4 September 1988, did you obtain figures from the owners of Neutral Junction and Banka? When I refer to the owners I'm referring respectively to Mr Klein and Mr Mengel? --- I did.

Secondly, did you then ascertain from them what sales they would have made, assuming that the herd structure was of a certain pattern as at a particular time? --- In the first run through they sat beside me and looked at the numbers on the screen and made sales month - in the months that they wanted to. So they instructed me to make particular sales of particular classes of animals at a particular time.

Di you then assign values to the particular cattle that they said they would've sold at various times? --- We did.

Did you, at that time, obtain those values from a number of sources including Mr Tony Edwards? --- Correct.

And, secondly, from actual sales invoices relating to animals actually sold at about the same time as you were notionally selling cattle? --- Correct.

And, thirdly, if you couldn't obtain values in respect of a particular sale by either of those means, did you obtain valuations from one or other of the owners? --- Correct.

In order to reach an assessment about the final herd valuation - that is, as to its actual value now, well, I think you went up to October 1990? --- Correct?

Did you obtain from the owners their assessments as to their herd structure as at that date? --- For the 'with' situation?

Yes? --- They provided that. The mode provided the 'without' situation?

Did that information enable you, with the assistance of the Rangepak program, to carry out a number of comparisons? --- It did.

Were they as follows: (1) a difference in income from cattle sales? --- Correct.

We'll get to these more specifically later on but - and by that - that is, to ascertain what income would likely have been derived, but for the quarantine, compared with what income was actually derived? --- Correct."

The Herdecon Module is described in Mr McCosker's report:

"The most powerful tool available for modelling herd biology is the HERDECON Module of the RANGEPAK model, which was developed by CSIRO in 1987/88. During the year it took to develop the model, I worked with CSIRO to test it and provide input into its design. I also provided advanced biological data to test its validity.

HERDECON is a computer program, which, given various input parameters such as calving rate, death rates, sales, purchases, growth rate, seasonal type, initial herd structure and numbers and management decisions, can make forward predictions (on a monthly basis) of herd numbers and cashflow. The accuracy of the model is only limited by the accuracy of the biology entered as the data can be entered in matrix form allowing parameters to be varied by both age within class and by month of year for any given type of year.

HERDECON is now the leading dynamic herd model used throughout Australia for sheep and cattle population dynamics modelling."

Hanlon took his biological variables from McCosker's report (Exhibit P).

As I follow it, the methodology was to ascertain the income actually derived and then calculate the income which would have been derived "without quarantine". I should make it plain here that throughout the evidence of both Hanlon and Dewsbury the expression "with quarantine" and "without quarantine" were adopted. I will use those expressions, although for reasons already set out I do not consider there was ever a "quarantine" in the statutory sense, but rather "movement restrictions".

Hanlon was working on shifting data and was still preparing reports during the trial. (See e.g., 1058, 1067, 1068 et passim).

Without going into the minute detail provided, the result Hanlon reached for the period for which he was calculating, namely September 1988 to October 1990 when he first gave evidence, (1073) was for direct loss of income \$35,037. He achieved this by using sales figures as given to him from the plaintiffs (based on Waybill records - Exhibit "J") for the "with quarantine" figures and then extrapolating "without quarantine" figures based on probabilities of sales in the normal course of events and using the biological data and values provided. Even at that time his figures differed from his original reports also apparently based on this data which had these figures in those reports: 96673, 43073, 46806. (See 1174-6.) I should add however that he properly took in the fact that after the quarantine the plaintiffs had sold more cattle than they would have wished, to make up their "with

quarantine" losses so that at times their income was greater than they would normally expect.

Mr Dewsbury comments on this situation as can be seen later and in fact his figures show an overall gain in income rather than loss.

I must confess I found some of the reasoning difficult to follow but I think the basic principles can be seen in the annexures to Hanlon's report Exhibit SS. Thus in Table 5(a) he takes the composition of Banka Banka herds with quarantine as 3778, as at October 1990 and assesses that the herds without quarantine in October 1990 would be 5879. For Neutral Junction the figures per Table 5(b) are 5965 with quarantine and 7073 without quarantine. The difference basically being due to the extra sales the plaintiffs' say they were forced to make to make up the earlier loss of income. This would naturally, for a time, give extra income but this income would be gradually eroded as the lesser numbers of stock would obviously produce lesser progeny. So Hanlon then extrapolates (using the biological and valuation data provided) into the year 1990-1 to show the overall loss. Similarly for Neutral Junction. I think the example he gives at p4 of Exhibit SS explains this.

Total Sales Income  
(September 1988 to 31 October 1990)

1988/90 (1989/90 1990/91  
sic. this should be 1988-89)

Without Quarantine	1,799,733	833,390	306,300
With Quarantine	1,385,624	959,650	500,473
Total Final figures therefore			
Without Quarantine		2,939,423	
With Quarantine		<u>2,845,747</u>	
	TOTAL DIFFERENCE		<u>93,676</u>

These figures do show the increased sales after lifting of the movement restrictions but if taken further would no doubt ultimately show up as a loss again. When that point is reached is not determined.

Hanlon at all times properly conceded that if the data given was incorrect the calculations would obviously be affected (e.g. 1213). This is an important matter, for instance in relation to cattle numbers, which varied throughout the various calculating Hanlon was asked to do. Mr Camens, the accountant called by the plaintiffs conceded (889) "Across the board, we have great difficulty with livestock figures". And see (893), (895).

A number of variables were put to Hanlon. For instance, a failure to add in the income from some 126 spayed and fat cows sold between May and September 1989 because the plaintiffs did not receive the money from an abattoir then in financial difficulties. Hanlon explained that on the basis that he was only calculating cash flow but it would seem an appropriate item for the calculations on the basis of money owed. (1217). Then followed this interesting piece of cross-examination at 1219-1222:

" Thank you. Now, can I take you to table 1C in exhibit SS and, if you were to have a look at the September 1990 - Banka Banka without quarantine figure, there is a figure there of \$182,600. Do you see that? --- Correct. Yes, I do.

Would you now please have a look at your earlier report for the same table - that's exhibit ---

HIS HONOUR: KK.

MR MILDREN: KK. Does that not show a different figure? --- It certainly does.

A figure of \$82,910? --- Yes.

Yes? Would you now go back, please, to your previous report, prior to that. Actually, that's the - what I have called - the third report and look at table 1A. Sorry, I think it's table 1C, in fact.

HIS HONOUR: 1C.

MR MILDREN: And does it not say, likewise, \$82,910? --- It does, yes.

