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## WHY DOES ADMINISTRATIVE LAW MATTER?

Any area of the law may be introduced by reference to a variety of alternative perspectives (such as theoretical, historical, and doctrinal). The following readings illuminate some of the themes and ideas presented in Chapter 1 of *Principles of Administrative Law (PAL)*, from theoretical, historical and doctrinal points of view. M Groves (ed), *Modern Administrative Law* (Melbourne: Cambridge University Press, 2014) contains a number of helpful essays on various aspects of the subject.

### LIST OF READINGS

- M Taggart, 'The Nature and Function of the State' in P Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 101–118
- P Cane, 'The Making of Australian Administrative Law' in P Cane (ed), *Centenary Essays for the High Court of Australia* (Sydney: LexisNexis Butterworths Australia, 2004)
- S Gageler, 'The Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92
- G Brennan, 'Parliament, the Executive and the Courts: Roles and Immunities' (1997) 9 *Bond Law Review* 136
- J Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in MW Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006) 115–38

# 2

## THE SCOPE OF JUDICIAL REVIEW

The readings in this chapter each concern questions connected to the issue of whether particular decisions or decision-makers can be subject to the courts' judicial review jurisdiction. That is, the questions raised relate to the 'scope' or 'reach' of judicial review. These questions cannot be answered without first grasping what it is that judges do when exercising their judicial review function. The first reading, from *Attorney-General (NSW) v Quin*, goes to the heart of judicial review's function as it is conceived within the Australian constitutional framework. In that case, Brennan J made a series of observations about the appropriate scope and function of judicial review that have reached seminal status in Australian administrative law. The issues traversed by Brennan J—in particular his insistence that 'the merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone' [(1990) 170 CLR 1, 36]—bear directly upon the value judgments involved in asking questions about the proper scope of judicial review.

As explained in *Principles of Administrative Law (PAL)* 2.2, judicial review is different from a typical appeal insofar as judges cannot, in general, substitute their own decision for that of the original decision-maker. Further, as the quote from *Quin* emphasises, judges are said to be limited to questions of 'legality' and as such are not entitled to consider the 'merits' of decisions. Although these ideas can only be fully appreciated and evaluated after looking at the more particular grounds on which administrative decisions can be judicially reviewed, the extract from *Quin* helps to put the larger picture in place. Another early and important Australian case, *Green v Daniels* (extracted in Chapter 4), is also especially helpful in illustrating the application of these basic ideas.

The focus of the next three extracts, *Australian Broadcasting Tribunal v Bond*, *Griffith University v Tang* and *NEAT Domestic Trading*, is on the scope of judicial review under statutory schemes of review, the most important being the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* (Cth). In terms of general impact on the application of the *ADJR Act*, perhaps the most significant case is *Bond*. The foundational interpretive exercise undertaken in that case has in large part set the boundaries of review under the *ADJR Act* through the construction given to the threshold terms 'decision' and 'conduct' in sections 5 and 6 respectively of that Act (for discussion, see *PAL* 2.5.1.1).

The cases of *Tang* and *NEAT* have generated much discussion and controversy, partly because, although directly addressing the threshold criteria for accessing judicial review

under the *ADJR Act*, they may also have implications for the scope of judicial review under the ‘constitutional’ and ‘common law’ sources of jurisdictions for judicial review (see *PAL* 2.4 and 2.6.1). Part of the interest in *Tang* and *NEAT* is that they provide interesting examples of judges’ thinking about the reach of judicial review in the context of decisions or decision-makers which are arguably not appropriately subjected to administrative (that is, ‘public’) law norms, but which are nonetheless implicated, often centrally, in governmental activities. As Kirby J put the point in his dissenting judgment in *NEAT* [(2003) 216 CLR 277, 300], the ‘question of principle’ presented in such cases is whether the decisions and other activities of private entities given functions under legislation are accountable according to the norms and values of public law, or are ‘cut adrift from such mechanisms of accountability’.

The final extract, presented under the heading ‘Judicial Review and the Public/Private Distinction’, is the leading judgment in the famous (for some, notorious) English *Datafin* case. This case demonstrates the willingness of English courts to consider a ‘functional’ approach to carving out administrative law’s territory, namely, a focus on whether the decision-maker exercises a ‘public’ power or function. The question of whether a function is public thus determines whether it should be subject to the norms of administrative law. *Datafin* is thought by many to symbolise this so-called ‘functional turn’ in English law, even if it leaves many questions unanswered (see further, *PAL* 2.6.1). But, as explained in *PAL* 2.6.1, no consensus has been reached as to whether the *Datafin* principle represents the common law of Australia. The High Court’s original (and constitutionally entrenched) jurisdiction under s 75(v) to engage in judicial review is limited to matters in which particular named remedies are sought against an ‘officer of the Commonwealth’: the ‘institutional’ flavour of this language might itself be thought to limit the extent to which the reach of judicial review in Australia will be conceived in functional terms. Still, the approach taken in *Datafin* is frequently raised by Australian courts when faced with the question of whether judicial review jurisdiction should extend to the supervision of non-statutory or otherwise non-state entities whose decisions affect a large section of the population or domain of regulatory activity. Given changes in the administrative state that are reflected in such practices as contracting-out of public service delivery to private actors, or the conduct of other kinds of governmental activity through partnerships between public and private actors, we can only expect this question to become more pressing in the future. Above all, therefore, the extract from *Datafin* is offered as food for thought.

## THE MERITS/LEGALITY DISTINCTION

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### ***Attorney-General (NSW) v Quin***

(1990) 170 CLR 1

High Court of Australia

This extract reproduces statements by Brennan J on the merits/legality distinction, and the scope of judicial review more generally, that have attained seminal status in Australian administrative law.

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Attorney-General (NSW) v Quin *continued*

### READING QUESTIONS

- 1 How does Brennan J understand the duty of the courts when exercising their supervisory jurisdiction over administrative action?
- 2 Why does Brennan J regard limitation of the scope of judicial review to the 'legality' and not 'merits' of administrative action to be so important to the legitimacy of the courts?
- 3 How important is the authority of Parliament to Brennan J's conception of the proper scope of judicial review?
- 4 Note that at one point in the extract Brennan J defends the doctrine of '*Wednesbury* unreasonableness' as remaining appropriately within the legality/merits distinction. After studying the 'norm' or 'ground' of judicial review now referred to as 'legal unreasonableness', you might reflect upon the following question: does Brennan J's defence of 'unreasonableness' as properly within the preserve of 'legality' review still hold?

*[Following concerns about fitness for office, Mr Quin and four other magistrates were not appointed to a new magistrates court system established under the Local Courts Act 1982 (NSW). In Macrae v Attorney-General (NSW) (1987) 9 NSWLR 268 the magistrates succeeded before the NSW Court of Appeal in arguing that they had been denied procedural fairness in the processes leading up to their non-appointment under the new scheme. Soon after that decision, the Attorney-General announced a policy of appointing magistrates by merit selection, as contrasted with an earlier policy that existing magistrates be reappointed unless considered unfit for judicial office. Mr Quin was not reappointed under the new policy, and successfully sought a declaration from the NSW Court of Appeal that his reappointment be determined in accordance with the earlier policy. The Attorney-General appealed to the High Court, who by majority found allowed the appeal and set aside the declaration.]*

*The following extract omits discussion of another issue of importance to the case, namely, the operation of the doctrine of 'legitimate expectations' in relation to the duty to afford procedural fairness in the making of administrative decisions. The rise and demise of 'legitimate expectations' is traced in Chapter 4 of this volume [see especially Kioa v West, Minister for Immigration and Border Protection v WZARH, and Plaintiff S10].*

**BRENNAN J: [35]** ... The question can be put quite starkly: when an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the courts to protect that individual's legitimate expectations against adverse exercises of the power? I have no doubt that the answer is: none. Judicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power. If it were otherwise, the courts would be asserting a jurisdiction, in protection of individual interests, to override the law by which a power to affect those interests is conferred on the repository.

Judicial review has undoubtedly been invoked, and invoked beneficially, to set aside administrative acts and decisions which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise unlawful. To say that the doctrine

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**Attorney-General (NSW) v Quin** *continued*

of ultra vires defines the scope of judicial review is too restrictive, although Mr Beatson has pointed out that:

Ultra vires is ... both a powerful constitutional justification for judicial control and a useful organizing principle for the creation of a coherent subject matter from what has sometimes appeared to be a 'wilderness of single instances'. ('The Scope of Judicial Review for Error of Law' (1984) 4 *Oxford Journal of Legal Studies*, 22.)

The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. In *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338, at p 380, Gibbs J. said that the duty of the courts extends to pronouncing on the validity of executive action when challenged on the ground that it exceeds constitutional power, but the duty extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law. The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall C.J. in *Marbury v. Madison* (1803) 1 Cranch 137, at p 177 (5 US 87, at p 111):

It is, emphatically, the province and duty of the judicial department to say what the law is.

The duty and jurisdiction of the court to review administrative [36] action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.

There is one limitation, '*Wednesbury* unreasonableness' (the nomenclature comes from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 KB 223), which may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, *Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: *Nottinghamshire County Council v. Secretary of State for the Environment* (1986) AC 240, at p 249. Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no

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 Attorney-General (NSW) v Quin *continued*

reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined. As Professor Wade explains (*Administrative Law*, 6th ed (1988), p 407) in a passage cited with approval in *Reg. v. Boundary Commission; Ex parte Foot* (1983) QB 600, at p 626:

The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard [37] which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.

If it be right to say that the court's jurisdiction in judicial review goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of power, the next question immediately arises: what is the law? And that question, of course, must be answered by the court itself. In giving its answer, the court needs to remember that the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented as well as interests which are represented must often be considered. Moreover, if the courts were permitted to review the merits of administrative action whenever interested parties were prepared to risk the costs of litigation, the exercise of administrative power might be skewed in favour of the rich, the powerful, or the simply litigious.

Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review, especially to provide some check on the Executive Government which nowadays exercises enormous powers beyond the capacity of the Parliament to supervise effectively. Such advocacy is misplaced. If the courts were to assume a jurisdiction to review administrative acts or decisions which are 'unfair' in the opinion of the court—not the product of procedural unfairness, but unfair on the merits—the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ: see *Secretary of State for Education and Science v. Tameside Metropolitan B.C.* (1977) AC 1014, at p 1064, and *Council of Civil Service Unions v. Minister for the Civil Service* (1985) AC 374, at pp 414-415. The absence of adequate machinery, such as an Administrative

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*Attorney-General (NSW) v Quin continued*

Appeals Tribunal, to review the merits of administrative acts and decisions may be lamented in the jurisdictions where the legislature has failed to provide it, but the default cannot be made good by expanding the function of the courts. The courts—above all other institutions of government—have a duty to uphold and apply the law which [38] recognizes the autonomy of the three branches of government within their respective spheres of competence and which recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government.

