

IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
COMMERCIAL LIST
EXPIDITED CASES DIVISION

Case No. CI-08-05369

WILLIAM SCHWARZENBERG

Plaintiff

v

COMMONWEALTH OF AUSTRALIA

Defendant

JUDGE: HIS HONOUR JUDGE ANDERSON
WHERE HELD: Melbourne
DATE OF HEARING: 31 August, 1 and 2 September 2009
DATE OF JUDGMENT: 27 November 2009
CASE MAY BE CITED AS: Schwarzenberg v Commonwealth of Australia
MEDIUM NEUTRAL CITATION: [2009] VCC 1513

REASONS FOR JUDGMENT

Catchwords: Environment protection – Seizure of exotic birds – Application for delivery up of seized birds – Whether birds “used or otherwise involved in the commission of an offence” – Whether evidence that the birds were “legally imported” – Meaning of “reasonable excuse” – s.444D *Environment Protection And Biodiversity Conservation Act 1999 (Commonwealth)*.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr D.J. Connell	Law 554 (Gerard A. Conlan)
For the Defendant	Mr G. Livermore	Australian Government Solicitor

HIS HONOUR:

- 1 William Schwarzenberg, the plaintiff, has been a collector of exotic birds for most of his life. For many years, the Commonwealth Government has sought to prevent the illegal trade in such birds as part of its responsibility to protect exotic species pursuant to Australia's international treaty obligations. Legislation has been enacted to achieve this objective, including most recently the *Environment Protection And Biodiversity Conservation Act 1999 (Commonwealth)* which came into effect in 2002.
- 2 On 8 August 2007, an officer of the relevant government department seized 243 exotic birds from the plaintiff pursuant to s.444A of the Act. The birds were conditionally released back to the plaintiff. The plaintiff has not been charged with any offence under the Act.
- 3 On 5 September 2007, the plaintiff made application to the Melbourne Magistrates' Court pursuant to s.444D of the Act seeking an order for "*delivery*" to him of the seized birds "*on the ground that the [birds were] not used or otherwise involved in the commission of an offence against Part 13A*" of the Act. If a court finds that the birds were so "*used or otherwise involved,*" it must order the birds "*to be forfeited to the Commonwealth*". Upon the application of the defendant, the plaintiff's application was later transferred to the County Court for hearing.
- 4 It was common ground upon the hearing that:
 - a. the relevant offence against Part 13A of the Act was the "*possession of illegally imported specimens contrary to s.303GN*";
 - b. each of the 243 birds seized was:
 - i. a proscribed "*specimen*";
 - ii. a bird that did not belong to a native species and had itself been imported, or was the progeny of imported birds;
 - c. at the time of the seizure, the plaintiff had the birds in his possession;
 - d. the plaintiff would not have committed an offence in relation to a particular bird, if:
 - i. the bird was lawfully imported, or all of the birds of which it is the progeny, were lawfully imported; or

- ii. he had “*a reasonable excuse*”;
 - e. an evidential burden in relation to the matters in (d) was upon the plaintiff.
- 5 The defendant relied upon provisions in earlier legislation which established procedures for recording transactions involving the protected exotic species:
- a. the *Wildlife Protection (Regulation of Exports and Imports) Act* 1982 required the obtaining of permits or authorities for the lawful importation of relevant exotic birds;
 - b. amendments to the Act in 1995 introduced a scheme for the mandatory registration of the birds, the National Exotic Bird Registration Scheme (NEBRS).
- 6 The plaintiff provided evidence of the particular persons from whom he had acquired each of the birds, or the birds of which the particular bird was the progeny. He did not however produce:
- a. a permit or authority in relation to the importation of a particular bird, or the birds of which the particular bird was the progeny;
 - b. a registration record from the NEBRS scheme in his own name in respect of a particular bird, or the birds of which the particular bird was the progeny.
- 7 The plaintiff relied upon evidence that the NEBRS scheme had been largely ignored by the owners of exotic birds in Australia and that very few birds had been registered under the scheme. This, it was suggested, had led to the scrapping of the registration scheme and the passage of the present legislation in 1999.
- 8 The issues for determination in the application were:
- a. whether there were any procedural defects in the warrants pursuant to which the departmental officer seized the birds which affected the legality of the seizure;
 - b. whether the plaintiff had satisfied the evidential burden upon him in relation to each of the birds, either by establishing that:
 - i. the bird was lawfully imported, or all the birds of which the particular bird in question was the progeny, had been lawfully imported; or
 - ii. he had “*a reasonable excuse*”.

- 9 On 28 August 2009, three days before the trial commenced, the defendant unconditionally released 70 of the exotic birds to the plaintiff, leaving the fate of a total of 173 birds to be determined by the Court. The decision was made by examining the lineage of each of the seized birds, as attested to by the plaintiff in his affidavit in support of the application. The plaintiff's entitlement to retain a bird was conceded by the defendant if the NEBRS records disclosed that a bird of the same species as the seized bird had been registered in the name of the person from whom the plaintiff asserted the bird, or the birds of which the seized bird was the progeny, had been acquired.
- 10 Defendant's counsel, Mr Livermore, informed the Court that this was an "*administrative decision*" of the defendant made for the purpose of resolving part of the plaintiff's application and was not the test the Court should adopt for the determination of the application.

Validity of the seizure

- 11 On 8 August 2007, the departmental officer who seized the birds, Ms Karen Smith, completed a "*Notice of Seizure*". Under the heading "*Reason for Seizure*" the notice records, "*The specimens have been seized as I reasonably suspect that they have been used (or otherwise involved) in the commission of an offence against Part 13A of the Act [on the grounds that] possession contrary to s.303GN of EPBC Act*".
- 12 Mr Connell submitted that the seizure was unlawful because the notice of the seizure did not state any grounds, or alternatively that the grounds stated were simply a repetition of the fact that an offence was suspected of having been committed. By s.444B, "*If a specimen is seized by a authorised officer under s.444A, the authorised officer must give...the person who had possession custody or control of the specimen immediately before it was seized a written notice...identifying the specimen; and...stating that it had been seized under s.444A and giving the reason for the seizure*".
- 13 In my view, the notice complied with the Act and specifically gave "*the reason for the seizure*". Section 444A entitled the officer to seize a specimen if the officer had reasonable grounds for suspecting that an offence involving the specimen had been committed against Part 13A of the Act. The notice specified the particular offence as "*possession contrary to s.303GN*" of the Act. Part 13A is headed "*International Movement of Wildlife Specimens*". It extends over 81 pages of the Act. Section 303GN makes it a specific offence to possess "*illegally imported specimens*". The

section sets out the “*objects*” of the section, the elements of the offence, the circumstances in which the section does not apply and notes that “*the defendant bears an evidential burden in relation to*” certain exculpatory matters. In the circumstances, there is nothing in the wording of the Notice of Seizure which would, in my view, affect its validity.

Plaintiff in possession of exotic birds specified in the legislation

14 The 173 disputed birds are all “*specimens*” covered by the seizure provisions of the Act. Both parties agreed that the critical issue in the case was whether the seized birds were “*used or otherwise involved*” in the commission of the relevant offence under the Act. If the birds fall into this category, the Court must order that they be “*forfeited to the Commonwealth*” pursuant to s.444D. The issue of where the burden of proof lies is critical. In my view, the statutory provisions require that when determining an application by an owner pursuant to s.444D, where it is alleged that the reason for seizure was that the plaintiff had committed an offence against s.303GN of the Act, the Court should adopt the following procedure:

- a. The Court must determine whether the elements of the offence under s.303GN are established including, in respect of each of the seized birds, that:
 - i. the plaintiff had the bird in his possession;
 - ii. the bird was a “*specimen*” proscribed under the Act;
 - iii. the bird did not belong to a “*native species*”, being an imported bird or the progeny of imported birds.