Yes. Now, can I suggest to you that the \$82,910 referred to in your earlier reports, is made up of the following herd numbers. Do you have your original data for that figure, please?

Can I suggest that the figure was originally made up of 11 bulls at \$440, 139 culled cows at 450 and 42 culled heifers at \$380; a total of 192 head at a total value of \$82,910? Is that right? --- Just with one correction. I think you said 11 bulls at 440?

Yes? --- I don't the arithmetic works at that. It should be 400. So I've got ---

At 400. I think you're right. I', sorry? ---Yes.

At 400.

So apart from that, the information that I read to you is correct, is it, as to how that original figure of \$82,910 is made up. Am I right?---Yes.

Thank you. Now, I'd like you to have a look now, at table 3B in exhibit KK? --KK or SS?

It doesn't - KK first, if you wouldn't mind. Table 3C I think it is.

HIS HONOUR: 3C of KK is it?

MR MILDREN: Yes. Does that not show the total number in the monthly sales Banka Banka without quarantine, of 192 head? --- That's correct.

Right, and that relates - that directly relates to the figure of 82,910 in table 1C. Is that correct? --- That's correct.

Right. Now, can I now take you back to exhibit SS. And if you wouldn't mind looking at table 3B, I think it is. Does that now show, under the month of September 1990, 187 beasts in the Banka Banka 'without quarantine' column? --- It does.

Right. Now, the corresponding value of those 187 beasts is the \$182,600 in table 1C, that I drew your attention to earlier? --- Can I just tell you now, it's a transposition error into that table, in the rush of doing that, It should be the same value as in the earlier report.

Right? --- I apologise for that error.

No, it's all right. Therefore, that being the case, there's an overstatement by \$100,000 approximately, in the 'without quarantine' sales figure. Is that correct? --- Yes, it will reduce that figure.

By \$100,00? --- Well, I'd like to add it up to get the exact figure. Approximately in that area.

Well, it's the difference between 182,600 and 82,910 isn't it? --- That's correct.

HIS HONOUR: Just let me make sure that - the 82,910 comes from exhibit KK, and you're saying the witness seems to be agreeing with you, Mr Mildren, the 182,000 in table 1C of exhibit SS is just a plain error.

HIS HONOUR: Yes.

THE WITNESS: It's a transposition error in rerunning the tables, Your Honour.

HIS HONOUR: But it affects the table ---?---It will affect the total of the direct income loss. You are correct.

MR MILDREN: By \$100,000 approximately. In fact, the end result is, if we allow it through, that there is in fact no loss of \$93,676 at all?

Is that correct?---I'm sorry. I thought you were asking some more. Yes, it would be that - that's something I just have to check, yes.

Yes. Thank you. Now, if I can take you now to the Neutral Junction ---

HIS HONOUR: I'm sorry, Mr Mildren, I didn't get that. Your last question related to if you took that 82,910 - where was the error you were pointing out them?

MR MILDREN: The figure I was pointing to, Your Honour, is the cumulative income loss figure of 93,3676 at the bottom of one of the October -  
--

HIS HONOUR: That's what I was looking for, yes. I couldn't find it.

MR MILDREN: And that disappears.

HIS HONOUR: And that, the witness says, would not be that figure at all? ---That's correct, Your Honour.

MR MILDREN: At that means, does it not, that if we go to the front of the report, on page 2, the direct loss of income is now nil, or in fact a negative?---Zero, yes."

Hanlon's explanation is at 1228:

"Well look, put it this way. You've got 187 beasts in September, under th Banka Banka without quarantine figure, in table 3B?--- That's correct.

Right?---Yes.

Selling for \$182,600?---No.

Well, that's what the tables say, on their face?---Sir, you've just brought out that the tables are inaccurate in that there was a mistake made in the rush to recalculate. So there is not that correlation. It's a spurious correlation you are trying to draw.

It's not spurious, with respect. What I'm suggesting to you is that if, indeed, there were \$182,600 worth of animals sold in September, if that were the instructions that went into the model, as a hypothetical case I'm putting to you, right, then you would have to make a corresponding adjustment to table 3B for your numbers?---Oh, most certainly. If we ran another set of numbers, the final number would alter, without question.

But it's not another set of numbers. What I'm saying is, if you used the number, which is in fact in your model, of \$182,600 - even though by error --- ? ---No, my working notes from the model, which are here, Your Honour, are - in fact tell me what I put into the model.

Well, how did the \$182,600 come to be put there at all? --- That - perhaps to understand, the figures from the model are run on a completely different thing. I think I explained, because of the crash, I had to completely rebuild the spreadsheets over the weekend - from a computer crash - to develop the second of figures. Now, in the mammoth task that that was, is why these gremlins have crept in. That had nothing to do with the numbers that were run in Rangepak. We're talking about 2 different sets of figures. In rebuilding the tables 1A, 1B and 1C, and the lack of time to absolutely thoroughly check that I would do normally, has resulted in that error. The working notes and the Rangepak printouts for each month are in this folder, and tell me that during

that period you are referring to those numbers were not put into the model."

While it is comforting to note that computers "crash" and while I am prepared of course to find that Hanlon made errors in good faith owing to the pressures upon him, I must comment that evidence such as this leaves me in doubt as to his ultimate figures. See also 1239, 1240, 1251-2, 1263, 1265.

In re-examination Mr Hiley felt bound to ask Hanlon to do some recalculations. Hanlon repeated his explanations as to pressure (1273). I am not satisfied that Hanlon made up much ground in re-examination. See 1273-4.

"Okay. So firstly, as a result of those errors, you've already told Mr Mildren there will be an effect upon the direct loss claim, all right, item A in your report? --- Yes.

So instead of it being a claim for \$93,000 in fact, it would appear that the plaintiffs have in fact derived more income than they would have ---?---At the end of the period.

At the end of the period. Perhaps, derived income to the extent of somewhere in excess of \$100,000 more than they would have? --- Correct.

Okay, so in a sense one might see the defendants as entitled to a credit for that extra income? --- If we are carrying everything else to the same period, that is correct, yes.

Okay?---Yes.

But does that change to the claim under item A for direct loss, that is from a claim for dollars positive to, perhaps, a credit to be given to the defendants. Does that change have any effect on item D in your report, which is your assessed reduced her value?---Well, because that 1(c) has reduced, you'd expect 1(d) to have gone up. But it doesn't effect it at this point in time, I think - is that your question?