If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk. The risk must be acknowledged for a reason which Frankfurter J. stated in *Trop v. Dulles* (1958) 356 US 86, at p 119:

All power is, in Madison's phrase, 'of an encroaching nature.' ... Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint.

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## CONSTITUTIONAL REVIEW

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### ***Plaintiff M68/2015 v Minister for Immigration and Border Protection***

[2016] HCA 1

High Court of Australia

This case involved a constitutional challenge to the legality of arrangements between the Australian government and the state of Nauru for the offshore processing of asylum seekers. As part of explaining the nature and scope of executive government under the *Constitution*, Gageler J discussed the relationship between the Executive and the Judiciary reflected in sections 75(iii) and 75(v) of the *Constitution*.

#### READING QUESTIONS

- 1 Do sections 75(iii) and 75(v) of the *Constitution* serve similar purposes?
- 2 What motivated the inclusion of section 75(v) in the *Constitution*? How does Gageler J understand the role given to the High Court under s 75(v)?

[After explaining the relationship between Executive and Legislative power in Chapters I and II of the *Constitution*, Gageler J continued:]

Plaintiff M68/2015 v Minister for Immigration and Border Protection *continued*

**GAGELER J:** [123] The Executive Government having been so subordinated to the Parliament, the relationship between the Executive Government of the Commonwealth and the federal Judicature was then spelt out in Ch III of the Constitution. Section 75(iii) entrenched original jurisdiction in the High Court in all matters ‘in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’. Section 75(v) went on in addition to entrench original jurisdiction in the High Court in all matters ‘in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’.

[124] The purpose of s 75(iii), as Dixon J observed, ‘was to ensure that the political organization called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction in which it could be impleaded and which it could invoke’ [*Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363]. The term ‘Commonwealth’, Dixon J pointed out, while ‘[i]t is perhaps strictly correct to say that it means the Crown in right of the Commonwealth’, has in s 75(iii) the meaning of ‘the central Government of the country’ understood in accordance with ‘the conceptions of ordinary life’ [(1948) 76 CLR 1 at 362–3. See also FW Maitland, ‘The Crown as Corporation’ (1901) 17 *Law Quarterly Review* 131 at 140, 143]. The term was used in s 75(iii) to encompass the totality of what is established by Ch II as the Executive Government of the Commonwealth, and the jurisdiction conferred by s 75(iii) was expressed so as to cover the enforcement of actionable rights and liabilities of officers and agencies in their official and governmental capacity, when in substance they formed part of or represented the Commonwealth [(1948) 76 CLR 1 at 367].

[125] The inclusion of s 75(iii) in the Constitution involved a rejection of any notion, which might otherwise have been drawn from the common law principle then still prevailing in England that the monarch could ‘do no wrong’, that the Executive Government of the Commonwealth was to enjoy immunity from suit for its own actions or for the actions of its officers or agents [*Werrin v The Commonwealth* (1938) 59 CLR 150 at 167–8; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 367; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 549–50]. The inclusion of s 75(iii) had the consequence of exposing the Commonwealth from its inception to common law liability, in contract and in tort, for its own actions and for actions of officers and agents of the Executive Government acting within the scope of their de facto authority [*James v The Commonwealth* (1939) 62 CLR 339 at 359–60; Cf *Little v The Commonwealth* (1947) 75 CLR 94 at 114]. Any exclusion of actions of the Executive Government from common law liability was to result not from the existence of a generalised immunity from jurisdiction but through the operation of such substantive law as might be enacted by the Parliament under s 51(xxxix) [*Werrin v The Commonwealth* (1938) 59 CLR 150 at 165. Eg *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155] or under another applicable head of Commonwealth legislative power.

[126] The purpose of s 75(v), as Dixon J put it, was ‘to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth

Plaintiff M68/2015 v Minister for Immigration and Border Protection *continued*

from exceeding Federal power' [*Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363]. It was, in particular, to safeguard against the possibility of s 75(iii) being read down by reference to United States case law so as to exclude a matter in which a writ of mandamus was sought against an officer of the Executive Government [*Ah Yick v Lehmert* (1905) 2 CLR 593 at 608–9. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92]. The purpose was to supplement s 75(iii) so as to ensure that any officer of the Commonwealth acted, and acted only, within the scope of the authority conferred on that officer by the Constitution or by legislation. Its effect was also to ensure that an officer of the Commonwealth could be restrained by injunction from acting inconsistently with any applicable legal constraint even when acting within the scope of the authority conferred on that officer by the Constitution or by legislation [*Church of Scientology v Woodward* (1982) 154 CLR 25 at 57, 64–5].

[127] The conception of an officer of the Commonwealth was held at an early stage not to be confined to a person holding executive office under Ch II of the Constitution: so as to encompass judicial and non-judicial officers of courts established by the Parliament under Ch III of the Constitution [*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Group Ltd* (1914) 18 CLR 54] as well as holders of independent statutory offices established in the exercise of legislative power under Ch I of the Constitution [*Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 127–8]. Section 75(v) is nevertheless at its apogee in its application to Ministers and other officers of the Executive Government [*Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 380].

[128] The overall constitutional context for any consideration of the nature of Commonwealth executive power is therefore that, although stated in s 61 of the Constitution to be vested in the monarch and to be exercisable by the Governor-General, the executive power of the Commonwealth is and was always to be permitted to be exercised at a functional level by Ministers and by other officers of the Executive Government acting in their official capacities or through agents. It is and was always to involve broad powers of administration, including in relation to the delivery of government services. Its exercise by the Executive Government and by officers and agents of the Executive Government is and was always to be susceptible of control by Commonwealth statute. And its exercise is and was always to be capable of exposing the Commonwealth to common law liability determined in the exercise of jurisdiction under s 75(iii) and of exposing officers of the Executive Government to writs issued and orders made in the exercise of jurisdiction under s 75(v). In 'the last resort' it is necessarily for a court to determine whether a given act is within constitutional limits [*Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 380, quoting *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533 at 566].

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## THE BOUNDARIES OF THE *ADJR* ACT

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### ***Australian Broadcasting Tribunal v Bond***

(1990) 170 CLR 321

High Court of Australia

This leading case on the interpretation of the *ADJR Act* saw the High Court give meaning to the terms ‘decision’ and ‘conduct engaged in for the purpose of making a decision’ in sections 5 and 6 respectively. The case came to the High Court on appeal from the Full Court of the Federal Court of Australia.

#### READING QUESTIONS

- 1 How does Mason CJ reach the conclusion that the meaning of the term ‘decision’ should ordinarily be regarded as signalling a decision which is ‘final and operative’?
- 2 How does Mason CJ understand the idea of a decision being ‘made under an enactment’?
- 3 Are you persuaded by his Honour’s treatment of the ‘policy considerations’ relevant to the proper construction of the term ‘decision’?
- 4 What is ‘conduct’ within the meaning of section 6 of the *ADJR Act*?

*[The Broadcasting Act 1942 (Cth) empowered the Australian Broadcasting Tribunal to conduct inquiries into whether a commercial broadcasting licensee was a ‘fit and proper person’ to continue to hold a broadcasting licence. The Tribunal commenced such an inquiry into licensee companies controlled by Mr Bond. Among the reasons for the inquiry was an incident in which Mr Bond had made a payment of \$400,000 in settlement of a defamation action brought by the then premier of Queensland, Sir Joh Bjelke-Petersen, against a television station that Mr Bond had acquired, and which he described in a television interview as necessary in order to ‘do business in Queensland’.*

*During the course of its inquiry the Tribunal published a statement called ‘Decision on Facts’ which recorded its conclusion that the allegations against Mr Bond had been proved, and that it did not consider Mr Bond or the companies he controlled to be ‘fit and proper persons’ to hold broadcasting licences under the Act. The Tribunal also indicated that, in light of these findings, it would consider whether to take action against the licensees. At this point, Mr Bond and his companies commenced proceedings in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (*ADJR Act*) to challenge the findings. Mr Bond alleged that the tribunal’s ‘Decision on Facts’ contained 11 ‘decisions’ and seven instances of ‘conduct’ that contained legal errors amenable to review under sections 5 and 6 respectively of the *ADJR Act*.*

*As stated by Mason CJ, Mr Bond’s challenge raised fundamental question ‘as to the limits of the jurisdiction of the Federal Court under the *ADJR Act* to review conclusions, including findings of fact, which constitute elements in the chain of reasoning leading to the ultimate administrative decision or order which is the subject of the application for review’ [at 328]. On the question of the proper construction to be given to both terms, Mason CJ said the following:]*

Australian Broadcasting Tribunal v Bond *continued*

**MASON CJ: [334]**

**Ambit of Judicial Review under the *ADJR Act***

The *ADJR Act* provides, inter alia, for judicial review of 'a decision to which this Act applies' (s.5) and 'conduct (engaged in) for the purpose of making a decision to which this Act applies' (s.6). The expression 'decision to which this Act applies' is defined in s.3(1) to mean 'a decision of an administrative character made ... (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1'. There is no definition of the central term 'decision'.

Section 3(5) of the *ADJR Act* provides that 'conduct engaged in for the purpose of making a decision' includes 'the doing of any act or thing preparatory to the making of the decision, including the taking of evidence or the holding of an inquiry or investigation'. Further, s.3(2) states that a reference to the making of a decision includes a reference to:

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing.

**[335]** It is not disputed in the present case that the Tribunal's decision that the respective licensees were no longer fit and proper persons to hold their licences was a 'decision of an administrative character made ... under an enactment', namely, s.88(2)(b)(i) of the Act. However, the remaining 'decisions' of the Tribunal are the subject of contention. These include the 'decision' that Mr Bond would not be found to be a fit and proper person to hold a licence.

**(1) Meaning of 'Decision'**

The definition in s.3(1) does not elucidate significantly the meaning of the word 'decision' as it is used in the *ADJR Act*. It is clear that a 'decision to which this Act applies' must be a decision of an administrative character, that it may be made in the exercise of a discretion, and that it must be made under an enactment. But these characteristics provide little guidance as to the meaning of the word 'decision' upon which the definition in s.3(1) is based.

The word has a variety of potential meanings. As Deane J. noted in *Director-General of Social Services v Chaney* [(1980) 47 FLR 80 at 100], in the context of judicial or administrative proceedings it ordinarily refers to an announced or published ruling or adjudication. In such a context, the word may signify a determination of any question of substance or procedure or, more narrowly, a determination effectively resolving an actual substantive issue. Even if it has that more limited meaning, the word can refer to a determination whether final or intermediate or, more narrowly again, a determination which effectively disposes of the matter in hand: see *Chaney*, at 100.

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**Australian Broadcasting Tribunal v Bond** *continued*

In the context of judicial proceedings, the Privy Council has accepted that ‘the natural, obvious and prima-facie meaning of the word “decision” is decision of the suit by the Court’: see *Rajah Tasadduq Rasul Khan v. Manik Chand* (1902) LR 30 Ind App 35, at p 39; *The Commonwealth v. Bank of N.S.W.* (1949) 79 CLR 497, at p 625; (1950) AC 235, at p 294. But here the relevant context is not that of a decision reached in curial or judicial proceedings, so that the meaning must be determined by reference to the text, scope and purpose of the statute itself.