All of these matters were conceded by the plaintiff. If they had not been conceded, in my view, the onus would have been upon the defendant to establish these matters. In the present case, I am satisfied from the evidence that the defendant would have established each of the relevant matters.

- b. The Court must then determine whether the plaintiff comes within one of the exceptions set out in s.303GN(3)-(5). In this case, sub-paragraphs (3) and (5) are relevant. Under sub-s.(3), no offence is committed if the “*specimen was lawfully imported*”, or all of the specimens of which the bird is the progeny were lawfully imported. Under sub-s.(5), the offence is not committed if the plaintiff “*had a reasonable excuse*”.
- c. As the note to sub-ss.(3) and (5) makes clear, the person alleged to have committed the offence of “*possession of illegally imported specimens*” bears

an evidential burden in relation to the matters in sub-s.(3) and (5) – see sub-s.(13.3)(3) of the Criminal Code. In the Code, “*evidential burden in relation to a matter means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist*”.

- d. There has not been a criminal prosecution. The present application has been brought by the plaintiff pursuant to s.444D of the Act. Ordinarily, as an applicant in the proceeding, the plaintiff would bear the onus of establishing the basis of the application, namely, “*that the specimen was not used or otherwise involved in the commission of an offence against Part 13A*”.
- e. I consider, however, that the intent of the Act is not to place that onus on the plaintiff as applicant. Section 444D anticipates that the application may be disposed of by:
 - i. “*The delivery of the specimen to the owner*”. This can occur pursuant to s.444C(4) if the Secretary grants a written application by the owner for the delivery to him of the specimen. Alternatively, the Court in granting the application pursuant to s.444D(1) may order the relief sought by the owner, presumably in circumstances where the Court does not find that the “*specimen was used or otherwise involved in the commission of the offence concerned*” and the Court is therefore not required to order the forfeiture of the specimen to the Commonwealth pursuant to s.444D(3) and the action has not been discontinued by the owner under s.444D(4);
 - ii. an order of the Court for “*the forfeiture of the specimen to the Commonwealth*”, if the Court finds that the “*specimen was used or otherwise involved in the commission of the offence concerned*” pursuant to s.444D(3);
 - iii. “*The disposal of the specimen under s.449*”. This provision has no application in the present case. It deals with the immediate disposal of a seized specimen by decision of the Secretary in circumstances, for example, where retention is likely “*to constitute a serious threat to the environment*”;
 - iv. the owner, having brought an action under s.444D(1) discontinues the action under sub-s.(4) “*otherwise than because of*” the three matters mentioned above, firstly, delivery to the owner, secondly, forfeiture to the Commonwealth or thirdly, disposal of the specimen. If the owner

discontinues the action in these circumstances, the specimen is forfeited to the Commonwealth.

- f. Before the Court should order the forfeiture of a specimen to the Commonwealth under s.444D(3), the owner must have brought an action under sub-s.(1) and “*the Court finds that the specimen was used or otherwise involved in the commission of the offence concerned*”. In my view, such a finding can only be made after the Court has considered the “*offence concerned*” under Part 13A of the Act including the elements of the offence and any onus cast upon the person alleged to have committed the offence in relation to matters claimed by way of exculpation.
- g. The plaintiff’s application is, however, a civil matter. The Court would not have jurisdiction if it were otherwise. The issue was ventilated at the time the application to transfer the action from the Magistrates’ Court was dealt with. When the plaintiff commenced the application in that Court, he clearly regarded the action as one appropriately brought as a civil proceeding.
- h. A civil proceeding would ordinarily require the applicant to bear the onus of proof and for the burden of proof to be proof on the balance of probabilities. What that means would depend upon the circumstances of the case and, if criminal conduct were alleged, the standard to which the relevant matters would be required to be proved, should appropriately reflect the seriousness of the allegations.
- i. If the plaintiff had been charged with an offence against s.303GN he would, if convicted, have been liable to a penalty of “*imprisonment for five years or 1,000 penalty units or both*”. Under s.13 of the Criminal Code, the prosecution would bear “*a legal burden of proving every element of an offence relevant to the guilt of the person charged*” and, additionally, would bear “*a legal burden of disproving any matter in relation to which the defendant had discharged an evidential burden of proof imposed on the defendant*”.
- j. In the present application, I consider that:
 - i. the plaintiff’s application will be determined by whether “*the Court finds that the specimen was used or otherwise involved in the commission of the offence concerned*”;

- ii. ultimately, it is for the defendant to satisfy the Court of that matter and the onus is not upon the plaintiff to prove that the specimen was not “*used or otherwise involved*”;
- iii. the onus upon the defendant is the civil onus of proof; upon the balance of probabilities having regard to the seriousness of the allegations made;
- iv. the plaintiff would ordinarily be required to prove the essential elements of the offence under s.303GN. In the present case these matters have been conceded. Even if they were not, I would be satisfied that they had been established to the requisite standard by the uncontested statements in the affidavit of Rosemary Ann Webb sworn 16 June 2009 which she adopted in her evidence-in-chief;
- v. the defendant bears an evidential burden in relation to the exculpatory matters relied upon in s.303GN(3) and (5). In the context of the present application, that means the burden of adducing or pointing to evidence that matters exist sufficient to discharge that burden and so that the defendant must then establish on the balance of probabilities that the exculpatory matters have not been established. The defendant therefore bears the ultimate burden of establishing on the balance of probabilities that the specimen was not lawfully imported or was the progeny of specimens which had not been lawfully imported (sub-s.(3)), and that the plaintiff did not have “*a reasonable excuse*” (sub-s.(5)).

Statutory scheme

- 15 Australia has international obligations under the 1973 Convention on International Trade in Endangered Species (CITES) and the 1992 Convention on Biological Diversity (Biological Diversity Convention). CITES became enforceable under Australian law on 27 October 1976 and was initially enforced under the Customs (Endangered Species) Regulations and then by the *Wildlife Protection (Regulation of Exports & Imports) Act 1982*. CITES established a worldwide system of controls on international trade in threatened wildlife and wildlife products by stipulating that government permits be required for such trade.
- 16 Section 22 of the 1982 Act prohibited the import of a prescribed specimen “*otherwise than in accordance with the permit or an authority*”. By s.50, the holder of the permit

or authority to import a live specimen was prevented, without written authority, from being able to “*sell or otherwise dispose*” of a specimen.

17 Trade was controlled not only in respect of species threatened with extinction but also in respect of other species which might become so if trade in them was not strictly controlled or monitored. Trade was also controlled in order to prevent threatened species from being traded under the guise of non-threatened species similar in appearance. A list of CITES specimens protected include all of the species of birds seized from the plaintiff. These species have been covered by Commonwealth statutory protections since at least 6 June 1981 and in some cases prior to that date. Apart from birds bred by the plaintiff, all of the original birds involved in the present application were said by the plaintiff to have been acquired by him after 1990. It is possible that, because of the age to which the birds may live, birds seized from the plaintiff may have been born, or have entered Australia, prior to CITES.

18 The *Wildlife Protection (Regulation of Exports & Imports) Amendment Act 1995* introduced a mandatory registration system for persons in possession of classified exotic birds. From 2 December 1995, a person who intentionally possessed a classified exotic bird was guilty of a criminal offence unless the bird was possessed in accordance with a registration certificate. In October 1996, the National Exotic Birds Registration Scheme was introduced to administer the scheme foreshadowed by the 1995 Amendment Act.