No, I don't think you heard my question. I said, does that change of item A of your report, which is the direct loss claim, have any effect on item D of your

report? If you want to - if you're not sure what I'm talking about, perhaps you have better go to it?---No, no.

Item D is the bit that talks about herd structure, and sets out the basis of the claim for reduced value of the herd. Item D is at page 11 - change in the capital base of the herd? --- Yes, yes. No, it doesn't impact on that at all."

In view of his earlier answer I am not convinced of his assurance in the last answer.

In the circumstances I prefer the evidence of Dewsbury. That is summarised at p1 of his report Exhibit 107. However he did concede that the final figure could be more properly described as "surplus cash". (2600).

Dewsbury's report:

"MENGEL & KLEIN v NORTHERN TERRITORY OF AUSTRALIA

'A Direct Loss of Income'

1. This aspect of the Plaintiffs' claim has been the subject of quite dramatic fluctuations as the evidence in relation to sales numbers and values has been refined and a number of errors and anomalies in the input data, and the modelling process itself, have been discovered and corrected.
2. The direct loss of income was initially calculated in the very first RCS Pty Ltd Expert's Report at \$96,673 and since that time it has varied as follows:

.	Per Exhibit KK	46806
.	Per Exhibit RR	35037
.	Per Exhibit SS	93676

3. During the evidence of Mr Hanlon in relation to Exhibit SS on 21 December 1990, he acknowledged that two previously undetected material errors had resulted from his recent re-running of the tables calculating the Direct Loss of Income (viz. Tables 1(a), 1(b), 1(c) of Exhibit SS). (See Transcript pages 1219-1226).
4. I have not yet seen any revised Tables 1(a) to (c) correcting for the two errors identified and acknowledged, however the sum of the errors amounted to approximately \$220,000, with the end result that, instead of a Direct Loss of Income of \$93,676, the Plaintiffs have in fact incurred no direct loss at all, but profited by some \$126,324."

There is a minor error in the final figure arising, I think, from a minor discrepancy in Hanlon's Report at Table 1(c). The final figure should be \$123,714 not \$126,324. (2498)

Dewsbury is a chartered accountant. Hanlon concedes that he is not an accountant.

Mr Dewsbury's analysis of the "Rangepack" computer is very thorough and his conclusion is that "the Rangepack Herd Econ model is a dynamic model and it is very obvious that with the number of input assumptions and variables available to the user, a multiplicity of end results can be achieved". He then sets out a number of variables which, he says "can have a dramatic impact upon the overall net growth rate of the herd". Those variables are set out at p9 of his report of 29 April 1991. (Exhibit 105). I am not satisfied that all these variables were correctly identified or applied by Hanlon.

I accept that Dewsbury can be regarded as partisan in that he concedes the intention of his inquiries was to find figures that would result in low damages. (2593). But

that did not seem to me to affect his professionalism as a witness and I found him much more satisfactory under cross-examination and indeed generally than Hanlon. Certainly he too conceded certain errors but they seemed to me of less import than Hanlons.

In the result the plaintiffs have not proved their damages for loss of income.

INCREASED INTEREST COSTS

In this respect I prefer the evidence of Mr Dewsbury which seems to me logical and understandable and not unfair to the plaintiffs and indeed basically accepting their figures as to intended sales prevented by the movement restrictions (2502). That evidence is best summed up from his report (Exhibit 107).

"MENGEL & KLEIN v NORTHERN TERRITORY OF AUSTRALIA

B. Increased Interest Costs as a Result of Delayed Income"

1. The Plaintiffs' 'Amended Substituted Statement of Claim' in Clause 14.1 states - 'The Plaintiffs wished to apply at least \$1,000,000-00 to reduce the borrowings and such greater sum as could be raised from the intended sales'.

Section 'B' of the Plaintiffs' Expert's Report - Exhibit SS states-

'The owners of the properties had planned large sales in September and October 1988 to reduce debts incurred by the group when purchasing Banka Banka Station'.

2. These two statements are both in harmony with tables 1(a) and 3(a) of Exhibit SS which indicate that the following sales were anticipated:

		<u>Banka</u>		<u>Neutral Junction</u>
	<u>No. Head</u>	<u>Value</u>	<u>No. Head</u>	<u>Value</u>
	(Table 3(a))	(Table 1(a))	(Table 3(a))	(Table 1(a))
Sept 1988	1,585	425,850	1,204	266,500

Oct 1988    868    209,987    785    229,000

2,453    \$635,837    1,989    \$495,500  
=====    =====    =====    =====

i.e. a total of 4,442 head for a sales revenue of \$1,131,337.

3. In the claim for additional interest costs incurred, Exhibit SS suggests that in some way, the anticipated sales of cattle some months after, (well after the lifting of the movement restrictions), in March 1989 through to October 1990, were also affected (delayed) by the same restrictions.
4. This of course does not necessarily follow and accordingly the Plaintiffs' claim for interest calculated through to October 1990 is therefore disputed.
5. The alternative basis of a claim for additional interest incurred as a direct result of only those delays which can be attributed to the movement restrictions is set out in Appendix B.1 and assumes that the initial shortfall in cash flows is reduced progressively by sales in the ensuing months until June 1989, when it was extinguished in full.
6. Based on the assumption that the proceeds of the sale of cattle would have been used to reduce the original Westpac borrowing to purchase Banka Banka Station, Appendix B.1. computes the Increased Interest Costs attributed to the delay in cash flows on the foregoing basis as \$76,450, compared with the Plaintiff's claim of \$204,291, per Exhibit SS Table 2A. This table assumes the correctness of the plaintiffs' evidence concerning their proposed sales numbers and values.
7. Based on the assumption that the proceeds of the sale of cattle would have been used to reduce the overdraft facility first (which is at a rate of interest of 1.875% per month according to Table 2(a) of Exhibit SS), Appendix B.2. computes the increased interest costs attributed to the delay in cash flows as being \$110,286. This table also assumes the correctness of the plaintiffs' evidence concerning their proposed sales numbers and values."

In fact Dewsbury basically followed the methodology of Hanlon (see Exhibit "SS"), and this seems accepted by the plaintiffs. At 2604 appear the following questions and

answers:

"Now, at page 3 - sorry, same page - paragraph 6, you've pointed out that there's a difference between the result that you've got of \$76,000 and the plaintiffs' claim of \$204,000. Do you agree that that difference occurs (1) because you applied the 16 percent interest rate and not the higher one that Mr Hanlon applied, that's one reason? --- That's one reason.

And the second reason is that you've calculated it only to June '89 whereas Hanlon has taken it right through to October '90?---That's another reason.