The fact that the *ADJR Act* is a remedial statute providing for a review of administrative action rather than some form of appeal from final decisions disposing of issues between parties indicates that no narrow view should be taken of the word [336] ‘decision’. In this respect it is significant that s.5 does not speak of ‘final decision’. It is also significant that the jurisdiction of the Federal Court to grant declaratory relief is not confined to granting relief in respect of ultimate decisions. The jurisdiction extends to questions in issue in pending proceedings. The existence of this jurisdiction, which antedated the *ADJR Act*, suggests that the concept of a reviewable decision is not limited to a final decision disposing of the controversy between the parties.

Nonetheless other considerations point to the word having a relatively limited field of operation. First, the reference in the definition in s.3(1) to ‘a decision of an administrative character made . . . under an enactment’ indicates that a reviewable decision is a decision which a statute requires or authorizes rather than merely a step taken in the course of reasoning on the way to the making of the ultimate decision. Secondly, the examples of decision listed in the extended definition contained in s.3(2) are also indicative of a decision having the character or quality of finality, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute or, in the words of Deane J., ‘a determination effectively resolving an actual substantive issue’. Thirdly, s.3(3), in extending the concept of ‘decision’ to include ‘the making of a report or recommendation before a decision is made in the exercise of a power’, to that extent qualifies the characteristic of finality. Such a provision would have been unnecessary had the Parliament intended that ‘decision’ comprehend every decision, or every substantive decision, made in the course of reaching a conclusive determination. Finally, s.3(5) suggests that acts done preparatory to the making of a ‘decision’ are not to be regarded as constituting ‘decisions’ for, if they were, there would be little, if any, point in providing for judicial review of ‘conduct’ as well as of a ‘decision’.

The relevant policy considerations are competing. On the one hand, the purposes of the *ADJR Act* are to allow persons aggrieved by the administrative decision-making processes of government a convenient and effective means of redress and to enhance those processes. On the other hand, in so far as the ambit of the concept of ‘decision’ is extended, there is a greater risk that the efficient administration of government will be impaired. Although Bowen C.J. and Lockhart J. appeared to emphasize the first of these considerations in *Australian National University v. Burns* [(1982) 64 FLR 166, at p 172], [337] there comes a point when the second must prevail, as their Honours implicitly acknowledged. To interpret ‘decision’ in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process.

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 Australian Broadcasting Tribunal v Bond *continued*

The policy arguments do not, in my opinion, call for an answer different from that dictated by the textual and contextual considerations. That answer is that a reviewable ‘decision’ is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.

Another essential quality of a reviewable decision is that it be a substantive determination. With the exception of s.3(2)(g), the instances of decision mentioned in s.3(2) are all substantive in character. Moreover, the provisions in sub-ss.(1), (2), (3) and (5) of s.3 point to a substantive determination. In this context the reference in s.3(2)(g) to ‘doing or refusing to do *any other act or thing*’ (emphasis added) should be read as referring to the exercise or refusal to exercise a substantive power. I do not perceive in s.16(1)(b) or in par.(e) of Sched.1 or par.(a) of Sched.2 to the *ADJR Act* any contrary implication. These exclusions from the *ADJR Act* or from s.13 appear to have been introduced for more abundant caution and it would be unwise to take too much from them.

If ‘decision’ were to embrace procedural determinations, then there would be little scope for review of ‘conduct’, a concept which appears to be essentially procedural in character. To take an example, the refusal by a decision-maker of an application for an adjournment in the course of an administrative hearing would not constitute a reviewable decision, being a procedural matter not resolving a substantive issue and lacking the quality of finality. Then it is the ‘conduct’ of the hearing in refusing an adjournment that is the subject of review. To treat the refusal of the adjournment [338] in this way is more consistent with the concept of ‘conduct’ than with the notion of ‘decision under an enactment’.

The interpretation of ‘decision’ which I favour is not as broad as that preferred by the Federal Court in *Lamb v. Moss* [(1983) 76 FLR 296]. There the Full Court of the Federal Court (Bowen C.J., Sheppard and Fitzgerald JJ.), after reviewing the authorities, which the Court said revealed ‘some inconsistency’, stated (at p 318):

In our opinion, there is no limitation, implied or otherwise, which restricts the class of decision which may be reviewed to decisions which finally determine rights or obligations or which may be said to have an ultimate and operative effect.

My view is more in accord with the tentative opinion expressed earlier by Ellicott J. in *Ross v. Costigan* [(1982) 59 FLR 184] when he said (at p 197) that ‘it may well be that the word “decision” means an ultimate or operative determination not a mere expression of opinion or a statement which can of itself have no effect on a person’. However, I would not wish for myself to place emphasis on the words ‘of itself’ in this statement. To say that a reviewable decision is an ultimate or operative determination does not mean that antecedent

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*Australian Broadcasting Tribunal v Bond continued*

conclusions or findings which contribute to the ultimate or operative decision are beyond reach. Review of an ultimate or operative decision on permissible grounds will expose for consideration the reasons which are given for the making of the decision and the processes by which it is made.

Least it should be thought otherwise, I should say that, to the extent in *Lamb v. Moss* that the magistrate decided that a prima facie case had been established and that he would proceed with the committal proceedings, a reviewable decision had been made. That decision was one for which s.41(2) of the *Justices Act 1902* (NSW) specifically provided. The decision resolved an important substantive issue to be determined before the ultimate decision could be made under s.41(6) of that Act whether to commit the defendant for trial or discharge him from custody.

I agree with the Full Court in *Lamb v. Moss* (at p 312) in thinking that the court has a discretion whether to grant or refuse relief by way of judicial review under the *ADJR Act*. The references in s.16 of the *ADJR Act* to 'in its discretion' are eloquent on that score. Further, I agree that only in most exceptional circumstances would it be appropriate to grant relief in respect of a decision given by a [339] magistrate in committal proceedings: see at p 326. The delays consequent upon fragmentation of the criminal process are so disadvantageous that they should be avoided unless the grant of relief by way of judicial review can clearly be seen to produce a discernible benefit.

## (2) Was There a Reviewable Decision?

### (a) The Findings that Mr Bond would not be Found to be a Fit and Proper Person and that the Licensees were no longer Fit and Proper Persons

It follows from my interpretation of the word 'decision' that the Federal Court had jurisdiction under s.3(1) of the *ADJR Act* to review the Tribunal's finding that the licensees were no longer fit and proper persons to hold their broadcasting licences under the Act. Although that decision was an intermediate determination made on the way to deciding whether to revoke or suspend the licences or to impose conditions on them, it was a decision on a matter of substance for which the statute provided as an essential preliminary to the making of the ultimate decision.

On the other hand, the Tribunal's conclusion that Mr Bond would not be found to be a fit and proper person to hold a licence was not a determination for which the Act provided and was no more than a step in the Tribunal's reasoning on the way to the finding that the licensees were no longer fit and proper persons to hold their licences. True it was an essential step in the reasoning by which the Tribunal chose to support its determination concerning the licensees, but this circumstance is not enough to invest the conclusion with the characteristics which would qualify it as a reviewable decision. I would reject the notion accepted in the Federal Court that the finding adverse to Mr Bond was a 'decision ... not authorized by' the Act within the meaning of s.5(1)(d). For the reasons already given, the finding was not relevantly a 'decision'.

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 Australian Broadcasting Tribunal v Bond *continued*
**(b) The Consequences of Concluding that the Finding Adverse to the Licensees was a Reviewable Decision**

My conclusion that the decision that the licensees were no longer fit and proper persons is a reviewable decision makes it unnecessary to decide whether all the other decisions and the conduct challenged by the respondents are reviewable. This is because the respondents are entitled to challenge that decision for error of law: see s.5(1)(f). [340] On this footing, the respondents were entitled to seek review of that decision on the grounds that the Tribunal erred in law: (a) in construing and applying s.88(2)(b)(i) of the Act; and (b) in deciding that it was unable to, and did not, make a finding about whether the Premier threatened to harm Mr Bond's interests in the State of Queensland. However, it will be necessary to decide whether the findings of fact are reviewable decisions if the respondents are unable to reach them by impugning the reviewable decision for error of law. ...

**(c) The Findings of Fact**

The next important question of principle is whether a finding of fact can amount to a reviewable decision and, if so, in what circumstances. The answer to the first part of this question does not present much difficulty. If the statute requires or authorizes the decision-maker to determine an issue of fact as an essential preliminary to the taking of ultimate action or the making of an ultimate order, then it would follow from what has already been said that the determination of the issue of fact would be a reviewable decision. The decision that the licensees were no longer fit and proper persons to hold their licences was just such a determination.

However, in ordinary circumstances, a finding of fact, including an inference drawn from primary facts, will not constitute a reviewable decision because it will be no more than a step along the [341] way to an ultimate determination. Of course an ultimate determination which depends upon a finding of fact vitiated by error of law or made without evidence is reviewable: see s.5(1)(f) and (h). In such a case the finding of fact may be challenged as an element in the review of the ultimate determination. But the point remains that ordinarily a finding of fact will not be susceptible to review independently of the ultimate decision.

Powerful considerations support the correctness of this view. The *Administrative Appeals Tribunal Act 1975* (Cth) ('the *AAT Act*') provides specifically for review on the merits by the Administrative Appeals Tribunal. It is scarcely to be supposed that the Parliament, in so providing, nevertheless intended to invest the Federal Court with a similar jurisdiction under the *ADJR Act*, for that would be the effect of that Act if it were to confer jurisdiction to review findings of fact generally. Indeed, the concept of judicial review which finds literal expression in the title of the *ADJR Act* and in its operative provisions tells against the existence of such a wide jurisdiction. The expression 'judicial review', when applied to the traditional review functions of the superior courts in our system of justice, exercisable by means of the prerogative writs and the grant of declaratory relief and injunction, ordinarily does not extend to findings of fact as such. To expose all findings of fact, or the generality of them, to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive

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*Australian Broadcasting Tribunal v Bond continued*

and judicial branches of government. Amongst other things, such a change would bring in its train difficult questions concerning the extent to which the courts should take account of policy considerations when reviewing the making of findings of fact and the drawing of inferences of fact.

It follows that in my opinion the Federal Court did not have jurisdiction to review the six findings of fact (Nos 5 and 7-11 inclusive in my earlier summary) of which the respondents sought review on the footing that they were reviewable decisions.