19 Ms Webb stated in her affidavit, filed on behalf of the defendant, that :

“17. *The intent underlying the NEBRS scheme was to make unlawful trade in exotic birds more difficult by creating a database of exotic bird holdings by species throughout Australia, thus enabling potential buyers to require a seller to show NEBRS registration records for that species, or document a ‘custody chain’ back to a seller who held NEBRS registration records for that species, before agreeing to make a purchase.*

18. *Persons in possession of exotic birds were required to register the number of exotic birds that they held by species under the NEBRS scheme, to maintain records in the form of a NEBRS Record Book of changes in their holdings of exotic birds by species, and to file a return to advise the Wildlife Branch of any changes to their holdings on at least an annual basis.*

19. *The NEBRS scheme remained in operation from October 1996 until January 2002, during which period it was mandatory for all persons who possessed classified exotic birds to register the number of bird that they possessed by species*".
- 20 The NEBRS scheme was discontinued on 11 January 2002. As a result of the operation of the scheme between October 1996 and January 2002, the Department established an inventory of known exotic bird species in Australia. The *Environment Protection Biodiversity Conservation Act* 1999 commenced on 16 July 2000 and Part 13A of the Act came into effect on 11 January 2002. The objects of Part 13A are set out in s.303BA and include, "(a) *to ensure that Australia complies with its obligations under CITES and the Biodiversity Convention*".
- 21 To administer the Act, the Department published an inventory of exotic (non-native) bird species on its website in January 2002 stating that under the *Environment Protection Biodiversity Conservation Act*, owners of exotic birds were responsible for keeping documents, records or other evidence that an exotic bird in their possession had been legally obtained. The Department considered that this required owners of exotic birds to have either a lawful import permit for the bird, or the birds of which it was the progeny, or evidence that the bird (or the birds of which it was the progeny) were registered under the NEBRS.
- 22 The plaintiff stated in his affidavit in support of the application that, "*over the years I began to add to my collection by trading, swapping and breeding birds from Australia and all parts of the world. This was always done in a legal fashion and at no stage have I ever engaged in any illegal activities relating to my birds*". The plaintiff set out in a schedule "*details relating to the acquisition of the original birds...including the persons from whom the birds were purchased, the relevant stock and approximate purchase dates*".
- 23 It will be necessary to consider, for each of the birds seized, whether the plaintiff has satisfied the evidential burden upon him in relation to the defence that the relevant "*specimen was lawfully imported*". If the plaintiff satisfies the evidential burden, it will then be necessary to consider whether the defendant has, on the balance of probabilities, excluded the reasonable possibility that a bird was "lawfully imported". Before undertaking this task, it is appropriate to consider the more general defence under sub-s.(5) that the plaintiff has a "a reasonable excuse" for his possession of the birds, even if he were not able to establish that they had been lawfully imported.

“Reasonable excuse”

- 24 The plaintiff submitted that he had “*a reasonable excuse*” for his possession of the seized birds, whether or not it were established that the birds, or the birds from which they are the progeny, were lawfully imported. The plaintiff submitted that NEBRS was a failure and was scrapped in 2002 because the majority of exotic bird owners failed to register birds under the scheme. In the circumstances, the plaintiff submitted, the NEBRS register cannot be used to determine whether or not possession of an exotic bird was lawful.
- 25 The plaintiff, in his affidavit in support of the application, stated that “*the NEBRS was flawed from the start with the widespread failure of the scheme to comprehensively record each and every exotic bird in Australia at its commencement. The government failed to ensure that then bird owners could feel sufficiently comfortable in pledging full details to the government of their bird ownership. The NEBRS has been widely viewed with derision by the bird fanciers community and the government eventually abandoned the scheme partially due to financial reasons and also due to the lack of connection that the scheme had to the reality of bird ownership in Australia*”.
- 26 The plaintiff further stated that he “*did not participate in NEBRS*”. The plaintiff did, however, register a number of birds in the name of his son, William Dean Schwarzenberg. The plaintiff prepared the relevant documentation and obtained his son’s signature to it. He also registered birds in the name of Mr Justin O’Donnell. He declined to answer questions during cross examination about Mr O’Donnell and his NEBRS records.
- 27 The plaintiff produced in evidence a report prepared by a fellow aviculturist, Damian John Dunemann, dated 13 February 2008 as an expert report for filing in an earlier proceeding for the delivery up of seized birds commenced by Norman Victor Collins (CI-06-03646). Mr Dunemann stated that “*the NEBRS scheme that was brought in was mandatory. However, the NEBRS scheme was flawed from the start and the flaws and deficiencies in this scheme continued throughout its lifespan and the scheme is regarded within the exotic bird keeping community as a discredited scheme past its lifespan and there have been endeavours both at a government and also bird keeping community level to remedy the deficiencies left by the NEBRS scheme and to introduce a more workable scheme that gives effect to Australia’s obligations under the CITES Convention as well as protecting the Australian environment and giving protection to legitimate bird keepers*”. Mr Dunemann stated that the birds registered under the scheme only represented a small proportion of the

exotic birds held in Australia and there was “*little or no verification of species that had been registered*”.

28 When the present legislation was introduced, some aviculturists were notified by the Department that it would be in their interests to “*maintain records of transactions including acquisition and movement of specimens*” and it was suggested that registration under the NEBRS would be regarded as providing “*proof that exotic birds were obtained and held legally*” and those details should therefore be provided at the time of transfer to allow “*continuity of records*”.

29 Mr Dunemann attached to his report a “*summary record*” of an industry workshop on the regulation of exotic birds under the EPBC Act held in Canberra on 9 December 2005. The critical issues to the industry were apparently that:

- a. following the cessation of the NEBRS in 2002, “*many owners were unaware of their responsibilities after the end of NEBRS and that as a result records were lost, destroyed or neglected*”;
- b. the government was not prepared to continue maintaining a central registry similar to NEBRS but suggested that an industry database would be appropriate under the EPBC Act as a “*reverse onus of proof falls with individuals to show that birds are legal (not illegal). This requires either an import permit or appropriate records of provenance of birds in possession*”.

30 The plaintiff also tendered in evidence notes of a further meeting of departmental and stakeholder representatives in Canberra on 19 May 2009. The meeting summary noted that, following the meeting in 2005, an Exotic Bird Advisory Group (EBAG) had been established. As a result of the consultations with that group, an Exotic Bird Record Keeping Scheme (EBRKS) had commenced in 2007. The operation of the scheme was reviewed by an independent consultant after 12 months of operation. The purpose of the meeting in May 2009 was to discuss the findings of the consultant.

31 The meeting summary noted that it was generally agreed that “*not all bird keepers participated in NEBRS, despite the fact it was mandatory and carried penalties for non-registration*”. In regard to EBRKS, whilst the scheme was voluntary, it was considered that buyers were “*asking questions*” and demanding “*records*” when purchasing exotic birds, and this was having a positive effect in reducing the illegal trade in the birds. It was also considered by bird collectors that there were problems under the present legislation defining whether particular birds were legal or illegal,

and there was doubt as to what records would be sufficient for this purpose. From the Department's perspective, *"As long as the 'reverse onus of proof' is present in the EPBC Act, it is the responsibility of exotic-bird keepers to keep records that prove legal origins of their exotic birds"*.

32 Pursuant to s.303GN of the Act, a person is not guilty of the offence of possession of illegally imported specimens *"if the defendant has a reasonable excuse"*. The majority judgment of Brennan CJ, Toohey, McHugh and Gummow JJ in *Taikato v R* (1996) 186 CLR 454 stated at p.464: *"The term 'reasonable excuse' has been used in many statutes and is the subject of many reported decisions. But decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of 'reasonable excuse' is an exception ... However, the reality is that when legislatures enact defences such as 'reasonable excuse' they effectively give, and intend to give, to the courts the power to determine the content of such defences"*.

33 In the present statute, s.303BA, which sets out the objects of Part 13A of the Act, and s.303GN itself, make it clear that the object of the offence created by the section is *"to comply with Australia's obligations under the Biodiversity Convention and CITES; and to otherwise further the objects of [Part 13A of the Act]"*.