They're the 2 main reasons? Probably the only reasons? --- At least the main reasons."

The explanation for using the rate of interest Dewsbury applied is set out at paragraph 4 of his report already cited. I accept that.

The explanation of taking the cut-off point is simple and given at 2632:

"Yes, well B1 shows that the expected income from the original intended sales of 4442 head proceeds of sale in that amount were in fact recouped by some time during June. There's an unrecouped balance at the end of May which is then entirely recouped during the month of June. In other words section A would then be nil if we did the exercise on the same bias." (See also 2501).

Later Dewsbury comments that "there is no way of calculating on a daily basis.

One must just say 'What's the balance at the end of the month?', and use that. There's really no other way of doing it".

The alternative figures given by Dewsbury are \$76,450 and \$110,286. The second is compatible with the evidence and common sense that the proceeds of sale of cattle would have been used to reduce the overdraft facility, first. (See 1103, 1121.)

Dewsbury has made some alternative calculations based on the original submissions of the plaintiffs to the Minister in their letter of 9/12/88 (Exhibit 20). The evidence however does not show that this was how the situation ultimately turned out.

I find the amount of damage under this head to be \$110,286.

#### COST OF CARRYING EXTRA STOCK TO JUNE 1989

This claim involves a number of hypotheses (see 1235-1238). As Mr Mildren points out, the calculation of \$82,760 amended to \$79,483 assumes that a real cost is involved and equates that cost to agistment costs. There is little evidence of any actual costs involved.

Dewsbury's comment was:

"As I understand the evidence, apart from agistment and associated costs claimed separately elsewhere ... no real out of pocket dollar cost was actually incurred by the necessity to feed more cattle on the properties."

The defendants make the following concession:

" We accept that, on the numbers which the plaintiffs claimed they intended to sell, those numbers were sold off by June 1989 (see Exhibit 107, table B2 under the heading "Cumulative Shortfall"). If the numbers to be sold were as in Exhibit 20, then those numbers were sold off by February 1989 (Exhibit 107 p5) and using the same theoretical calculation as Mr Hanlon did, this would produce a loss of \$6354 (Exhibit 107 p5)".

The amendment mentioned was agreed as the appropriate figure by both counsel as accurately reflecting the approach taken by Dewsbury and, although I do not think

the plaintiffs ultimately dispute this, I find specifically that I should accept the evidence of Dewsbury on this head.

I find therefore the amount of damage under this head to be \$6,354.

#### LOSS DUE TO ACCELERATED SALES OF MALE CATTLE

Hanlon himself says that this loss should be considered as part of the overall direct loss of income. (Exhibit "SS" p7). Since on his own evidence that loss seems to have become a gain it is not necessary to consider this further.

#### LOSSES ACCRUING TO TRUCKING BUSINESS

The plaintiffs operated a trucking business. They claimed to have lost business on the basis that the loss of sales to private buyers included a loss of the profit the plaintiffs would have made by using their own business to truck the cattle (as originally agreed with the private buyers) and making charges for the trucking which would have been profitable to them.

It is extraordinarily difficult to assess this. Hanlon did no more than make calculations referring to figures supplied by Mr Camens a partner in the firm which prepared the income tax statements for the plaintiffs. But Camens himself seems to have found the calculations difficult. His assessment of the profit component of the trucking operation of 40% was taken from the 1989 financial statements of Neutral Junction and in turn taken from the tax returns. Monthly financial statements were not prepared. (888.) After some

recalculation he came to a "profit margin after variables" of 38.8% (915). He conceded no allowance for leasing costs or insurance both for workers compensation and on the vehicles themselves but said he would have excluded them because they were fixed costs. (916-7.) Under cross-examination he agreed to certain propositions but maintained that his approach was correct, "Well, as I say, the exercise that I have done is to determine the net income that would have flowed into the bank account through that exercise and that's precisely what would have flown through the bank account". He gave this evidence at 922:

"QUESTION: But basically what I'm suggesting to you is that it's really not possible to do this kind of calculation on this basic information that you've got for the simple reason that you would need to really separate out the earthmoving and slashing income and expenses from the cartage operation to do it properly?

ANSWER: Absolutely. Ideally that would be the way you would go and that's why I tried to get some independent verification of the sort of numbers we were coming up with."

The "independent verification" came from a client of Camens whom he had consulted who had experience in management of such operations.

It seems therefore that Camens was going his best to work out these figures on an essentially pragmatic basis.

Dewsbury, naturally, comments that "the financial statements referred to do not disclose any separate financial data for the trucking business, but only an aggregation of

the revenues and expenditures of the cartage, earthworks and slashing operations carried on".

His conclusion is that "in my view no meaningful reliable assessments or conclusions with regard to the trucking operation's contribution rate can be drawn from the financial data available" (Exhibit 107 -p8).

No doubt Dewsbury is correct also in his statement that "profitability can vary quite dramatically".

Nevertheless I am satisfied that some profit would have been made based on the probability, that since the 1989 Financial Statement did show a profit and the 1988 statement also showed a profit at some 30% (920-1), there is some continuity in the results. I have tried to work out what sort of profit would be shown, taking into account the sort of matters mentioned by Dewsbury, but that seems impossible on the figures before me. Yet I consider they must be given some significance. The dilemma I have here is to choose between two alternatives:

1. Accept the invitation of Mr Mildren that (the onus being on the plaintiffs to prove the damage), they have not satisfactorily done so.
2. Accept that there was damage in the sense of loss of properly expected profits and make some allowance for what I consider the obvious, that they were not the figure finally arrived at by the plaintiffs but something less, to take into account the sort of contingencies mentioned by Dewsbury.

I was impressed by Camens' evidence and his essentially pragmatic approach and I consider the only fair way is to adopt the second alternative and taking a very broad axe indeed to come to some estimated figure. The calculations of Hanlon based on Camens' statement came ultimately to \$50,062 and I consider that I must discount that by 50% for contingencies. The figure I arrive at for this head of damage is \$25,000.

#### ADDITIONAL TESTING COSTS

The defendants do not dispute this item if in fact the date is correct and I have no reason to doubt it. There is some minimal duplication with another item (additional wages) and I will deal with that later. The figure given by Hanlon is \$21,529 and I so find.

#### PERSONAL COSTS TO OWNERS

Hanlon is doing no more here than conveying his instructions. (See Exhibit "SS" at p8). I accept the submission of Mr Mildren that these are items of personal inconvenience and not recoverable. (See McGregor on Damages - 15th Ed. - paragraph 87.)