### (3) Meaning of 'Conduct'

The distinction between reviewable decisions and conduct engaged in for the purpose of making such a decision is somewhat elusive. However, once it is accepted that 'decision' connotes a determination for which provision is made by or under a statute, one that generally is substantive, final and operative, the place of 'conduct' in the statutory scheme of things becomes reasonably clear. In its setting in s.6 the word 'conduct' points to action [342] taken, rather than a decision made, for the purpose of making a reviewable decision. In other words, the concept of conduct looks to the way in which the proceedings have been conducted, the conduct of the proceedings, rather than decisions made along the way with a view to the making of a final determination. Thus, conduct is essentially procedural and not substantive in character. Accordingly, s.3(5) refers to two examples of conduct which are clearly of that class, namely, 'the taking of evidence or the holding of an inquiry or investigation'. It would be strange indeed if 'conduct' were to extend generally to unreviewable decisions which are in themselves no more than steps in the deliberative or reasoning process.

Accordingly, there is a clear distinction between a 'decision' and 'conduct' engaged in for the purpose of making a decision. A challenge to conduct is an attack upon the proceedings engaged in before the making of the decision. It is not a challenge to decisions made as part of the decision-making process except in the sense that if the decisions are procedural in character they will precede the conduct which is under challenge. In relation to conduct, the complaint is that the process of decision-making was flawed; in relation to a decision, the complaint is that the actual decision was erroneous. To give an example, the continuation of proceedings in such a way as to involve a denial of natural justice would amount to 'conduct'. That is not to deny that the final determination of the proceedings would constitute a decision reviewable for denial of natural justice.

So, in *Chan v. Minister for Immigration and Ethnic Affairs* [(1989) 63 ALJR 561] it was possible to review the decision of the delegate for error of law on the basis either that it was a reviewable decision or that the inquiry preceding the making of the decision was reviewable conduct. But it was not precise in that case to describe the decision of the delegate as reviewable conduct, because the decision was not a matter of procedure. Further, in truth it was the decision, not the conduct engaged in for the purpose of making the decision, which was the subject of challenge, and the decision of the delegate can have been reviewable as an improper exercise of power only because the decision itself was reviewable; s.6(1)(e) would not permit the review of conduct as an improper exercise of power.

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**Australian Broadcasting Tribunal v Bond** *continued*

This view of the relationship between a ‘decision’ and ‘conduct’ is supported by an examination of the provisions of the *ADJR Act*. Section 6(1) provides for a direct challenge to conduct on procedural grounds only. The other grounds of challenge set out in [343] the sub-section go to the invalidity of the proposed decision to which the conduct relates. Then, it is the proposed decision rather than the conduct which is challenged; s.6 merely allows the challenge to take place before the making of the proposed decision. In other instances, conduct may only be impugned upon procedural grounds: see, for example, s.6(1)(a) and (b).

Some reference must be made to s.6(1)(f) which speaks of an error of law being ‘committed in the course of the conduct’. On its face, this provision permits of review of any error of law made, for example, in an inquiry held for the purpose of making a ‘decision’. Such a review of conduct might entail a challenge to a substantive, as well as a procedural, error of law. However, this ground of review of ‘conduct’ does little to expand the ‘error of law’ ground contained in s.5(1)(f) relating to errors of law ‘involved’ in the decision. Ordinarily, if not always, an error of law made in the course of conduct engaged in for the purpose of making a decision would be an error of law involved in the decision itself. This ground of review does not detract, therefore, from the argument that the *ADJR Act* maintains a dichotomy between reviewable decisions and reviewable conduct.

It follows, therefore, that substantive decisions, findings of fact and inferences from findings of fact generally are not capable of review as ‘conduct’ unless what is alleged is some breach of procedural requirements in the course of the conduct involved in reaching the relevant conclusion, although it is possible that they may give rise to subsequent conduct which is reviewable.

(4) Was there Reviewable Conduct?

The finding that Mr Bond would not be found to be a fit and proper person to hold a broadcasting licence was not procedural and was no more than a step in the Tribunal’s process of reasoning, and so the finding did not amount to ‘conduct’. For similar reasons the making of the findings of fact did not amount to reviewable conduct. ...

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***NEAT Domestic Trading Pty Ltd v AWB Ltd***

(2003) 216 CLR 277

High Court of Australia

This case arose in the context of a statutory scheme regulating the export of wheat from Australia. A corporation whose shareholders were wheatgrowers was given a central role in the decision-making structure associated with the scheme. The question for the High Court was whether decisions of that corporation with respect to refusing export permits to non-shareholder wheatgrowers were ‘decisions’ ‘made under an enactment’ for the purpose of judicial review under the *ADJR Act*. The case came to the High Court on appeal from the Full Court of the Federal Court of Australia.

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NEAT Domestic Trading Pty Ltd v AWB Ltd *continued*

### READING QUESTIONS

- 1 In the process of denying the applicability of the *ADJR Act*, the joint judgment distinguishes between statutory provisions which give a decision-maker the power to make a decision and those which recognise the decision-maker's consent as a precondition to a valid decision being made by some other (statutory) decision-maker. Does this distinction adequately justify the conclusion that the AWBI's decision was not made under an enactment?
- 2 What role did the AWBI's status as a private corporation which could be expected to maximise profits play in the court's reasoning? Are these issues relevant to interpreting the statutory phrase, 'made under an enactment'?
- 3 To what extent does the reasoning in *NEAT* apply beyond the *ADJR Act* context?
- 4 Gleeson CJ also dismissed the appeal. How did his reasoning differ from the majority?
- 5 Which approach is best suited to confront the question of the applicability of judicial review in the context of trends in governance (see *PAL* 2.3), such as contracting out and privatisation?

**MCHUGH, HAYNE AND CALLINAN JJ: [291]** Over the years, Australia has had many different marketing schemes for its primary products. Some have been established by State legislation; some have been established by federal legislation. This appeal relates to the federal regulation of some aspects of the export marketing of wheat. The particular questions raised concern the operation of s 57 of the *Wheat Marketing Act 1989* (Cth) (the 1989 Act).

At the times relevant to these proceedings, s 57(1) of the 1989 Act prohibited the export of wheat unless the Wheat Export Authority (the Authority), established by the 1989 Act, (a) had given its written consent to the export of the wheat and (b) the export of the wheat was in accordance with the terms of that consent. Sub-section (1A) of that section provided that this prohibition did not apply to what the Act refers to as 'nominated company B': AWB (International) Ltd (AWBI). AWBI is a company limited by shares, incorporated under the *Corporations Law* (Vic). At the times relevant to these proceedings it was a wholly owned subsidiary of AWB Ltd (AWB), another company limited by shares, also incorporated under the *Corporations Law* (Vic). There were two classes of shares in AWB: A Class and B Class. A Class shares could be issued only to 'Growers'—persons producing an annual average of at least 33 1/3 tonnes of wheat per year. Each Grower could hold only one A Class share. The holder of A Class shares had voting rights, and the number of votes depended upon the average annual tonnage of wheat delivered by that shareholder to the AWB Group. Holders of A Class shares were not entitled to dividends. A Class shares were redeemable preference shares. B Class shares were intended to be capable of being traded on the Australian Stock Exchange Ltd and carried the right to participate in dividends. Holders of A Class shares controlled the board of AWB.

The object of AWB, stated in its constituent document, was 'to be primarily involved in the business of Grain Trading'. This was further [292] defined as the undertaking of grain trading activities and investments with a view, among other things:

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 NEAT Domestic Trading Pty Ltd v AWB Ltd *continued*

in relation to wheat growers who sell pool return wheat to the company or its subsidiaries, to maximise their net returns from the pools by securing, developing and maintaining markets for wheat and wheat products and by minimising costs as far as practicable.

The reference to ‘pool return wheat’ was a reference to arrangements by which Growers and others sold wheat to a single purchaser which would then negotiate the sale of that wheat overseas. At the times relevant to these proceedings that purchaser, or pool company, was AWBI [the 1989 Act, s 84]. The pool company would take the amounts it received from sales of wheat of a particular type or grade and divide the returns (net of costs) rateably among those who had supplied the grain that was sold. These arrangements were often referred to as ‘Single Desk’ selling arrangements. There was to be a single seller of Australian wheat in overseas markets and thus no competition between sellers of Australian wheat in those markets.

Before giving a consent to the export of wheat, s 57(3A) obliged the Authority to consult AWBI. Sub-section (3B) then provided that:

The Authority must not give a bulk-export consent without the prior approval in writing of [AWBI]. For this purpose a consent is a *bulk-export consent* unless it is limited to export in bags or containers.

Between November 1999 and February 2000 the appellant made six applications to the Authority for its consent to the export of durum wheat in bulk. In each case the Authority refused its consent because AWBI did not give its approval in writing. The central question in this appeal is whether AWBI’s failure to give approval was legally infirm.

The appellant brought proceedings in the Federal Court of Australia seeking, among other things, declarations that the Authority’s refusals of bulk-export consents were unlawful and void. It further alleged that AWBI had not consulted with the Authority and that AWBI’s refusal to consult with the Authority, and its refusal to approve the exports was, in each case, a decision of an administrative character made under s 57 of the 1989 Act, or conduct engaged in for the purpose of making such a decision. The appellant alleged (among other things) that AWBI had failed to take account of all relevant considerations, had taken into account irrelevant considerations, and had applied a policy without regard to the merits of the particular application. It claimed a declaration that AWBI’s decision or conduct was unlawful and void. Other allegations were made, and other relief was claimed, under the *Trade Practices Act 1974* (Cth). Those other claims do not fall to be considered in this appeal.

### [293] The proceedings below

At first instance, the primary judge (Mathews J) dismissed the appellant’s proceeding. The primary judge found that ‘the effective reason’ for AWBI’s refusal to approve the application for the consents the appellant sought was, in each case, the existence of its policy that ‘in the current market environment’ no bulk-export consents would be approved. Her Honour further found that AWBI had arrived at this policy because to approve bulk-export consents

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*NEAT Domestic Trading Pty Ltd v AWB Ltd continued*

would not be consistent with the obligation, imposed on AWBI by its constituent document, to maximise returns to growers who sold wheat into AWBI wheat marketing pools. That being so, her Honour found that AWBI, in making its decisions to refuse approval, did not fail to take account of relevant considerations.

The appellant appealed to the Full Court of the Federal Court. That Court (Heerey, Mansfield and Gyles JJ) dismissed the appeal. Heerey J concluded that AWBI's decisions were 'outside the province of administrative law'. Because AWBI was a company incorporated under the *Corporations Law*, engaged in trade and commerce, it 'must be free as a matter of commercial judgment to adopt what might be regarded in administrative law terms as an inflexible policy'. There was, in his Honour's view, 'no breach of any rule or principle of administrative law which had the effect that AWBI was acting outside s 57(3B)' in refusing its approval.

Neither Mansfield J nor Gyles J considered it necessary to decide whether decisions to grant or withhold approval for the purposes of s 57(3B) were decisions of an administrative character made under an enactment, or were beyond the reach of administrative law. Their Honours preferred to rest their conclusion on the proposition that, as a commercial entity, AWBI could lawfully consult only its own interests in deciding whether to grant approval.