34 Section 303GN makes it an offence for a person to have in their possession a CITES specimen. A person can exculpate themselves if they produce evidence that the specimen itself, or the specimens of which it is the progeny, were lawfully imported or *"the defendant has a reasonable excuse"*. There is a further ground of exculpation; *"if the specimen was neither imported, nor the progeny of any other specimen that was imported"*. However, the offence itself does not apply if the specimen belongs *"to a native species"*. It is difficult to see what scope this provision would have except for *"specimens"* which might also *"belong to a native species"*. The exotic birds with which the present case is concerned do not fall within that category.

35 Therefore, the statutory context of the *"reasonable excuse"* defence is:

- a. an offence created to ensure that Australia complies with its treaty obligations, including the protection of *"wildlife that may be affected by trade"*;
- b. the offence is constituted by the simple possession of a particular specimen;

- c. a defendant can escape liability if he or she produces evidence of lawful importation of the specimen or its forebears and that fact cannot be reasonably excluded;
- d. s.303GY of the Act defines the circumstances in which a specimen is to be regarded as having been “*legally imported*” by reference to the relevant statutory regime at the time of importation.

36 The High Court’s analysis in *Taikato* demonstrates the inappropriateness of attempting to define in advance the circumstances which might constitute “*reasonable excuse*”. As Kirby J said in *Taikato* at p.491, the phrase “*reasonable excuse*” contains “*broad words of exemption*”. In the EPBC Act, the exclusion is additional to the circumstances covered by s.303GN(3) and (4), i.e. where the bird or the birds of which it is the progeny were either lawfully imported, or it was not an imported specimen.

37 The defendant’s counsel, Mr Livermore, submitted that the “*reasonable excuse*” exemption would have limited application, and he gave as an example circumstances where a person came upon an injured exotic bird and had the bird in his or her possession simply for the purpose of conveying the bird to a veterinarian or animal hospital.

38 In the present case, I must consider whether liability under the Act is excluded because the plaintiff was unable to provide evidence of lawful importation of the seized birds, or the birds of which it was the progeny, as a result of a failure by many exotic bird collectors to participate in the NEBRS scheme. In my view, the evidence was insufficient for me to be satisfied that the non-participation of bird collectors in NEBRS rendered the scheme of limited utility. In fact, in the present case the Department’s consideration of the lineage claims made by the plaintiff in relation to the seized birds resulted in the release of many birds to the plaintiff.

39 However, there is a more fundamental problem with the plaintiff’s submission. If some exotic-bird owners refused to fully participate in a statutory registration scheme which was in operation for a number of years, it would be difficult to regard this as a “*reasonable excuse*” for either their own failure to register the birds under the scheme or to ensure the legality of the birds’ provenance at the time of the plaintiff’s acquisition. As a general proposition, it cannot be accepted that a failure by some or even many bird-owners to register their birds under the NEBRS scheme can be a

reasonable excuse for the plaintiff's failure to establish that the birds, or the birds of which they were the progeny, had been lawfully imported.

40 With regard to the specific birds seized from the plaintiff, the evidence of the provenance of the birds is very sparse. Apart from the name of the person from whom the birds, or those from which they are the progeny, were acquired:

- a. the date is only defined by reference to a year or years;
- b. few details of the circumstances of the acquisition are given, including any relevant enquiries or requests for documentary evidence either of registration or lawful importation of the birds.

41 In these circumstances, there is little basis for concluding that the plaintiff has adduced or pointed to evidence suggesting that he had a "*reasonable excuse*" for his possession of the seized birds.

The credibility of the plaintiff

42 The evidence adduced on behalf of the plaintiff was generally unsatisfactory. On the critical issue of the provenance of each of the birds, the details provided by the plaintiff were very limited and included inconsistent accounts of the origins of particular birds. It is clear from the answers given by the plaintiff to questions from departmental officers, that he was at least aware of "*irregularities*" in the acquisition of birds by certain collectors and certainly of the absence of appropriate record keeping by a number of the collectors from whom he acquired birds. There is also a lack of evidence of enquiries made by the plaintiff from the vendors at the time of acquisition. In his evidence at the hearing, the plaintiff said however, that certain statements made to the departmental officers on 8 August 2007 were made whilst affected by alcohol or were simply based on "*gossip*" and were "*just wild accusations by me with no basis*". He said, "*I suspect a lot of things, but I don't know if it is true*".

43 So far as the plaintiff's own record keeping was concerned, he declined to participate directly in NEBRS and instead used his son's and Mr Justin O'Donnell's NEBRS records for registering some of his birds. He said that he "*didn't register all his birds [as] I knew I couldn't prove all of them*". The plaintiff said that ill health required him to use his son's name for registration under NEBRS. The plaintiff's evidence in this regard was unsatisfactory. The impression was that the plaintiff considered that he needed to pay lip service to NEBRS by registering a certain number of birds and, in

some instances, birds were registered in the expectation that they may be seized by departmental officers. In certain cases, the registration details were clearly inaccurate (particularly as to the year of acquisition), in others, birds were registered under incorrect names.

- 44 The plaintiff in his evidence at the hearing conceded that his son's principal record book was a "reconstruction" and was not necessarily completely accurate. He said, "*so that record book is not a proper complete record of the birds that I had. It's just something we did to try and keep the authorities at bay, and we thought by registering a few birds here and there, they would leave us alone, which they actually did*".

The plaintiff said in evidence that "*Mr O'Donnell had nothing to do with the birds registered in his name. They were my birds*". He refused, however, to answer questions about Mr O'Donnell's NEBRS records on the grounds that he may incriminate himself. This made it difficult to find evidence which satisfied the evidential burden upon the plaintiff or to conclude that the defendant had not excluded the reasonable possibility that the birds, or their forebears, had been lawfully imported.

- 45 Whilst the plaintiff said that he had "*never knowingly purchased a smuggled bird*", there was little satisfactory evidence by the plaintiff of his compliance with the requirements of NEBRS or enquiries made at the time of the acquisition of birds, to ensure that they had a lawful provenance. At best, he requested a "*NEBRS number*" and took it "*on trust*" without further enquiry or substantiation. The plaintiff said, "*I have never seen anyone else's NEBRS book ever. I took people at face value when they gave me a number*".

Crimson Bellied Conure

- 46 The first bird listed by the plaintiff was the Crimson Bellied Conure. Sixteen Crimson Bellied Conures were seized. The plaintiff said that this included an original stock of two birds and 14 birds bred from them. The plaintiff said he purchased two Crimson Bellied Conures from Ray Gibbon of Little River, Victoria in approximately 1999. On 8 August 2007, the plaintiff was interviewed by departmental officers at Sunshine. He was questioned about a record book that appeared to be a NEBRS document. The plaintiff stated to the departmental officers that his son, William Dean Schwarzenberg, signed all the NEBRS documents with the Department but that the plaintiff personally did all the trading of the birds and prepared all the NEBRS documentation for his son's signature.