#### CATTLE DEATHS

These are dealt with in the final herd valuations. (See Exhibit SS p8.)

#### AGISTMENT COSTS

328 head of cattle were agisted for 6.5 weeks to speed up recovery of cattle affected by the movement restrictions. The item is not disputed by the defendants. Amount: \$6,269.

### OTHER COSTS - AGISTMENT

Hay, transport and tick treatment associated with the agisted cattle. The item is not disputed by the defendants. Amount: \$28,120.

### CARCASS TOW AWAY

Forced sales during the hotter months of October and November resulted in cattle in poorer condition being trucked causing deaths in transit. The item is not disputed by the defendants. Amount: \$625.

### ADDITIONAL WAGES

As a result of the movement restrictions the Banka Banka stockmen had to be employed for a further two months. Additional wages were also paid on Neutral Junction. The defendants do not dispute this item save to suggest some minimal duplication with the item "Additional Testing Costs". The figure calculated by Hanlon is \$7,000 and the defendants suggest a discount of \$1,000 for the duplication. This appears reasonable. Amount: \$6,000.

### ADDITIONAL PROPERTY VALUATION

This item is claimed on the basis that the additional property valuation was required as a result of the changed financial situation. The quantum of \$8,865 is not disputed by the defendants but they submit that this was a requirement of the original loan (see Exhibit "D" p36) and not caused by the defendants and is too remote. I agree.

### PROPRIETORS' TIME

This is related to the item Personal Costs and save that some of the claims may be properly allowable on taxation I do not otherwise allow them on the basis set out under the latter heading.

#### ADDITIONAL ACCOUNTANCY FEES

The evidence of Camens was that in addition to the normal work he did for the plaintiffs as their accountant he expended time specifically on what he describes as "work related directly to the quarantine" (877). His estimate is \$40,962.

The defendants submit that the item was not proved, that Camens was not able to demonstrate how many hours of additional work were in fact involved and the figures cannot be checked. I have no difficulty with this item. Under cross-examination he admitted that the figure of \$48,123 was "basically uncheckable" (908). That is, of course, true, on the basis that he has not been able to specify the number of hours devoted to this activity as distinct from others. But he has done, what seems to me, a reasonable exercise in going through his invoices and "tried to allocate the component that would relate to the court case" (908). I am quite satisfied to rely upon his professional expertise and integrity. Indeed neither is attacked. I reject the submission of the defendants that the claim is too remote. In my view it arises directly and foreseeably from the circumstances of this case. Although Dewsbury makes some comments about quantum and uncertainty of evidence it does not affect my finding that the evidence is acceptable.

I accept the figure of \$40,962.

## RANGELAND DEGRADATION

There was some attempt to prove through Hanlon an item of rangeland degradation. I am satisfied this was outside the expertise of Hanlon who freely admitted he was not an agronomist (1174). Mr Hiley conceded that the amount could not be quantified (1172). I reject this claim as not being properly supported by expert evidence.

## CHANGE IN THE CAPITAL BASE OF THE HERD

As I follow Hanlon's methodology - and I think I am over simplifying - it was to obtain on a certain date two sets of figures. The date Hanlon chose was 1/10/90. The two sets of figures required were:

1. The actual numbers of the herd on 1/10/90. This should be reasonably precise and represents the "with quarantine" figure.
2. The estimated number of the herds as at 1/10/90 had the quarantine not been imposed. This is obviously speculative. Hanlon obtained the numbers from the plaintiffs starting from 4/9/88. "They sat beside me and looked at the numbers on the screen and made sales months - in the months that they wanted to. So they instructed me to make particular sales of particular classes of animals at a particular time." He subsequently fed into the computer certain variables e.g. birth and death rates. That gave him the estimated "without quarantine" figure.
3. He then obtained the value of the herd as at 1/10/90 on a "with

quarantine" and "without quarantine" basis making allowances for different values of different stock e.g. calves, cows etc. The values, as at various times, were given to him by a Mr Edwards, the plaintiffs and some other sources. (1055).

4. He then subtracted the value of the stock as at 1/10/90 "with quarantine" from the value of the stock as at 1/10/90 "without quarantine". The difference then was the loss of value in the capital base of the herd.

I have set this out rather crudely because the operation was more complicated than this. For instance, Hanlon fed into the computer the biological data given by McCosker (Exhibit "P") which sets out estimated mortality figures, weight gain depending on the type of seasons and reproduction rates. The endeavour was to produce a figure both of numbers and valuation which, allowing for such variables as could be reasonably estimated, gave a figure as accurate as possible for the value of the "without quarantine" herd at a certain date - in this case 1/10/90.

I do not think the defendants challenge the basic methodology. What they do challenge is the data from which it was obtained and there is no doubt about the fluctuations of that data. The defendants submit that the fluctuations were so enormous as to make the whole exercise fatally flawed. The submission has a great deal of substance. Hanlon cannot be blamed for the variations since they represent merely his changed instructions, but the result has been set out by Mr Mildren in Exhibit 35. His summary of Hanlon's calculations in

his different reports on this head are as follows:

1st Report	- November 1990	- 292800
2nd Report	- November 1990	- 292800
3rd Report	- November 1990	- 292800
Exhibit KK	- November 1990	- 297150
Exhibit RR	- during trial	- 762864
Exhibit SS	- during trial	- 644806

Variations of such magnitude must leave one in considerable doubt as to their accuracy, particularly as Hanlon was, as he himself complained, working under pressure, and left me with the strong impression that another day's evidence would produce another set of figures.

Since Hanlon was only working on the data given, it is obvious that the plaintiffs were continually changing that data. What must be ascertained is how reliable that data was and what credence can be put on the final figures. Any significant variation in numbers can obviously produce a significant variation on the ultimate result of the "without quarantine" figure.