The appellant contended that, to understand the way in which the 1989 Act's marketing scheme operated, it was necessary to consider not only the scheme of the 1989 Act as a whole, but also the historical [294] background against which the scheme was enacted. It is as well, therefore, to say something about that history.

### Regulation of wheat marketing

Since the end of World War 2 there has been a series of federal Acts dealing with aspects of the marketing of wheat. (There had been earlier federal legislation affecting the wheat industry but the War of 1939–45 marks a convenient point at which to begin reference to past legislation.) As originally enacted, the 1989 Act provided a very different regime for the marketing of wheat from that provided by it at the times relevant to this matter. The Australian Wheat Board, a statutory corporation tracing its roots to the *Wheat Industry Stabilization Act 1948* (Cth), played a central role in the marketing scheme for which the 1989 Act originally provided. As enacted, the 1989 Act provided for the Australian Wheat Board to control the export of wheat. By s 57, as it then stood, export of wheat, without the Board's consent, was forbidden.

In 1997 and 1998, significant changes were made to the 1989 Act and the scheme for which it provided. The Explanatory Memorandum for the *Wheat Marketing Legislation Amendment Bill 1998* (by which the second part of these changes were made) described their purpose as being to 'restructure' the Australian Wheat Board 'from a statutory marketing authority to a grower owned company'. From 1 July 1999, there were to be three grower-owned companies involved in the marketing of wheat—AWB, AWBI and a third company undertaking domestic trading of grains and other non-pool commercial activities not handled by AWB. A Wheat Export Authority was to control exports of wheat and to monitor the performance of AWBI in relation to the export of wheat.

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 NEAT Domestic Trading Pty Ltd v AWB Ltd *continued*

As amended by the 1998 Bill, the 1989 Act provided (in s 5(1)) that the Wheat Export Authority had the functions:

- (a) to control the export of wheat from Australia;
- (b) to monitor [AWBI's] performance in relation to the export of wheat and examine and report on the benefits to growers that result from that performance.

The Explanatory Memorandum for the 1998 Bill noted that there was [295] to be a National Competition Policy review of wheat legislation in 1999–2000 and that what it described as AWBI's 'export monopoly' would expire in 2004. The export monopoly was said to provide 'a tool to conduct the export marketing of Australian wheat to maximise the net returns to growers'. The Explanatory Memorandum also recorded that options considered for providing that export monopoly had included: legislating the monopoly for *all* wheat exports to the grower company [AWBI]; legislating the monopoly for *bulk* wheat exports to that company with a separate mechanism to manage exports by other than AWBI; and:

Legislat[ing] the monopoly to an independent statutory body to manage, with a legislative requirement that wheat export rights reside with the new grower company [AWBI] for a prescribed period.

It was said that this third option had been chosen.

The apparent complexity of this history may be contrasted with the brevity of the legislative expression of the scheme that was introduced in 1997 and 1998. The central provisions of that legislation have already been mentioned. They are the prohibition on export of wheat without the Authority's consent (s 57(1)), the exemption of AWBI from that prohibition (s 57(1A)), and the provisions of s 57(3A) and (3B) that required the Authority, before giving a consent to export, to consult with AWBI, and provided that the Authority not give a bulk-export consent without AWBI's prior approval in writing. To those provisions there may be added reference to s 57(3E) which required the Authority to 'issue guidelines about the matters it will take into account in exercising its powers' under s 57, and reference to s 57(7) requiring the Authority, before the end of 2004, to conduct a review, and report to the Minister about, among other things, AWBI's conduct in relation to consultations for the purposes of s 57(3A) and the granting or withholding of approvals for the purposes of s 57(3B). Reference should also be made to s 57(6) which provided that:

For the purposes of subsection 51(1) of the *Trade Practices Act 1974*, the following things are to be regarded as specified in this section and specifically authorised by this section:

- (a) the export of wheat by [AWBI];
- (b) anything that is done by [AWBI] under this section or for the purposes of this section.

### The appellant's contentions

The appellant had contended at trial that, because AWBI had not acted *lawfully* in failing or refusing to give its written approval, s 57(6) did not apply and that the appellant could,

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*NEAT Domestic Trading Pty Ltd v AWB Ltd continued*

therefore, maintain claims that AWBI had contravened the *Trade Practices Act*. That issue may, however, be put aside.

Although put in a number of different ways, central to the [296] appellant's contentions was the proposition that AWBI did not consider, but should have considered, 'the merits' of each application which the appellant had made to the Authority for a bulk-export consent. It was said that, had the merits been considered, AWBI could have, indeed should have, concluded that to approve the giving of consent would not have detracted from the 'single desk' selling arrangements or the pursuit of AWBI's legitimate commercial objectives. In the language of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the AD(JR) Act) it was said that there had been 'an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case' (ss 5(2)(f) and 6(2)(f)).

These contentions proceeded from the premise that AWBI's decision to give or not give approval to the grant of an authority to export was regulated by the 1989 Act. Again, to adopt the language of the AD(JR) Act, the appellant's contentions were premised on the proposition that to give or not give approval in writing was 'a decision of an administrative character made. ... (whether in the exercise of a discretion or not) under an enactment' [s 3(1), definition of 'decision to which this Act applies']. The validity of this premise must be examined.

### AWBI and the Act

AWBI does not owe its existence to the Act; it is a company limited by shares incorporated under the Corporations Law. To a very great extent, its powers, and the powers and obligations of its organs, are regulated by the applicable companies legislation. So, for example, at the time of the events giving rise to this appeal, its board of directors owed duties to its sole shareholder, AWB. The content of those duties was to be found in the *Corporations Law* (Vict) and the considerable body of judge-made law affecting directors' duties. The central duty of the board of AWBI was to observe its constitution and to pursue the interests of the company as expressed in that document. As a wholly owned subsidiary of AWB those duties would, no doubt, have required the board of AWBI to pursue the interests of its parent (and thus, its parent's shareholders) to the extent that those interests were compatible with other obligations of AWBI. In fact the interests of the two companies coincided. The constituent documents of both AWB and AWBI required that AWBI seek to maximise returns to those who sold wheat into AWB wheat marketing pools.

If AWBI gave its approval to the Authority giving a bulk-export consent it may not be entirely clear whether the Authority had a discretion to refuse consent. For present purposes, it is convenient to consider both possible constructions. On one construction of the 1989 Act the Authority would retain no discretion to refuse a consent once AWBI had given its approval in writing. If that were so, it would be [297] evident that AWBI's decision to give, or not give, approval would be determinative. The competing view is that the Authority retained a discretion to refuse a bulk-export consent, even if AWBI had given its approval to it. On that view AWBI's role might better be described as exercising a power of veto. No matter which construction is correct, it is necessary to recognise that, under s 57 of the 1989 Act,

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 NEAT Domestic Trading Pty Ltd v AWB Ltd *continued*

a company incorporated under ordinary companies legislation for the pursuit of commercial purposes is given a role to play in connection with permitting what otherwise is conduct (exporting wheat) forbidden by federal statute on pain of penalty. And the company given this role is itself exempted from the operation of this prohibition.

At the least, then, there is an intersection between the private and the public. A private corporation is given a role in a scheme of public regulation. The parties could point to no other federal legislation in which there was a similar intersection. If processes of privatisation and corporatisation continue, it may be that an intersection of this kind will be encountered more frequently. At its most general this presents the question whether public law remedies may be granted against private bodies. More particularly, do public law remedies lie where AWBI fulfils the role which it plays under the 1989 Act?

We would answer this second, more particular question, 'No'. That answer depends in important respects upon the particular structure of the legislation in question. It is not to be understood as an answer to the more general question we identified.

There are three related considerations which lead us to give that answer. First, there is the structure of s 57 and the roles which the 1989 Act gives to the two principal actors—the Authority and AWBI. Secondly, there is the 'private' character of AWBI as a company incorporated under companies legislation for the pursuit of the objectives stated in its constituent document: here, maximising returns to those who sold wheat through the pool arrangements. Thirdly, it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.

### The roles of the Authority and AWBI

Section 57 gives the Authority, not AWBI, the power to give the consent to export without which an offence is committed. It is the Authority's decision to give its consent which is the operative and determinative decision which the 1989 Act requires or authorises [*Bond* (1990) 170 CLR 321, 336–7, (Mason CJ)].

The Authority is created by the 1989 Act and derives its functions and powers entirely from that Act. In that sense it is a creature of the 1989 Act. The Authority may not give consent without AWBI's prior [298] approval in writing. That approval was a condition which must be satisfied before the Authority might give its consent. It was, in that sense, a condition precedent which had to be met before the Authority could lawfully exercise the power which the 1989 Act conferred on it to give its consent to the proposed export.

Unlike the Authority, AWBI needed no statutory power to give it capacity to provide an approval in writing. As a company, AWBI had power to create such a document. No doubt the production of such a document was given statutory significance by s 57(3B) but that subsection did not, by implication, confer statutory authority on AWBI to make the decision to give its approval or to express that decision in writing. Power, both to make the decision, and to express it in writing, derived from AWBI's incorporation and the applicable companies legislation. Unlike a statutory corporation, or an office holder such as a Minister, it was neither necessary nor appropriate to read s 57(3B) as impliedly conferring those powers on AWBI.

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*NEAT Domestic Trading Pty Ltd v AWB Ltd continued*

On that understanding of s 57(3B) AWBI's determination to approve the Authority's giving consent was not a decision under an enactment for the purposes of the AD(JR) Act. The approval was a condition precedent to the Authority considering whether to give its consent to export.

If the Authority had any discretion about giving a consent once AWBI had given its approval, the Authority would have had to exercise that discretion having regard to the nature, scope and purpose of the power and the context in which it is found. It is those matters which would be relevant for the decision-maker to take into account. It is in these 'public' considerations that the 'merits' which the appellant said had not been considered would be found.

### AWBI

The two other considerations we have mentioned (the 'private' character of AWBI and accommodating public law obligations with AWBI's private interests) are conveniently dealt with together. AWBI, not only does not owe its existence to the 1989 Act, it, and its organs, had the various obligations we have mentioned earlier. Chief among those was, and is, the pursuit of its private objectives. So far as its constituent documents and applicable companies law principles are concerned, reference to any wider 'public' considerations would be irrelevant.

Because the 1989 Act did not expressly or impliedly require or [299] authorise AWBI to decide whether to approve the issue of a bulk-export permit, AWBI could not be compelled, by mandamus or otherwise, to decide whether to grant or not grant its approval. It was under no statutory, or other, obligation to consider that question.

It follows that s 57(3B) is not to be read as imposing on AWBI a duty to consider those matters that we have described as 'public' considerations when deciding whether or not to grant approval. That is, s 57(3B) is not to be read as requiring AWBI to consider matters of the kind which the Authority should take into account in forming its decision whether to grant its consent. Nor should it be read as shifting to AWBI the obligation to take account of matters derived from the subject matter, scope or purpose of the Act which bear upon a decision whether a particular export should be permitted. The subsection did not require AWBI to consider those matters to the exclusion of consideration of its own commercial interests; it did not require AWBI to give preference to those matters over its own commercial interests. Section 57(3B) neither modified nor supplanted the obligations which AWBI and its organs had under its constituent documents and applicable companies law principles.