- 47 In the plaintiff's son's NEBRS return for the year to 6 January 1999, it was recorded that a male and female Crimson Bellied Conure had been obtained, making the balance on hand, two. In the annual summary sheet for the year to 6 January 2000, an additional male and female were obtained, making a total of four Crimson Bellied Conures. The documentation for the following two years included a certificate of registration for the year to 6 January 2002 which showed a total of four birds of that species registered in the name of the plaintiff's son.
- 48 The plaintiff said in evidence that the document was not an actual NEBRS record. The original had been destroyed in a house fire and, "*years later*" the plaintiff had attempted to reconstruct the document from records and from his memory. The plaintiff conceded in evidence that the record was not completely accurate. The plaintiff, in the interview on 8 August 2007, was referred to the entry relating to Crimson Bellied Conures. He said that he did not remember getting the birds from [Ray Gibbon] "*but I actually thought that we originally got them off Chalmers*" [Alan Chalmers of Ariah Park, NSW]. The plaintiff said he was "*totally confused*". He said that he thought he had got the birds from Chalmers "*before NEBRS*".
- 49 Having been referred to what purported to be his son's NEBRS register book, he said, in relation to Ray Gibbon, "*Maybe we actually bought four off him, I don't know*". He said, "*We put up our hand. We told NEBRS that we had them. They didn't ask us where we got them from*". The plaintiff was asked, "*Did you have Crimson Bellied Conures that weren't registered on NEBRS?*" He replied, "*No. We only had four...and we put the whole four down at NEBRS*". He said that since 1999 he had bred about 40 birds from the original four and had sold a number but did not know how many. The Department referred to the documentation filed by Mr Ray Gibbon pursuant to NEBRS, which showed that Mr Gibbon was not registered in relation to Crimson Bellied Conures.
- 50 In my view, the plaintiff has not satisfied the evidential burden upon him in relation to these birds. He has asserted that he bred 14 birds from an original stock of two that he purchased in approximately 1999 from Mr Ray Gibbon. This evidence was:
- a. inconsistent with the NEBRS records prepared by the plaintiff in his son's name which showed that he obtained two birds during 1998 and two further birds in 1999;
 - b. not supported by Mr Gibbon's NEBRS records which do not record any registration of Crimson Bellied Conures. There is no evidence of enquiry from Mr Gibbon and the vagueness and inconsistency of the plaintiff as to dates

and lack of reference to documentation makes it difficult to conclude that, if any records of these transactions existed, they would have assisted the plaintiff;

- c. not assisted by the answers given by the plaintiff in the interview on 8 August 2007 that he thought he got the birds from Chalmers although he might have bought the four birds from Gibbon;
- d. not clarified by the plaintiff's evidence at the trial.

51 I am satisfied that there is no credible evidence to support the contention that the original birds, from which the plaintiff bred the balance of the 16 Crimson Bellied Conures seized from him, were lawfully imported.

Rose-Crowned Conures

52 Thirty-three of these birds were seized from the plaintiff. The plaintiff said that they included an original stock of four birds, and twenty-nine birds bred from them. The plaintiff said that he purchased four Rose-Crowned Conures from Ray Gibbon in "*approximately 2001*". He said that these birds were acquired after his son had lodged his 2001 NEBRS annual summary schedule and, because the NEBRS scheme was abandoned before it was time for the plaintiff's son to lodge the 2002 schedule, the birds were never registered in NEBRS. The NEBRS records apparently provide no support that Rose-Crowned Conures were ever registered in Mr Gibbon's name.

53 On 11 November 2006, the plaintiff had a series of interviews with departmental officers, including at his property at Lancefield Road, Monegeetta. During an interview commencing at 9.11 am, the plaintiff was asked if he knew Phillip Need. He told the investigators that he had known him for many years because of their connection with exotic birds. The plaintiff said that Phillip Need had smuggled "*a heap*" of Rose-Crowned Conures before NEBRS came in, and that the birds had been passed on to John Kenny.

54 Later on 11 November 2006, at 1.37 pm, the investigators resumed their interview with the plaintiff and asked him about the birds at his property. When the plaintiff was asked about Rose-Crowned Conures, he said that he had had them "*from when Phillip Need give them to me*". The plaintiff said that he had also bought Rose-Crowned Conures from "*R. Gribben*", who had NEBRS number 140 for the birds. The plaintiff said that "*about eight or ten*" had come from Mr Need. Together with other

birds, he had sent the Rose-Crowned Conures to John Kenny which “*he eventually sold to people*”, although some of the birds had bred whilst they were with the plaintiff.

55 When the plaintiff was further interviewed on 8 August 2007, he said that he had bought Rose-Crowned Conures “*off Ray*” and “*bred them up*”. He said he had not obtained the birds “*from anyone but Ray*”. He had bred about forty birds, some of which he had sold.

56 In my view, the plaintiff has not satisfied the evidential burden upon him in relation to these particular birds, for similar reasons I have given earlier in relation to the Crimson-Bellied Conures. There is no credible evidence to support the plaintiff’s contention that the original birds from which he bred other Rose-Crowned Conures had been lawfully imported.

Bronze-Winged Pionus

57 Three of these birds were seized from the plaintiff. The plaintiff said that this included an original stock of two birds and one further bird which had been bred from them. In the affidavit in support of the application, the plaintiff said that he acquired the original birds after 2001 from persons registered in the NEBRS scheme and specifically that he purchased them from Paul Almond of the Oaks, New South Wales, in approximately 2002.

58 In an interview with departmental officers on 11 November 2006, the plaintiff said that he had bought three of the birds – one each from Ron Rodda, Paul Almond and John Strachan. In an interview on 8 August 2007, the plaintiff said that Strachan “*got me one once*” and Almond “*sent me one; I bought one*”. The NEBRS records for Paul Almond do not show that he had been in possession of this species of bird. The plaintiff has failed to satisfy the evidential burden upon him. There is no credible evidence that any of the birds seized had been lawfully imported, or were the progeny of such birds.

Blue-Headed Pionus

59 One bird was seized from the plaintiff. He said that he had purchased the bird from Paul Almond in approximately 2002. In an interview with departmental officials on 8 August 2007, the plaintiff was taken to entries in a NEBRS record book in his son’s name. The plaintiff admitted in evidence that this record book was not an original record but was reconstructed from other written records and recollection as to the

birds he had had at the relevant time. In his cross-examination at the hearing, the plaintiff conceded that the record was not accurate.

60 The record book included "*Blue-Headed Pionus*". On 8 August 2007, when asked about the entry, the plaintiff said that he had "*actually got four of them ... from Chalmers ... two weren't mine*" and that "*one had since died*". The plaintiff also said in his affidavit that he acquired birds from "*Allan Chambers*", although that had been in 1993 and 1998. The NEBRS records from Paul Almond do not show that he had been in possession of the Blue-Headed Pionus. The plaintiff has failed to satisfy the evidential burden upon him. There is no credible evidence that the seized bird or its forbears had been lawfully imported.

Umbrella Cockatoos

61 Eight of these birds were seized from the plaintiff. The plaintiff said that he had purchased four birds and bred four. The plaintiff said that the birds were referred to in his son's NEBRS certificate of registration for the period expiring 6 January 2002. The document refers to the birds by their common name "*White Cockatoo*", with one recorded as having been obtained in the year to 6 January 1998 and a total of seven held in the year to 6 January 2002. The plaintiff said that he purchased two birds from Gordon Dossier of Benalla in approximately 1996 and two more from Coomora Aviaries in Queensland in approximately 2004. There are no NEBRS records from Gordon Dossier showing that he possessed these birds and Coomora Aviaries was not registered under NEBRS.

62 The NEBRS records for Justin O'Donnell, in the return submitted on 12 August 1997, showed that two White Cockatoos were held. In the interview on 8 August 2007 the plaintiff said that he had registered birds in the name of Justin O'Donnell. Generally, in relation to the White Cockatoos, the plaintiff said that he "*had them before NEBRS started*" and he thought he "*bought a couple off Anthony Catt*" and "*could have bought one or two from different dealers in Sydney*". He said that Coomora Aviaries was a business which who advertised in the publication "*Bird Keeper*". I do not consider that the plaintiff has satisfied the evidential burden upon him, or that there is any credible evidence that the seized birds or their forebears had been lawfully imported.