The figures given by the plaintiffs for the opening sequence, say 3/9/88 upon which all the calculations for the "without quarantine" scenario depended, varied considerably. Mr Mildren has extracted them as follows:

"BANKA BANKA

<u>Source</u>		<u>Opening No.</u>
Amended substituted Statement of Claim (para.14.6)(Transcript p.486).		8,000
Substituted Statement of Claim (para.14.6)(Transcript pps 484-486).		8,700
Stock Book numbers	9,291	
less sales to 3/9/88	2,480	
	-----	
Therefore herd as at 3 September 1988 (see Ext.F and Transcript pps 483-4).	6,811	6,811
Tax Return to 30/6/88 (Ext.12).	6,080	
After allowing for sales, deaths & natural increases the opening stock as at 4/9/88 was 6,000 head (see Transcript pps 493-94).		6,000 (?)
Mengel conceded he did not exactly know (Transcript p.494.10).		
Figure advised by Cridlands to Mr Dewsbury (Ext.105, p.2 para 3) (See also Ext.106 - 3rd last table). (Presumably Hanlon's earlier reports based on this figure). Hanlon's evidence (p.1186).		7,300
Hanlon used a total for Ext.SS (p.1193).		6,972

NEUTRAL JUNCTION

<u>Source</u>	<u>Opening No.</u>
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Amended Substituted Statement of Claim (para 14.6) (c.f. Transcript p.751.5).	6,500
Substituted Statement of Claim (para 14.6)	6,500
Klein's evidence in chief (Transcript p. 617.5) (Klein admits his estimate is based on memory - Transcript p.753).	8,100
Total numbers added up in XXN	7,440
Figure advised by Cridlands to Dewsbury (Ext.105, p.2 para 3 and Ext.106) (Hanlon's evidence p.1186).	8,015
Tax Return (Ext.17) suggests (Transcript pps 743-751).	6,625
Hanlon's total for Ext.SS (Transcript p. 1193)."	8,180

(The figures used by Hanlon in Exhibit SS come from Exhibits "MM" and "NN" given as herd structures at various times).

The closing figures also vary for the "with quarantine" scenario but not to the same extent, ranging from 3778 - (Exhibit MM) to 4349 - (Exhibit KK) for Banka Banka and 5965 (Exhibit NN) to 6131 (Exhibit 34) for Neutral Junction.

One can, of course, make allowances for small variations and one would not expect any pastoralist to know the exact number of his stock at any given time. But

differences of over 1000 in the numbers on the two stations do call for criticism and indeed doubt as to the ultimate figures relied on. (Note Camens' concession - "Across the board we have great difficulty with livestock figures" (889).

Dewsbury's report is very detailed and makes strong criticisms of the figures supplied and the various ways they have been used. It would be tedious to detail his criticisms in full but I attempt to summarise in this fashion. See Exhibit 107 - pp. 20-30.

1. A difference in numbers makes a significant difference to the whole calculation.
2. The "with" scenario is used directly by the figures given in Exhibits "MM" and "NN". No attempt is made to put them through the "RangePack". The "without" scenario is done through the RangePack. Thus "we are not comparing like with like. We are not comparing the results of two models which both start with the same opening herd structure at 4/9/88 but then process hypothetical versus actual data for the period to October 1990, to give a theoretical versus an actual result at that time".
3. Comparing the herd figures given in tax returns for 87/88, 88/89 and 89/90 gives significantly different results. He suggests certain explanations for the discrepancies - the explanations not being to the advantage of the plaintiffs.

4. The plaintiffs have not brought into account the \$123714 "profit" on sales. This should alter the "with quarantine" figures. "With that money the plaintiffs could have purchased stock to that value to increase their closing stock.
5. "None of the relevant figures (opening stock, closing stock, natural increase, and aging of stock) can be independently checked by reference to recorded data which would prove or confirm this claim."

I accept the criticisms set out.

Nevertheless I am satisfied that there must necessarily have been some change in the basic structure of the herd owing to the necessity to sell under pressure.

All the criticisms of the figures arrived at by Mr Hanlon through various and varied instructions still seem to me to leave a substratum of proved loss. The almost insoluble difficulty is how to assess that loss. I repeat the observation in Luntz - Assessment of Damages - 3rd Edition - para 1.8.2:

"Where a plaintiff, although unable to quantify the damages, proves that actual damage has been sustained, the court should not award a merely nominal sum, but should make an attempt to arrive at a reasonable, substantial sum, however difficult the task."

I commence with certain primary observations.

1. The larger sums claimed by the plaintiff under this head e.g. \$644806 or \$762864 are not proved to my satisfaction. Not only did they change drastically throughout the trial but they have considerable elements of uncertainty, they depend upon herd numbers which have not been satisfactorily proved, they were done under pressure and with the distinct impression almost admitted by Hanlon that they could change drastically again. I have no confidence in them whatever.

2. In view of the variations in the opening figures of the plaintiffs, I think the only safe way is to take the lowest - thereby acknowledging the claim but ensuring that it does not go beyond the figures I consider have been proved to my reasonable satisfaction.

3. I acknowledge the force of Dewsbury's criticisms and should make allowance for them at least in the broad sense.

4. I have neither the expertise nor the Rangepack equipment to calculate figures through the computer. In any event, because of the many variables, I regard the ultimate computer figures, even if produced by a competent operator, as no more than estimates with a wide degree of variation.

That leads me to the ultimate problem of how to find some solution in the morass of figures presented to me. Somehow I must struggle out of this numerical slough of Despond.

The solution I have reached is neither elegant nor precise but I believe it has a sufficiency of pragmatism and common sense. If I am wrong I leave my best wishes for those in Another Place to correct me.

I am satisfied that the closing figures for stock for the stations in October 1990 are too low. I do not mean that they are necessarily inaccurate for that time, but they represent a point from which they must recently have descended. I say this because the tax returns of the stations for June 1989 give closing stock for Banka Banka at 5757 and for Neutral Junction at 5775. This compares with Exhibits "MM" for Banka Banka at 3778 for October 1990 and 5965 for Neutral Junction for October 1990. The draft tax returns, (admittedly only that for 89/90 drafts, but the instructions must have come from the plaintiffs) show Banka Banka stock for June 1990 as 6142 and for Neutral Junction as 5093. It seems therefore wrong as a matter of damage to choose a figure in October which is substantially lower than figures in June 1989 and June 1990. The allegation of the plaintiffs is that it is this difference between their stock at September 1988 and their stock at October 1990 which is the measure of damage. Surely the fact that the stock has fluctuated between September 1988 and October 1990 must have some significance, otherwise the plaintiffs could merely choose the lowest point in the scale to increase the damages. It is true that one should also not seek the highest point on behalf of the defendants. Obviously stock have been sold from time to time but a decrease in the capital value of the herd is something which must be measured on a continuum.

It seems to me that this is what Dewsbury has done in his annexure D1 to his

report Exhibit 107. Even if this was not precisely his intention, I am prepared to accept his figures as logical, for he explains clearly his approach in Exhibit D1 while pointing out the differences between his figures and the plaintiffs.

If one takes Dewsbury's figures, which admittedly differ from any of the various versions of the plaintiffs but seem to me to be based on rational extrapolation from the income tax figures, his estimates are as follows on p.22 of his Report - Exhibit 107:

	Neutral Junction	Banka Banka
as at 4/9/88	6089	5912
as at October 1990	4031	4854"

The total difference in numbers is 2116.