The appellant did not contend, whether in this Court or in the courts below, that AWBI was not entitled to take its own interests into account in deciding whether to give its approval to the Authority's grant of consent. But once it is accepted that AWBI may consider its own commercial interests, a distinction between those interests, and what were said to be the 'merits' of an individual application for approval, cannot be drawn. As pointed out earlier, the 'merits' of an individual application are, for present purposes, those matters derived from the context of the 1989 Act and the subject matter, scope or purpose of the Act which are identified as bearing upon the decision. We have referred to these as 'public' considerations.

NEAT Domestic Trading Pty Ltd v AWB Ltd *continued*

Under the 1989 Act AWBI could export without consent. It could, indeed it should, have been seeking to maximise returns to those who sold wheat through the pool arrangements. One way of doing that was to remain the sole bulk exporter of wheat. Remaining the sole bulk exporter was consistent with the form of export monopoly preferred in the Explanatory Memorandum to the 1998 Bill—a monopoly managed by the Authority but possessed by AWBI (the new grower company) pursuant to its ‘wheat export rights’.

If remaining the sole bulk exporter of wheat was a consideration that might legitimately be taken into account by AWBI when deciding whether to give approval to the Authority consenting to bulk export of wheat (and the appellant did not submit to the contrary) it is a consideration which could outweigh any counter-vailing consideration which an applicant for consent could advance. It could outweigh *any* countervailing consideration derived from the context of the 1989 Act, or from the nature, scope or purpose of the 1989 Act’s provision that AWBI’s prior written approval was a necessary condition for the Authority’s giving its consent. [300] That being so, there is no sensible accommodation that could be made between the public and the private considerations which would have had to be taken into account if the 1989 Act were read as obliging AWBI to take account of public considerations.

For these reasons, neither a decision of AWBI not to give approval to a consent to export, nor a failure to consider whether to give that approval, was open to judicial review under the AD(JR) Act or to the grant of relief in the nature of prohibition, certiorari or mandamus.

The appeal should be dismissed with costs.

*[Gleeson CJ favoured the view that the AWBI’s decision was an administrative decision made under an enactment but dismissed the application on the ‘administrative law merits’.]*

**GLEESON CJ:** [284] There is some difficulty in relating the conduct of AWBI, and the complaint of the appellant, to the context of administrative law. AWB and AWBI are trading corporations, operated for the benefit of their corporators. However, the Act gives each a statutory role which may affect the interests of members of the public, such as the appellant. A question arises as to the extent to which that role is circumscribed. When a statute confers a discretionary power which is capable of affecting rights or interests, the identity and nature of the repository of the power may be a factor to be taken into account in deciding what are intended to be matters that must necessarily, or might properly, be considered in decision-making or whether it is intended that the power is at large.

[...]

[286] The appellant’s complaint about AWBI’s withholding of approval of the bulk-export consents sought by it from the Wheat Export Authority is that AWBI was acting in accordance with a rule or policy without regard to the merits of the case. In putting its case in that way, the appellant was invoking ss 5(2)(f) and 6(2)(f) of the Judicial Review Act. The language of those provisions reflects established principles of administrative law expressed, for example, by Lord Browne-Wilkinson [287] in *R v Secretary of State for the Home Department; Ex parte Venables* [[1998] AC 407, 496–7]:

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*NEAT Domestic Trading Pty Ltd v AWB Ltd continued*

When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future ... By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.

These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases ... But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful.

It will be necessary to return to the question whether what is here involved is a decision of an administrative character, being an exercise of a discretionary power, to which those principles apply. Let it be assumed, for the moment, that this is so.

The reference in the appellant's submissions to the merits of its applications for bulk-export consent requires further analysis. The information provided by the appellant to the Wheat Export Authority in support of each application for consent was relatively sparse. It amounted to little more than information that there was a purchaser in a certain country for a certain quantity of durum wheat, which the appellant had available for export. Bearing in mind that the appellant and AWBI were competitors, it may not be surprising that further information was not provided. What, exactly, does it mean to speak of the 'merits' of such an application? Presumably, it was self-evident that the proposed transaction would be in the financial interests of the appellant, and its suppliers; if it were otherwise, it would not be proposed. Is that a consideration to which AWBI was bound to pay regard? Section 57 plainly envisaged that AWBI would be, if not the sole, at least the principal, exporter of Australian wheat. It conferred on AWBI what was, in effect, a capacity to veto bulk exports by any potential competitor. This reflected the single desk system of export marketing; a system described in the Explanatory Memorandum as a [288] monopoly. In this context, a reference to 'merits' cannot sensibly be a reference to the financial interests of the appellant. The legislation gave AWBI a power to veto any application. That would always be adverse to the interests of an applicant. Where a statute confers a monopoly on X, and then gives Y power to relax the monopoly, but only if X approves, then it is not easy to give practical content to a suggested legislative requirement that X consider on its merits each proposal for a relaxation of X's monopoly. But it can hardly mean that X is required to have regard to the financial interests of its would-be competitor.

In such a context, where there is at least a potential conflict between the interests of the exporter seeking approval and the interests AWBI is required by its constitution to pursue, the concept of the merits of an application for approval must be related to considerations, if any,

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 NEAT Domestic Trading Pty Ltd v AWB Ltd *continued*

that AWBI is required or entitled to take into account, or considerations that are extraneous to its decision. It is to the provisions of the Act that one must look for some warrant for concluding that a particular consideration is obligatory, or available, or extraneous. Judicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function conferred upon AWBI. The appellant might genuinely believe that the system itself is unfair. A judge might share that opinion. Nothing follows from that. The question is what, if anything, the Act requires, or permits, or forbids AWBI to take into account in giving effect to its role in the system.

It is possible that, in a given case, an exporter, applying for consent from the Wheat Export Authority, might seek to make out a case to show that the granting of the consent could not possibly have any adverse effect upon the single desk system of marketing, or upon AWBI, or the growers whose interests it represented. Given that AWBI was entitled, indeed bound, to pursue grower interests, an exporter might seek to show that a particular application promoted those interests, or was at least incapable of affecting them adversely, either directly or indirectly. That is not the present case. As noted above, the appellant provided little information in support of each application. It did not present information or argument in support of a change of the single desk policy, or seek to show that the policy was irrelevant to its particular proposals.

It may also be accepted that personal animosity towards an applicant, or a desire to confer a personal benefit upon a particular grower or exporter, would be extraneous considerations; and others may be imagined. But they have nothing to do with the present appeal. The sole complaint is that AWBI adhered to a policy; and that, in its adherence to the policy, it failed to take account, or foreclosed [289] consideration, of matters it was either required or entitled to take into account.

The policy manifested in s 57 itself is not difficult to discern. It is to be understood in the light of the history of wheat marketing, the exigencies of the international market, and the single desk system. Section 57(7) suggests that the policy is open to legislative review, but, in its present form, it involves conferring on AWBI a right to export, and requiring that any other potential bulk exporter must obtain the consent of the Wheat Export Authority, which must, in turn, have the approval of AWBI. The legislation confers upon AWBI a practical monopoly on the bulk export of wheat, save to the extent to which the Authority (which is to issue guidelines) and AWBI (which is not bound by the guidelines, but whose conduct is subject to review and report) are prepared to relax the monopoly.

There is nothing inherently wrong in an administrative decision-maker pursuing a policy, provided the policy is consistent with the statute under which the relevant power is conferred, and provided also that the policy is not, either in its nature or in its application, such as to preclude the decision-maker from taking into account relevant considerations, or such as to involve the decision-maker in taking into account irrelevant considerations. The policy, and its application, must be measured against those requirements, having regard to the matter presented for decision, and the information and arguments, if any, advanced for or against a particular outcome.

NEAT Domestic Trading Pty Ltd v AWB Ltd *continued*

Mathews J found that, in withholding approval in respect of the appellant's applications for bulk-export consent, AWBI had determined to pursue a policy that would be maintained 'under current market conditions'. She described that policy as follows:

[The] material shows that AWBI's reason for maintaining its policy against bulk export permits can be encapsulated into a very simple proposition, which is this: the grant of bulk export permits might well benefit individual growers who sell their wheat under the permits, but this will be at the likely expense of growers who deliver their wheat to the National Pool. It is against AWBI's constitutional mandate to prefer individual growers who are outside the pool system to growers who are within it. Therefore bulk export permits should not be approved.

Mathews J considered, and I agree, that there is nothing about such a policy that is inconsistent with the Act, or with the role it assigned to AWB. Furthermore, there was nothing about the particular circumstances of any of the appellant's applications that required re-consideration of the policy, or that rendered the policy irrelevant, or potentially irrelevant, to those applications. The policy was a proper policy, available to AWBI consistently with the legislative scheme, and there was nothing in the circumstances of the case that demonstrated a refusal to entertain the possibility that a particular case [290] might fall outside the policy, or require its re-consideration [*British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, 624–5]. No such case was advanced on behalf of the appellant, either to the Wheat Export Authority, or to AWBI, or in this Court. There was nothing contrary to the Act in the adoption by AWBI of a general policy; a policy which so closely reflected the legislative purpose. The complaint that the policy was administered in an unduly inflexible manner was rejected by Mathews J. It is entirely theoretical, no reason having been advanced as to why the policy should have been relaxed in the case of the appellant other than that it would have been in the interests of the appellant, and its suppliers, for that to be done. As Mathews J found, 'no material was put before AWBI which could be expected to persuade it to deviate from its policy'.

Mathews J was right to reject the appellant's case on what might be termed the administrative law merits. That makes it strictly unnecessary to decide whether the withholding of an approval by AWBI was a decision of an administrative character made under an enactment. I should indicate, however, that my preference is for the view (accepted by Mathews J) that it was. While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds what amounts, in practical effect, to a virtual or at least potential statutory monopoly in the bulk export of wheat; a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate. It exercises an effective veto over decisions of the statutory authority established to manage the export monopoly in wheat; or, in legal terms, it has power to withhold approval which is a condition precedent to a decision in favour of an applicant for consent. Its conduct in the exercise of that power is taken outside the purview of the *Trade Practices Act*.

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NEAT Domestic Trading Pty Ltd v AWB Ltd *continued*

In *Burns v Australian National University* [(1982) 40 ALR 707, 714], Ellicott J said, in relation to the meaning of 'administrative' in the context of s 3 of the Judicial Review Act:

It is obviously unwise to attempt a comprehensive definition but, in my opinion, it is at least apt to describe all those decisions, neither judicial nor legislative in character, which Ministers, public servants, government agencies and others make in the exercise of statutory power conferred on them, whether by Act of the Parliament or by delegated legislation. In other words it at least covers the decisions made in executing or carrying into effect the laws of the Commonwealth. Such decisions, as the definition indicates, may or [may] not require the exercise of a discretion. Usually they will.