Moluccan Cockatoo

63 Eight of these birds were seized from the plaintiff. He said that he had purchased four birds and bred four. The plaintiff said that the birds were referred to in his son's

NEBRS certificate of registration for the period expiring 6 January 2002. The records included two “*Cacatua Moluccensis*” or “*Salmon-crested Cockatoo*” (other names for the Moluccan Cockatoo). The return for the period to 6 January 1999 shows that in the period, four birds were obtained and two were disposed of. The plaintiff said that of the four original birds, two had been purchased from Rod Rodda of Port Wakefield South Australia in approximately the late 1990s and two from Gordon Dossier in approximately 1998. The NEBRS records apparently show that Ron Rodda possessed the species of bird but did not dispose of any during the scheme’s operation from October 1996 until January 2002. In relation to Gordon Dossier, the records show that Gordon Dossier disposed of two of the birds in 1998. The answers of the plaintiff in the interview on 8 August 2007 do not throw any further light on this matter.

64 The plaintiff has not established the evidential burden of proof upon him in relation to the acquisition of the birds. The NEBRS records of the plaintiff’s son are on the plaintiff’s admission unreliable, although there is some support for the acquisition of birds from Dossier in NEBRS records which show the disposal of two of the birds in 1998. Rod Rodda had birds of the species, but according to his NEBRS records, he did not dispose of any birds between 1996 and 2002, although it is possible that the date of “*the approximate late 1990s*” might have included a date before 1996 when the NEBRS scheme commenced to operate. The evidence in relation to the acquisition from Rodda is limited, however, to mere assertion by the plaintiff and is unsupported by the plaintiff’s son’s NEBRS record.

65 Whilst, in relation to the birds alleged to have been acquired from Dossier, there is some evidence that two of the original birds may have had a recorded provenance, the evidence is insufficient, in my view, so as to require the defendant to assume the burden of excluding that possibility on the balance of probabilities. The plaintiff has failed to satisfy the evidential burden upon him.

Patagonian Parrot

66 Six of these birds were seized from the plaintiff. The plaintiff said that he had purchased two birds and bred four from them. His recollection was that he had purchased two of the birds from Anthony Catt of Beresfield, New South Wales, in approximately 1997. The NEBRS records for the plaintiff’s son, for the period to 6 January 2002, listed seven *Cyanoliseus Patagonus* (common name Burrowing Parakeet), which are other names for the Patagonian Parrot. The return for the year to 6 January 1998 shows that four of the birds were obtained during the previous

year.

67 Mr O'Donnell's NEBRS scheme records include an application for registration dated 12 August 1997 showing that he had three *Cyanoliseus Patagonus* (described with a common name Antipodes Parakeet) in his possession at that time. The plaintiff has, at different times, claimed that he registered his own birds either in his son's name or through Mr O'Donnell. He has also admitted that his son's records are not entirely accurate. The NEBRS records for Mr Catt disclose that he did not possess any birds of the relevant species. The plaintiff's interviews with departmental officers on 7 and 8 August 2007 refer to the purchase of numbers of these birds from Wayne Dempsey and from Mr O'Donnell, as well as the belief of the plaintiff that he may have got birds through Anthony Catt.

68 In the circumstances, I do not consider that the plaintiff has satisfied the evidential burden upon him or that there is any credible evidence that the seized birds had been lawfully imported or were the progeny of such birds.

Hawk-Headed Parrot

69 Five of these birds were seized from the plaintiff. He said that three were original stock and two had been bred from them. He referred to the Certificate of Registration under the NEBRS scheme of birds in the name of his son, for the period expiring 6 January 2002. The Hawk-Headed Parrot is also known as the Red-fan Parrot.

70 The plaintiff said that in approximately 1993, he purchased two Hawk-Headed Parrots from Colin (Ted) McKechnie of Cuddle Creek, South Australia. Mr McKechnie is now deceased. The plaintiff also claimed that, in addition to the birds purchased from Mr McKechnie, he purchased two further birds in approximately 1999 from Mr Mal Ackroyd. The NEBRS records showed that Mr McKechnie did not possess the Hawk-Headed Parrot species, although it is not clear what the position was prior to the introduction of NEBRS in 1996.

71 In the interview between the plaintiff and departmental officers on 8 August 2007, the plaintiff was asked about the Hawk-Headed Parrot or Red Fan Parrot. The annual summary sheet submitted by the plaintiff's son pursuant to the NEBRS scheme in January 2000 disclosed that in the previous year three Red Fan Parrots had been obtained. Although the answers in the record of interview are difficult to follow, it appears that the plaintiff said that the Hawk-Headed Parrots, registered by his son, had been obtained from a Mr Sinkovich and a Mr Armitage through an agent, Mal

Ackroyd. The plaintiff described the transaction with Mr Ackroyd as follows: “*He was dealing at the time, and he rang me up, and he said to me, ‘Do you want to buy two Hawk Heads?’ I bought the Hawk Heads, I paid for them, he gave me a number, and I put it in the book*”. A similar situation had occurred with the birds purchased from Mr Sinkovich. The plaintiff in his answers to questions referred to the vendor as “*Simpson*” and it is not clear whether he is a different person than Sinkovich.

72 During his cross-examination, the plaintiff was taken to answers he had given in his interviews in relation to Mr Ackroyd. He was asked whether Mr Ackroyd had been involved in the illegal importation of exotic birds or their eggs. In his evidence at the hearing, the plaintiff said that he “*had no idea that Mal was involved in smuggling birds*”. In relation to the Hawk-Headed Parrot, the plaintiff relies upon his son’s records, which he concedes are not accurate. His statements to the investigating officers were not consistent with the records or with the claims made in the present application. In the circumstances, I am not satisfied the plaintiff has established the evidential burden upon him or that there is any other credible evidence that the seized birds had been lawfully imported or were the progeny of such birds.

Red-Fronted Macaw

73 Sixteen of these birds were seized from the plaintiff. The plaintiff claimed that he had an original stock of five birds and had bred eleven from them. The plaintiff claimed that he had purchased three of the original birds from Paul Almond in about 1995 and a further two birds from Mick Gixti of Austral in New South Wales in approximately 2002. The plaintiff relied upon the fact that the Certificate of Registration under the NEBRS scheme in his son’s name for the year to 6 January 2002, included a total of four Red-Fronted Macaws.

74 In the annual summary sheet dated 1 January 2001, submitted by the plaintiff’s son under the NEBRS scheme, are included four Red-Fronted Macaws obtained during the previous year. The plaintiff said that he had purchased “*the four birds from Armitage and Gixti through Mal Ackroyd ‘in good faith’*”. There is confusion between the names “*Almond*” and “*Armitage*” and the dates attested to in the plaintiff’s affidavit in support of the application, as 1995 in respect of Mr Almond and 2002 in respect of Mr Gixti, are inconsistent with other details. Mr Gixti’s NEBRS records apparently showed that he disposed of two Red-Fronted Macaws in 2000 but that Paul Almond did not possess the species.

75 In the circumstances, the plaintiff’s claim is little more than an assertion with no

supporting evidence with sufficient consistency or credibility to conclude that the plaintiff has satisfied the evidential burden upon him.