I then turn to one of the earlier reports of Hanlon, Exhibit KK and note that he records (at p9) from instructions a total difference of 2136. Obviously he is working on different figures but it is the figure of 2136 and its proximity to 2116 which is of interest. Allowing for differences in herd structure it gives a figure in monetary terms which is worked out through the various calculations he has described - allowing the calculations to be accurate for the data fed in. Allowing for various discrepancies, it seems to me that I can use that result as roughly approximate to the result from the figures worked out by Dewsbury. In other words I am prepared to use that as a benchmark to establish the damage proved under this item.

The figure given is \$297,150 but I make certain deductions from that. I first

bring into account the credit of \$123,714 pointed out by Dewsbury at p29 of his report. It seems accepted by the plaintiffs that some allowance should be made for that. As Dewsbury points out that sum could have been used, by the plaintiffs to purchase stock to that value to increase their own stock. I make some allowance for the fact that it would not have been received immediately to make up the loss so the plaintiffs would still have had that loss in their capital structure until they received it. I think I can fairly reduce the amount to some \$100,000.

Then, difficult as it may be, I should have regard to some of the criticisms voiced by Dewsbury which allow some uncertainty which may be to the disadvantage of the defendants. In very broad terms I allow some \$17,000 for that to round off the damages under this head to \$180,000.

I am of course quite aware of the crudity of this approach but I have been unable to think of any better alternative.

Damages under this head \$180,000.

#### THE HIATUS IN THE LEGISLATION

The plaintiffs succeed here because the provisions of the BTEC Scheme were not properly imported into the Northern Territory legislation and regulations thereto. It seems regrettable that they could only recover on the chance of a legislative omission, i.e. really by accident. For, had the legislative scheme been properly in place they could not have recovered.

Yet the damage to them was real in either case; and it was not damage caused by any fault of theirs.

The real problem seems to lie in the failure to allow some form of compensation where cattle are properly detained to prevent the spread of infection but not destroyed. In the latter case and for de-stocking there was provision for compensation. (See now ss32-34A of the Act). But the plaintiffs still lost commercially through no action of theirs and in the normal course of events would have had to bear that loss themselves although the restrictions were imposed for the general good. It does not seem right that in those circumstances they could only recover on the off-chance by some legal invalidity or some failure of duty on the part of the officers of the first defendant. The loss was just as real to them in any event.

## FINAL DAMAGES

The gross total damages then would be as follows:

Increased Interest Costs	110,286
Cost of carrying extra stock to June 1989	6,354
Loss accruing to the trucking business	25,000
Additional testing costs	21,529
Agistment costs	6,269
Other costs - agistment	28,120
Carcass tow away	625
Additional wages	6,000
Additional accountancy fees	40,962
Charge in capital base of herd	<u>180,000</u>
<u>Total</u>	<u>425,125</u>

The plaintiffs make out their claim on the Beaudesert principle and not on any other head of claim.

The movement restrictions continued between 4 September to 14 November - a period of 71 days. For 20 days (from 29 September to 19 October) the plaintiff Mengel refused to give up the reactors. While having every sympathy with Mengel in his predicament, I must regard this as a clear case of failure to mitigate damages. The award should therefore be reduced in proportion, i.e. subtracting 20 days from the period of the restrictions so that the plaintiffs should receive 51/71 of the damages. 51/71 of \$425,125 equals \$305,371 and there will be judgment for that amount.

Since the defendants have succeeded on certain issues I propose to reserve the question of costs. Similarly, and at the request of counsel, I reserve the question of interest. There will be liberty to apply on these matters.

## APPENDIX

### LEGISLATION IN OTHER STATES AND TERRITORIES

(a) QUEENSLAND

Stock Act - 1915-87 (January 1988 reprint)

S11 Power to make regulations, inter alia, "in relation to the introduction of stock into the State from another State or Territory", and including regulations "prohibiting the introduction of stock if they are in a prescribed condition of disease".

Stock Regulations 1988

"positive reactors" means stock that have reacted positively to a test as described in the BTEC Campaign SDR. Definitions of "suspect herd" and "confirmed free" are given and are in the same terms as the SDR.

Regulation 19 - Brucellosis

An owner of cattle shall not introduce cattle from a suspect herd without an approved eradication programme or, if from a herd with an approved eradication programme, shall not introduce entire cattle unless for immediate slaughter but may introduce spayed females and steers.

Although the plaintiffs dispute this, it seems to me unanswerable that under the Queensland legislation which contains the definition of "suspect" as in the SDR, the plaintiffs' herd would be considered "suspect".

The plaintiffs' contention is that Regulation 19(d) allows an owner of cattle to introduce cattle "from a TN MN or CF herd which were not previously infected or from previously infected herds which have undertaken whole herd confirmatory testing not less than 18 months after attaining a CF status".

The plaintiffs' argument is that the status of Banka Bank and Neutral Junction remained TN and CF and therefore could come within the regulations. Even assuming that the status did remain under the NT legislation, that would not in my view in any way prevent the operation of the Queensland regulations or bind the Queensland Regulations to a NT classification. Under the Queensland Regulations the herds would clearly be classified "suspect" with the resultant consequences.

Further, by Regulation 9, stock cannot be introduced into the State without a certificate signed by the "Chief Veterinary Officer" which expression is defined as "a Chief Veterinary Officer of another State or Territory or a person authorised by him". The certificate is to be in a prescribed form which requires the CVO to certify that the stock were subjected to a "clean" test for brucellosis. A clean test is defined as " ... all the stock comprising the group under test are negative to the test or that all positive reactors to the test are slaughtered and found free of evidence of disease on autopsy and further laboratory examination as may be required by the Chief Inspector or CVO". It is plain that the NT CVO

or his delegate could not give such a certificate once the reactors had appeared and until the proper tests had been done.

See also S11(3) of the Act making it a criminal offence to introduce stock into the State contrary to the Regulations.

(b) SOUTH AUSTRALIA

Stock Diseases Act 1934.

S6(1)(a) - the Governor may by proclamation prohibit or put restrictions on the importation or introduction of stock.