The argument that what is involved is not a decision of an [291] administrative character under an enactment takes as its focus the private interests represented, and pursued, by AWBI, as distinct from the public character of the Wheat Export Authority. That appears to me to involve an incomplete view of the interests represented by AWBI, and also to leave out of account the character of what it does, which is, in substance, the exercise of a statutory power to deprive the Wheat Export Authority of the capacity to consent to the bulk export of wheat in a given case.

*[Kirby J issued a strong dissent. Some of the points of principle canvassed in his Honour's dissent are also noted in his reasons in the next case extracted: Griffith University v Tang.]*

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## ***Griffith University v Tang***

(2005) 221 CLR 99

High Court of Australia

This case came to the High Court on appeal from the Supreme Court of Queensland. The case addressed the scope of the term 'made under an enactment' in the context of disciplinary decisions made by a university that had been established under a statute.

### READING QUESTIONS

- 1 Why is this case of relevance to the interpretation of the Commonwealth *ADJR Act*, despite being brought under the *Judicial Review Act 1991* of Queensland?
- 2 What test is stated to determine whether a decision is 'made under an enactment'?
- 3 What reasons are given to support this test?
- 4 Do these reasons reflect policy concerns about the appropriateness of over-extending judicial involvement in the decisions of certain sorts of decision-makers?
- 5 How was the test applied?
- 6 Would it have made a difference to the outcome had the discipline procedures been contained in either (a) delegated legislation or (b) a contract between the university and Tang?
- 7 Does *Tang* have implications for the judicial review beyond the *ADJR Act* context?
- 8 Is Kirby J's dissent persuasive?

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Griffith University v Tang *continued*

**GUMMOW, CALLINAN AND HEYDON JJ:** [112] This appeal turns upon the construction of the *Judicial Review Act 1991* (Qld) (the Review Act). This Queensland legislation has its provenance in federal law. That is apparent from s 16(1) of the Review Act, which states:

If—

- (a) a provision of the Administrative Decisions (Judicial Review) Act 1977 (Cwlth) [‘the AD(JR) Act’] expresses an idea in particular words; and
  - (b) a provision of this Act appears to express the same idea in different words because of different legislative drafting practice;
- the ideas must not be taken to be different merely because different words are used.

One consequence of the linkage between the text and structure of the federal and State statutes has been reliance in the present litigation upon various decisions construing the AD(JR) Act.

### The federal legislation

In *Shergold v Tanner* [(2002) 209 CLR 126 at 129–30], reference was made to the development of the federal system of administrative law, including the AD(JR) Act. The statement in para 390 of the Report of the Commonwealth Administrative Review Committee [(1971), p 113] (the Kerr Committee) of its main recommendations and suggestions had included the exercise by a new federal court of jurisdiction to review on legal grounds [113] ‘decisions, including in appropriate cases reports and recommendations, of Ministers, public servants, administrative tribunals ... but not decisions of the Governor-General’.

The eventual translation of that recommendation into the terms of the AD(JR) Act had a significance for the later case law (and for the present case) in two respects. First, the term ‘decision’ was ambiguous; many decisions are made by administrators in the course of reaching an ultimate determination. The Kerr Committee had not adverted to what Mason CJ later [*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 336–7] discerned as competing policy considerations, enhancement of the administrative processes of government by providing convenient and effective means of redress, and impairment of efficient administration of government by fragmentation of its processes. Secondly, the adoption in the AD(JR) Act of the phrase ‘a decision of an administrative character made ... under an enactment’ directed attention away from the identity of the decision-makers, the Ministers and public servants referred to by the Kerr Committee, and to the source of the power of the decision-makers. In contrast, s 75(v) of the *Constitution* fixes upon the phrase ‘officer of the Commonwealth’. The resultant uncertainties generated by the case law on the AD(JR) Act have continued for more than twenty-five years.

### The State legislation

Section 19 of the Review Act provides that the Supreme Court of Queensland has jurisdiction to hear and determine applications made to it under the statute. However, Pt 5 (ss 41–47) reforms and preserves the jurisdiction of the Supreme Court to provide remedies

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 Griffith University v Tang *continued*

in the nature of those of the prerogative writs of mandamus, prohibition or certiorari and uses the term 'prerogative order' to identify this reformed jurisdiction (ss 3, 41(2)). In addition, whilst informations in the nature of quo warranto are abolished by s 42, an injunctive remedy of that nature, called a 'prerogative injunction' (s 3), is provided by s 42(2). Finally, s 43 provides revised procedures for the exercise of the Supreme Court's jurisdiction to administer the declaratory and injunctive remedy as developed in public law. To the foregoing, there may be added the potential for 'public law' issues to found claims of redress for tortious conduct.

The federal system of administrative law, including the AD(JR) Act, operates in addition to the jurisdiction conferred on this Court by the *Constitution*. Section 8 of the AD(JR) Act confers jurisdiction on the Federal Court and the Federal Magistrates Court. Further, a significant measure of that jurisdiction with which the High Court is endowed by [114] s 75(v) of the *Constitution* has been conferred on the Federal Court by s 39B of the *Judiciary Act 1903* (Cth).

In a similar fashion to the operation of the AD(JR) Act in the broader setting of the federal system of administrative law, so also, in Queensland, the new remedies provided by the Review Act are to be understood in the context of administrative law in the wider sense described above. It is undisputed that the Review Act does not exhaustively cover the whole of that field. Section 10(1) states that the rights conferred by the Review Act are in addition to any other right to seek review by the Supreme Court, any other court or a tribunal, authority or person. However, what the respondent sought was a statutory order of review.

### Griffith University

The litigation arises from the exclusion of the respondent from the PhD candidature programme conducted by Griffith University (the University). The University is not one of those educational institutions created by Royal Charter. Rather, the University is wholly the creature of statute. It is established as a body corporate by s 4 of the *Griffith University Act 1998* (Q) (the University Act) and 'has all the powers of an individual' (s 6). One of the functions of the University conferred by s 5 is the conferral of 'higher education awards'. The University Act is to be read with an understanding of the *Higher Education (General Provisions) Act 1993* (Q) (the Higher Education Act). The effect of s 8(1) of the Higher Education Act was to prohibit an unauthorised non-university provider of courses of higher education from conferring a 'higher education award'. That term was defined in s 3 so as to include 'a degree, status, title or description of bachelor, master or doctor'.

The result was that the PhD degree sought by the respondent could only be obtained in Queensland from a body such as the University established by the University Act. If the respondent, with a view to obtaining an advantage or benefit, were to attempt to induce the belief that she had been awarded that degree contrary to the fact, then she would commit an offence created by s 8(3) of the Higher Education Act.

The Council of the University is its governing body (the University Act, s 8). It may delegate most of its powers to committees but not its power to make university statutes or rules (s 11).

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**Griffith University v Tang** *continued*

Two of the committees established by the Council are the Research and [115] Postgraduate Studies Committee and the University Appeals Committee.

By letter dated 19 July 2002 from the University addressed to the respondent, she was notified that the Assessment Board, a sub-committee of the Research and Postgraduate Studies Committee, had found that she had engaged in academic misconduct. Reference was made specifically to the presentation by the respondent of falsified or improperly obtained data as if they were the result of laboratory work. The respondent was invited to make further submissions to Professor Finnane, the Chair of the Assessment Board. By letter dated 9 August 2002, Professor Finnane wrote to the respondent indicating the receipt of further submissions by her and acknowledging that the Assessment Board had determined that she be excluded from her PhD candidature programme on the ground that she had undertaken research without regard to ethical and scientific standards. The letter notified the respondent that she had a right to appeal against this decision and enclosed a copy of the Policy on Student Grievances and Appeals.

Thereafter, on 21 October 2002, Associate Professor Healy, Chair of the University Appeals Committee, wrote to the respondent stating that, on 17 October 2002, the Appeals Committee had determined that the respondent's appeal be dismissed on grounds which were identified as follows:

- after a full review of the evidence presented to the University Appeals Committee, including the evidence and arguments provided by yourself in support of your appeal, the Committee was satisfied, on a strong balance of probabilities, that an ongoing fabrication of experimental data by yourself did occur over an extended period for a significant number of experimental results, as alleged in the initial complaint by Associate Professor Clarke and Dr Tonissen, and as found by the Assessment Board.
- the procedures followed by the University which culminated in the Assessment Board's finding against yourself were consistent with the principles of procedural fairness and with the policies, practices and procedures for consideration of allegations of Academic Misconduct within the University. The Committee was satisfied that any perceived errors or omissions in these procedures were not such as to vitiate the fairness of the procedures, or result in a different outcome had alternative actions been taken to avoid the perception of such errors or omissions.

The letter continued by stating that, in reaching its conclusion, the Appeals Committee:

noted that it had not been suggested at any stage in the complaints or appeals process that you had any motive for fabricating your data other than saving time and effort; or that the data presented [were] [116] intended to yield a result which differed in a significant, systematic or scientifically interesting way from what would have been yielded by application of the proper procedures and protocols.

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 Griffith University v Tang *continued*

Nevertheless, the Appeals Committee had remained satisfied that exclusion of the respondent from the PhD candidature ‘was appropriate in the context of [her] responsibility as a professional scientist to adhere to ethical and scientific standards at all times’.

[...]

### [117] The structure of the Review Act

Section 20(1) of the Review Act provides that a person ‘who is aggrieved by a decision to which this Act applies’ may apply to the Supreme Court for a statutory order of review in relation to the decision. Section 20(2) lists in paras (a)-(i) the grounds of review. The text of s 20 has its provenance in the opening passage in the much litigated s 5(1) of the AD(JR) Act. It will be apparent that three distinct elements are involved: first, the existence of a decision to which the Review Act applies (because made ‘under’ an enactment); secondly, an applicant to the Supreme Court who is ‘aggrieved’ by that decision; and, thirdly, reliance upon one or more of the listed grounds of review.

The first element as it appears in the AD(JR) Act has been well described as its ‘linchpin’ which governs the statute at all stages [Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd edn (2004), 49]. It is with its appearance in the Review Act that this litigation is concerned.

However, something more should be said of the other two elements in s 20. As to the requirement that the applicant be ‘aggrieved by’ a decision, the question whether the applicant is such a person only arises if there can be shown to be a decision to which the Review Act applies. If the answer be in the negative, then there is nothing ‘by’ which any applicant can assert a grievance. If the answer be in the affirmative, then a question of adequacy of ‘standing’ may arise. Recollection of and reflection on many decisions construing the AD(JR) Act [see Aronson, Dyer and Groves, 683–6] indicate that, particularly with regulatory schemes, it is not the successful applicant for a permission or licence but a third party who seeks administrative review.