Buffons Macaw

- 76 Five birds were seized from the plaintiff. He said that three were original stock and two had been bred from them. He claimed that two original birds had been purchased from Mr Mal Ackroyd in the mid 1990s. Whilst the NEBRS records apparently showed that Mr Ackroyd did not possess the species, if the alleged date of purchase of the mid 1990s were correct, it may have been before the commencement of the NEBRS scheme. The Buffons Macaw are apparently also known as Great Green Macaws.
- 77 In his interview with the departmental officers on 8 August 2007, the plaintiff said that he bought the birds "*before NEBRS came in*". He had them for 10 to 15 years and then had a conversation with Mr Ackroyd and told him, "*I'm going to put them in my record book, how about I just put two this year and two next year?*" The plaintiff said Mr Ackroyd was "*the only one who's got Buffons*". In the interview the plaintiff was taken to entries relating to the Great Green Macaw which showed, in an entry dated 10 February 2002, that he had purchased two birds. The plaintiff was asked where Mr Ackroyd had got the birds from. He replied, "*Where did he get them from? I – if you – he had 200 birds there when I bought it. How – like why – am I supposed to ask him where he got every bird? ... Well, it's like when you go to see drug dealers laundering money at the casino, does the casino ask them where they got the money from?*" In an interview on 11 November 2006, the plaintiff discussed being with Mr Ackroyd in Bangkok in the mid 1990s and he appears to suggest that Mr Ackroyd was involved in the illegal importation of parrot eggs into Australia.
- 78 The inconsistencies in the plaintiff's accounts of where the Buffons Macaws came from leads me to the conclusion that the plaintiff has not satisfied the evidential burden upon him in relation to those birds.

Hyacinth Macaw

- 79 Six birds were seized from the plaintiff. The plaintiff said that he had an original stock of three birds and had bred an additional three. He referred to the fact that his son's Certificate of Registration for the period expiring 6 January 2002 under the NEBRS scheme referred to one Hyacinth Macaw. He said that additionally one of the birds had been purchased after the NEBRS scheme was abandoned in 2002. In his affidavit in support of the application, the plaintiff said that he had purchased two of the birds from Mr Mal Ackroyd in the mid 1990s. The annual summary sheet,

submitted by the plaintiff's son under the NEBRS scheme and dated 1 January 2001, includes one Hyacinth Macaw as having been obtained during the year to 6 January 2001. The application for registration under the NEBRS scheme, completed by Mr O'Donnell on 12 August 1997, included two Hyacinth Macaws. Two such birds were included in the annual summary sheet for the year to 30 September 2000, one bird in the following year and two birds in the year to 30 September 2002.

80 In his interview on 8 August 2007, the plaintiff said that Mal Ackroyd was "*the only person that had Buffon Macaws and Hyacinth Macaws, right, and everyone in Australia knew he had them ... and I bought the four Hyacinths off him*". When he was asked where Ackroyd had got the Hyacinth Macaws from he said, "*Well, I have no idea*". The plaintiff said that, "*I wanted to put my hand up for the Hyacinths*" and said that he thought that as a consequence departmental officers would "*come out and take them straightaway*". Later in the interview, the plaintiff was asked whether the entries made by Mr O'Donnell in relation to the two Hyacinth Macaws were accurate entries and he replied, "*There are six Hyacinth Macaws, yeah, when we finished we had six Hyacinth Macaws ... I bought five Hyacinth Macaws off Mal Ackroyd ... I bred three, I gave two back to Mal and he lent me one last year*". There is no consistent or credible evidence from which the plaintiff might satisfy the evidential burden upon him.

Severe Macaw

81 Four birds were seized from the plaintiff. He said that three were original stock and one had been bred from them. He said that three of the birds had been purchased from Mal Ackroyd in the mid 1990s and a further bird from Graham Matthews of Baramera, South Australia, in approximately 2004. In the interview with departmental officers on 11 November 2006, the plaintiff said that he bought three of the birds from Mal Ackroyd in 2001 or 2002 and a further bird from Graham Matthews.

82 The plaintiff's son's record book recorded the purchase of three birds from M. Ackroyd on 24 May 2002 and one bird from G. Matthews on 2 March 2004. The plaintiff was asked about the entries in the interview on 8 August 2007. He was asked, "*Are the two entries here in this record book accurate*". He answered, "*Well, I bought four birds, and I've got them, yeah*". He was asked, "*Do you know where those birds came from? Do you know where those people got them from?*" He responded, "*I've got no – no idea*". In the circumstances, I am not satisfied the plaintiff has established the evidential burden upon him.

Illiger's Macaw

83 Eight of these birds were seized from the plaintiff. He said that he had an original stock of two birds and had bred six birds. He suggested in his affidavit that these birds were acquired after 2001 and because of the abandonment of the NEBRS scheme they were not recorded. The plaintiff also stated in his affidavit that four birds had been purchased in approximately 2002 from Mal Ackroyd. The NEBRS scheme records apparently showed that Malcolm Ackroyd possessed one such bird which he did not dispose of.

84 The Illiger's Macaw is also known as the Blue-Winged Macaw. The Certificate of Registration in the plaintiff's son's name for the period expiring 6 January 2002 showed that five Blue-Winged Macaws were held at that time. The Certificate of Registration for the period expiring 6 January 2001 included four Blue-Winged Macaws, one had been obtained that year and four in the year to 6 January 2000. However, when the plaintiff was questioned on 8 August 2007 about the Blue-Headed Macaw, he said that his son recorded the Blue-Headed Macaw as a Blue-Winged Macaw and the records refer to "Blue-Winged Macaw (Blue-Headed Macaw)".

85 In his interview with departmental officers on 11 November 2006, the plaintiff said, "*When I bought my Illiger's, I got them off Armitage, which is registered, 436 was their number*". He said it was in "*about 2001*". On 8 August 2007 the plaintiff was asked about the entry in his records and whether he had obtained the birds from Armitage. He said, "*I don't know if I got them from Mal's or his old man ... we bought them in good faith and we got a number and we put it in the book ... all my birds came from dealers ... they were openly sold on the open market*".

86 These inconsistencies make it difficult to be satisfied that there is any credible evidence by which the plaintiff can satisfy the evidential burden upon him.

Blue-Headed Macaw

87 Five birds were seized from the plaintiff. He claimed an original stock of two from which three had been bred. The plaintiff said that he purchased the birds from Allan Chambers of Ariah Park, New South Wales, in approximately 1993. He said that these birds were commonly "*misidentified by the person making the recording on the NEBRS at the time of registration*". The scientific name of the Blue-Headed Macaw is *Primolius Couloni*.

88 The plaintiff in his interview on 8 August 2007 said that in his son's records the Blue-Headed Macaw was recorded as a Blue-Winged Macaw. The notation in the records

was “*Blue-Winged Macaw (Blue-Headed Macaw)*”. The Blue-Headed Macaws were registered as Blue-Winged Macaws under the NEBRS scheme.

89 The plaintiff’s claim in relation to this bird is little more than an assertion with no supporting evidence and, accordingly, the evidential burden has not been satisfied.

White-Fronted Amazon

90 Seventeen of these birds were seized from the plaintiff. He said that he had purchased an original stock of two birds and had bred the remaining 15. Two birds had been purchased from Malcolm Ackroyd in approximately the early to mid 1990s and a further two birds had been included in the collection purchased from Phillip Need in approximately 1990.

91 In the NEBRS Certificate of Registration of the plaintiff’s son, for the year to 6 January 2002, he is registered as possessing two of the birds. In the application under the NEBRS scheme to renew registration, signed by the plaintiff’s son on a date in December 1998, it is stated that two White-Fronted Amazons were obtained in the year to 6 January 1999, and no further birds of that species were obtained in the following two years.

92 The record book of the plaintiff’s son showed that he had purchased two White-Fronted Amazons from R. Draper, registration number 356. The plaintiff said that in fact he had purchased the birds from Chalmers before NEBRS started. He sold two to Draper and had intended to sell him another pair “*when they got in good feather*”, however “*they didn’t get back in good feather*”. The plaintiff said they “*stayed at my place and when NEBRS came in as far as I was concerned they were supposed to be his birds, I got his number ... I put his number down to put the connection for where the birds were and we told NEBRS we had them and we had two White-Fronted Amazons and there they are*”.

93 The plaintiff appeared to be saying that he had acquired the birds many years earlier, and because he regarded the remaining two birds as belonging to Draper, although they had not been delivered to Draper because of their condition, his son had registered the birds as having been acquired from Draper in 1999.