By proclamation SA Govt Gazette (4/12/86), the introduction into South Australia by road of cattle from, inter alia, the Northern Territory from herds classified in relation to brucellosis as "non-assessed, suspect, infected or restricted" is prohibited. "Suspect" is not defined in the South Australian legislation. Leaving aside the question whether the term may be imported from the SDR the plaintiffs concede that "there is a value judgment to be made by somebody" (3096) and in my view the appropriate South Australian official would have no difficulty in considering "suspect" to have a definition somewhat similar to the SDR. It would be surprising if it were otherwise and equally surprising if the plaintiffs' stock after the discovery of the reactors had been allowed into South Australia.

By Regulation 22 and the prescribed Forms, a certificate is required before stock from, inter alia, the Northern Territory can be introduced into South Australia without a certificate from an Inspector of Stock, or

Government Veterinary Officer, as to the status of the herd. The expression "suspect" is one of the classifications. The Certificate itself does refer to the SDR and adopts the definitions.

S28(2) of the South Australian Act provides that "no diseased stock or infected stock or stock which are suspected to be diseased or infected stock shall be introduced into the state".

Although as Mr Mildren points out the Act, Regulations and Proclamations do not specifically refer to animals conveyed by rail rather than by road, I would think that the terms in S28(2) (and c.f. S28(1)) are wide enough to carry that meaning.

(c) NEW SOUTH WALES

S11B of the Stock Diseases Act 1923 empowers the Governor by Proclamation to "restrict or absolutely prohibit the importation or introduction into the State" of any stock "that might in his opinion be infected or contaminated with disease or might carry or spread disease".

Proclamation 506 of 1987 is headed:

"Restriction of the introduction of cattle into New South Wales from Queensland and Northern Territory (Brucellosis)."

The Proclamation provides that "No person shall introduce or cause or permit to be introduced any cattle other than steers or bullocks into New South Wales from herds known or suspected to be infected with brucellosis without the prior approval of the Chief, Division of Animal Health".

(Again, there appears to be no definition of "suspected" but I make the same comments as with the South Australian legislation.)

The Proclamation continues:

"No person shall introduce or cause or permit to be introduced any

cattle into New South Wales except under the following conditions:

1. The cattle shall be presented to an Inspector during the hours of daylight at or nearest the place of entry into New South Wales.
2. Unless otherwise exempted by clause 3 below of this Proclamation the cattle shall have first been tested for brucellosis with negative results within 30 days immediately preceding their introduction into New South Wales.
3. The cattle shall not be required to be tested for brucellosis provided they are being introduced -
  - (i) directly from a Brucellosis Free Area; or
  - (ii) directly from a Brucellosis Provisionally Free Area and the status of the herd of origin is Confirmed Free, Monitored Negative or Tested Negative and provided that -
    - (a) the stock enter only at crossing places approved by Chief, Division of Animal Health;
    - (b) a permit in or to the effect of Form 3 of the Stock Diseases Regulations has been issued by an Inspector at or nearest the place of introduction; and
    - (c) movement shall be by motor transport sealed by an Inspector for direct movement to an abattoir approved by Chief, Division of Animal Health for slaughter within 7 days.
4.
  - (a) At the time of introduction there shall be presented to an Inspector at or nearest the place of introduction, a declaration made by the person having possession of the stock at the time and a certificate signed by a Veterinary Officer or Inspector of Stock for the State or Territory from which the stock are being introduced in or to the effect of Schedule 1 hereto.
  - (b) Any certificate signed by a Veterinary Officer or Inspector fo Stock pursuant to this Proclamation shall

be invalid unless movement of the stock related thereto commences within 14 days of the date of certification."

The certificate referred to in 4(a) contains a declaration by the Inspector that, inter alia, the stock were tested with negative results for brucellosis.

"Tested for brucellosis" is defined in the Proclamation as meaning "tested by the CFT or any other test approved by the Chief, Division of Animal Health at a laboratory approved by the CVO of the State or Territory concerned and each and every animal in the consignment to be moved is tested with negative results". (Emphasis added).

(d) WESTERN AUSTRALIA

Regulation 66 of the Enzootic Diseases Regulations made pursuant to the Enzootic Diseases (Regulations) Act 1968 empowers the Minister to declare an area to be a brucellosis free area. By Proclamation dated 4/2/77 the Minister proclaimed the Kimberley area a free area and by Proclamation (undated) but gazetted 31/3/85 the Minister proclaimed the South Brucellosis Free Area extending from the southern boundary of the Kimberley free area. This seems to cover the whole of Western Australia.

By Regulation 29 "the conditions restrictions and prohibitions set out in the Second Schedule apply to and in relation to the movement of stock into the State".

By clause 14(6) of the second schedule (headed "Brucellosis") breeding cattle cannot be moved from a suspect herd from a Free Area or a Provisionally Free Area into the Kimberley Free Area or the Southern Free Area.

The term "suspect" is included in the terms mentioned in clause 14(1)(a), all of which terms are stated to be descriptions "of the herd by reference to its status in relation to the disease

brucellosis". No mention is made of the SDR but the only reasonable conclusion seems to be that this term as well as the others mentioned e.g. "accredited free", "confirmed free" etc, must necessarily be defined by reference to the SDR or at the least terms almost similar. Cattle from C.F. herds could not be moved into those areas unless every animal had been tested by CFT with negative results. See clause 14(4). Cattle from a TN herd from a provisionally free area could not be moved into those areas (i.e., Kimberley and Southern Free Area) unless the animals were only bulls and had two negative CFT tests within a period of approximately 2 months before movement. (Clause 14(5)).

(e) VICTORIA, A.C.T. and TASMANIA

It is not, in my view, necessary to set out the details of the legislation of the more remote States and Territories. Suffice it to say that Mr Mildren has produced the appropriate Acts and Regulations of Victoria, the A.C.T. and Tasmania and I have examined them and am satisfied that in their various ways they would prohibit the importation of stock with reactors except for slaughter.

(f) SUMMARY OF THE LEGISLATION

I do not accept the plaintiffs' submissions that if the status of the properties was CF2 or TN no tests would be required for interstate movement. I am satisfied that each other State and Territory would use its own terms and consider the cattle suspect so far as they were concerned. It would not be to the point that so far as the Northern Territory was concerned the status "suspect" may have been imposed lawfully or unlawfully.

In view of the whole of the BTEC campaign and the possible threat of infecting their own herds with brucellosis, it would be remarkable if other States and Territories did not make their own decision about this, and once the presence of reactors was established, it would be that which would make it impossible for interstate movement until that situation was resolved.

I conclude therefore that the defendants' submission is correct that under the legislation of all other States and the Australian Capital Territory the presence of reactors in the plaintiffs' cattle until proven negative prevented entire animals entering those States and the Australian Capital Territory except for slaughter.