94 In his interview the plaintiff said that he had bred 20 or 30 birds from “*that original pair*”. These birds were not reflected in the NEBRS records and it would be highly unlikely that the original birds were not used for breeding between 1996 and 2002. The records of the plaintiff’s son are unreliable. The account given by the plaintiff in

relation to these birds receives only minor support from his son's NEBRS records. There is no evidence of the original provenance of the birds apart from the assertions that they were obtained in the 1990s from Mr Need and Mr Ackroyd. The plaintiff has not satisfied the evidential burden upon him.

Cuban Amazon

- 95 Eighteen birds were seized from the plaintiff. He said that four were original stock and 14 had been bred from them. The plaintiff said that he had purchased the birds from Allan Chambers in about 1998. The plaintiff referred to the Certificate of Registration under the NEBRS scheme for the year to 6 January 2002 in his son's name which showed a holding of Cuban Parrots (*Amazona Leucocephala*).
- 96 In the plaintiff's son's application to renew registration under the NEBRS scheme, dated 16 January 1998, two Cuban parrots are recorded as having been obtained with a total of two birds on hand. The following year a further two birds are recorded as having been obtained with a total of four on hand. In the annual summary sheet for the year to 6 January 2001, it shows a previous total of eight Cuban Parrots and an additional two obtained during the year.
- 97 Mr O'Donnell, in his NEBRS application, dated 12 August 1997, included three Cuban Parrots. A further bird was obtained the following year, although a total of four birds were disposed of during that year. In the following year, to 30 September 1999, eight further Cuban Parrots were obtained, six were disposed of and two remained on hand. The following year no Cuban Parrots were held.
- 98 In the interview, dated 8 August 2007, the plaintiff said that he had bought the "Cubans" from Allan Chalmers. Later he was asked where his Cubans came from and he replied, "*I bought them back in the 90s off Chalmers. I bought about – I think I originally [bought] six birds off him somewhere and I ended up putting them on the books and put my hand up for them. I was very nervous when I put my hand up, I thought they'd come and take them*". The plaintiff said that he registered them under the name of J. O'Donnell first, "*to see if they'd come and take them and then I shifted them back to my place*". The plaintiff said that he had bred about 20 or 30 Cuban Amazons.
- 99 The plaintiff's evidence appears to confirm that he had little idea, and considerable concern, about the original provenance of the birds. He used the NEBRS registrations

of Mr O'Donnell and his son to try and legitimise the birds, however there is little evidence to satisfy the evidential burden upon the plaintiff.

Yellow-Naped Amazon

100 Five birds were seized from the plaintiff. From an original two birds, an additional three birds had been bred and retained. The plaintiff said that in about 1990 he purchased four Yellow-Naped Amazons as part of the complete collection of birds from Phillip Need. The plaintiff also referred to his son's Certificate of Registration for the year to 6 January 2002 which included three Yellow-Naped Parrots. The annual summary sheet, included in the plaintiff's son's NEBRS renewal application, dated 1 January 2001, includes three Yellow-Naped Amazons. Mr O'Donnell's summary sheet, as part of his NEBRS renewal application, dated 29 September 1999, included two Yellow-Naped Parrots obtained that year. The following year the two birds were disposed of.

101 In his interview, dated 8 August 2007, the plaintiff said that Yellow-Naped Amazons were amongst the birds purchased from Phillip Need in about 1989 or 1990. The plaintiff said that the original four Yellow-Naped Amazons came from Phillip Need. He said that he had "*had other Yellow-Naped Amazons. Whether they were, or not registered at the time I'm unsure*". He said that he had bred, "*not many, but I've bred a couple*".

102 There are inconsistencies between the records kept by the plaintiff's son and Mr O'Donnell with the plaintiff's account that the original birds came from Mr Need and that he had only "*bred a couple*". There is no evidence at all about the provenance of the birds the plaintiff says were acquired from Mr Need. There is little explanation as to how the original birds relate to the birds recorded by the plaintiff's son and Mr O'Donnell. In the circumstances, the plaintiff has not satisfied the evidential burden upon him.

Red-Browed Amazon

103 Three birds were seized from the plaintiff, two original birds and one bred from them. The plaintiff said that he purchased the birds from Anthony Catt in about 1996. In the interview on 8 August 2007, the plaintiff said that these birds had been registered by his son as Red-Crowned Amazons. The scientific name of the Red-Browed Amazon is *Amazona Rhodocorytha*. The scientific name for the Red-Crowned Parrot is *Amazona Viridigenalis*. This latter bird is also commonly known as the Green-Cheeked Amazon.

- 104 In the Certificate of Registration under the NEBRS scheme for the plaintiff's son for the year to 6 January 2002, four Red-Crowned Parrots were included. In the NEBRS renewal application lodged by the plaintiff's son on 5 January 2000 he stated that two Red-Crowned Parrots had been obtained during the year and a further two birds were included in the renewal application for the following year. These represented the four birds shown in the registration certificate.
- 105 There is no evidence in relation to the Red-Browed Amazons if they are, indeed, the Red-Crowned or Green-Cheeked Amazons. No attempt was made to register them under the NEBRS scheme until 2000, although the original birds were apparently purchased in 1996. The defendant has conceded that the plaintiff is entitled to keep the three Green-Cheeked Amazons seized from him, apparently because the plaintiff's claim that he purchased birds from M. Gixti in about 2002 received some confirmation from Mr Gixti's NEBRS records, which showed that he disposed of two birds in October 2000. The Green-Cheeked Amazons are not an issue in the proceeding any longer. In relation to the Red-Browed Amazons, there is no evidence to satisfy the evidential burden upon the plaintiff.

Tucuman's Amazon

- 106 Six birds were seized from the plaintiff. The plaintiff said that he acquired three birds from Phillip Need in about 1990 and two birds from Malcolm Ackroyd in the mid 1990s. The plaintiff said that four of the six birds seized had been bred from an original pair.
- 107 The plaintiff, in his interview on 8 August 2007, said that he had entered the Tucuman's Amazons in the record book of his son, wrongly as Orange-Winged Amazons. The scientific name for Tucuman's Amazon is *Amazona Tucumana*. The scientific name for the Orange-Winged Amazon is *Amazona Amazonica*. The plaintiff said that, "*I didn't identify the birds properly*". He said, "*I bought the Tucuman's Amazon and I – I am not sure if I had two or four birds originally, I bred a couple, some have died and I got some off – I think – and I am not 100 per cent sure whether I got them off Phillip Mead or Chalmers, yeah, but I can't tell you exactly*".
- 108 The Certificate of Registration under NEBRS for the plaintiff's son for the year to 6 January 2002 did not include any Tucuman's Amazons but did include five Orange-Winged Parrots (*Amazona Amazonica*). The annual summary sheet included with the NEBRS renewal application, dated 5 January 2000, included two Orange-Winged Amazons. Three further birds were included the following year making a total of five

birds.

109 In the circumstances, it is difficult to give the plaintiff's explanation much credibility. The birds he says were acquired in 1990 were not recorded as having been registered under NEBRS, or if wrongly recorded as Orange-Winged Parrots, they were not so recorded until the renewal application in January 2000. The plaintiff has not satisfied the evidential burden upon him.

Conclusion

110 In the circumstances, the plaintiff's application will be dismissed. I find that each of the birds seized was used or otherwise involved in the commission of the offence of being in possession of illegally imported specimens, contrary to s.303GN of the Act and that each of the birds must be forfeited to the Commonwealth. I will hear submissions from the parties as to whether any further orders are appropriate.

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Certificate

I certify that these 30 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 27 November 2009.

Dated: 27 November 2009

Hannah Christensen
Associate to His Honour Judge Anderson