In dealing with this criterion of a person ‘aggrieved’, the cases under the AD(JR) Act may be said, putting the matter very broadly, to have rejected a ‘rights-based approach’ whilst ‘understandably [refusing] to go into specifics’ [Aronson, Dyer and Groves, 684]. But it is one thing to anchor the legislation in the criterion of a decision to which the review statute applies because it is made ‘under’ an enactment; another to fix the legislative criterion for standing to enliven the Review Act. It is the first which is the precondition for the second, not vice versa.

With respect to the need to base an application for review upon one or more of the enumerated grounds, observations by Lehane J in *Botany Bay City Council v Minister of State for Transport and Regional Development* [(1996) 66 FCR 537; affd (1996) 45 ALD 125] are pertinent. Paragraph (a) of the listed [118] grounds in s 5(1) of the AD(JR) Act and s 20(2) of the Review Act is concerned with a breach of the rules of natural justice in relation to the making of the decision in question. It was against this background that, in *Botany Bay City Council*, a case under the AD(JR) Act, Lehane J observed [at 568]:

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 Griffith University v Tang *continued*

The argument, as I think is not uncommon, proceeded on the basis that there was a relationship between the questions of standing and, in the context of procedural fairness, of a right to be heard. Where, of course, a decision affects an individual interest it is highly likely that a conclusion on one matter will dictate a conclusion on the other: it is of course inconceivable that someone entitled to a hearing in relation to a proposed deportation order would not, if denied a hearing, be entitled to challenge the order once made. It is, however, different I think in what may be described loosely as a public interest case, such as the present. In such a case it would not be at all unusual, I think, to find that a person with standing to challenge a decision once made had, nevertheless, no right to be heard in relation to its making: as will be apparent, I think this is such a case. *Ogle v Strickland* [(1987) 13 FCR 306] was, I should think, another; and *North Coast Environment Council Inc v Minister for Resources* [(1994) 55 FCR 492] may well have been a third. In reality, they are in my view separate questions, in relation to each of which there is a distinct set of principles, emerging from strikingly separate lines of authority.

The reference in s 20(1) to a person ‘aggrieved’ includes ‘a person whose interests are adversely affected by the decision’ (s 7(1)(a)). The respondent has maintained that she is a person aggrieved by the decision because her exclusion from the PhD candidature has destroyed her prospects of following a professional career in the fields of molecular biology and bioscience. The University does not put its case on the ground that the respondent was not a person ‘aggrieved’. Rather, the question cannot arise unless it be shown that there was a decision to which the Review Act applied.

The orders which may be made on an application for a statutory order of review in relation to a decision are detailed in s 30(1) of the Review Act. They include orders setting aside the decision or part of it; an order referring the matter for further consideration by the decision-maker; and relief in the nature of a prohibitory or mandatory injunction.

As indicated above, it is the expression in s 20(1) ‘decision to which this Act applies’ which provides the battleground in the litigation. The expression is defined in s 4 of the Review Act as [119] meaning a decision falling within the description in para (a) or para (b). Paragraph (b) states:

a decision of an administrative character made, or proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part)—

- (i) out of amounts appropriated by Parliament; or
- (ii) from a tax, charge, fee or levy authorised by or under an enactment.

This finds no counterpart in the AD(JR) Act. No issue is before this Court respecting para (b). The focus in debate has been para (a). This is in terms which follow those of the definition of ‘decision to which this Act applies’ in s 3(1) of the AD(JR) Act. The provision in para (a) in the Queensland definition reads:

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 Griffith University v Tang *continued*

a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion).

The words within the brackets emphasise that the decision may be made in exercise of a power rather than an obligation, so that it is proper to speak of a decision required or authorised by an enactment.

Section 3 of the Review Act states that:

‘enactment’ means an Act or statutory instrument, and includes a part of an Act or statutory instrument.

The term ‘statutory instrument’ is comprehensively defined. The definition of ‘enactment’ in s 3(1) of the AD(JR) Act includes ‘an instrument (including rules, regulations or by-laws) made under [statute]’ and many cases under the AD(JR) Act have turned upon the question whether a decision was ‘made under’ such an instrument.

No statutory instrument is relied upon in this appeal. However, the definition of ‘enactment’ is not without significance. A decision made under a statutory instrument might, on one view, have been considered to have been made ‘under’ the statute which conferred the power to make the statutory instrument. On that approach, it would have been unnecessary to give the fuller definition of ‘enactment’.

*[After describing the application made by Ms Tang to the Supreme Court, and also the conclusions reached by the Court of Appeal, the joint judgment noted:*

*It has been common ground throughout the present litigation that the enrolment of the respondent at the University as a PhD candidate did not give rise to a contractual relationship between the parties. In the Court of Appeal, Jerrard JA said:*

*In the instant appeal ... there is no evidence of any payment made by [the respondent] to [the University] for admission to the PhD course, or of any terms or conditions agreed to between the parties when she was (presumably) admitted or accepted as a PhD candidate.*

*Had reliance been placed upon contract, then the occasion may have arisen to consider the apparent exclusion from justiciability of issues of academic judgment, including issues of competence of students, by the English Court of Appeal in Clark v University of Lincolnshire and Humberside [[2000] 1 WLR 1988]. The basis upon which the lack of justiciability was put in Clark appears ... to be that any adjudication would be, as Sedley LJ put it, ‘jejune and inappropriate’ (Clark, at 1992).]*

### The definition

The defining expression ‘a decision of an administrative character made ... under an enactment’ has given rise to a considerable body of case law under the AD(JR) Act, some of it indeterminate in outcome. The focus has been upon three elements of the statutory expression. The first is ‘a decision’; the second, ‘of an administrative character’; and the third, ‘made ... under an enactment’.

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 Griffith University v Tang *continued*

The cases, particularly in the Federal Court, have tended to see these as discrete elements. But there are dangers in looking at the definition as other than a whole. The interrelation between them appears from the following passage in the joint judgment of Toohey and Gaudron JJ [122] in *Australian Broadcasting Tribunal v Bond* [at 377] respecting the AD(JR) Act:

It does not follow that, because s 5 is not confined to acts involving the exercise of or a refusal to exercise a substantive power, the acts which constitute a decision reviewable under s 5 of [the *AD(JR) Act*] are at large. They are confined by the requirement in s 3(1) that they be made 'under an enactment'. A decision under an enactment is one required by, or authorised by, an enactment [cf *Australian National University v Burns* (1982) 43 ALR 25]. The decision may be expressly or impliedly required or authorised [see *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290, 302–3; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 404–6]. If an enactment requires that a particular finding be made as a condition precedent to the exercise of or refusal to exercise a substantive power, a finding to that effect is readily characterised as a decision 'under an enactment'. However, it is otherwise with respect to findings which are not themselves required by an enactment but merely bear upon some issue for determination or some issue relevant to the exercise of a discretion. Findings of that nature are not themselves 'decisions under an enactment'; they are merely findings on the way to a decision under an enactment.

*Bond* concerned the exercise of a power vested by statute in the appellant to suspend or revoke licences under the statute. This Court decided that, to qualify as a reviewable decision, it will generally be necessary to point to a decision which is final or operative and determinative, at least in the practical sense, of an issue of fact falling for consideration; a conclusion reached as a step along the way in a course of reasoning to an ultimate decision ordinarily will not qualify as a reviewable decision. The reasoning in *Bond*, particularly that of Mason CJ, apparently responded to an apprehension of misuse of the statutory review system by challenges at intermediate stages of decision-making processes.

However, as has been pointed out [Aronson, Dyer and Groves, 60], there was left a number of 'escape hatches' for such litigants. One of these was an absence of the *Bond* restrictions in the alternative avenues of review under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*. This possibility had been recognised at the outset by the Kerr Committee. In para 390 of its Report, the Committee had written:

[123] The constitutional jurisdiction of the High Court in cases in which prohibition, mandamus or an injunction is sought against an officer of the Commonwealth is, of course, unaffected by our recommendations and the reasons why a Commonwealth Administrative Court is recommended with a somewhat parallel jurisdiction are set out in the report. The reasons are that many administrative decisions are not important enough to warrant the attention of the High Court; proceedings in the

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 Griffith University v Tang *continued*

recommended Administrative Court should be less expensive and such a court should be readily available in a nearby locality; and the Court would be part of a comprehensive and integrated system of administrative law in relation to which the High Court would play its role in important matters either on appeal or where necessary in its original jurisdiction.

The second element of the definition to which attention is given by the case law is the expression 'of an administrative character'. The evident purpose here is the exclusion of decisions of a 'legislative' or 'judicial' character. The instability of the distinctions which the statute thus preserves may be appreciated by regard to two Federal Court decisions. In *Queensland Medical Laboratory v Blewett* [(1988) 84 ALR 615], a ministerial decision which took effect by substituting a new table of fees for the table set out in a Schedule to the *Health Insurance Act 1973* (Cth) was held to have a legislative rather than an administrative character. Thereafter, in *Federal Airports Corporation v Aerolineas Argentinas* [(1997) 76 FCR 582], a determination by the Corporation in exercise of power conferred by the *Federal Airports Corporation Act 1986* (Cth) to make determinations fixing aeronautical charges and specifying those by whom, and the times at which, the charges were due and payable was held to have an administrative rather than legislative character.

This appeal involves particular consideration of the third element[.] that presented by the requirement that the decision be 'made ... under an enactment'. Here again, as with the earlier two elements just discussed, there is involved a question of characterisation of the particular outcome which founds an application for review under the statute. Questions of characterisation provide paradigm examples of the application of the precept that matters of statutory construction should be determined with regard to the subject, scope and purpose of the particular legislation, here the Review Act.

In considering the present case, some care is needed lest an answer is given at odds with the subject, scope and purpose of the Review Act. In a leading Australian text, the following passage is in point [Aronson, Dyer and Groves, 73–4]:

**[124]** Many of the difficulties stem from the fact that no statute could possibly spell out the detail of every single decision or step in the decision-making process, which it requires of its administrators. Some statutes are admittedly more detailed than others, whilst some do little more than stipulate the administrator's end goals and a few methods. But, whether the statute be detailed or broad brush, they all need to contain a provision which states in substance and in very broad terms that a Minister, bureaucrat or other agency has the power (or even the duty) to administer this Act, and to do all things necessary in that regard. The recent trend is to treat decisions which can find no other statutory source of authority than such a clause as not being made *under* an enactment for *ADJR* purposes, although there has been scant attempt to identify why that approach should be adopted as a matter of principle. (Original emphasis.)

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**Griffith University v Tang** *continued*

It is not necessarily an adequate answer to the suggested attribution to the outcome in question of one character, to urge the possession of additional or alternative attributes. Two examples from federal constitutional law may be given. Where a federal law, the validity of which is in issue, fairly answers the description of being a law of two characters, one of which is and the other of which may be not a subject matter appearing in s 51 of the *Constitution*, the possession of the positive attribute is sufficient for validity and the other character is of no determinative significance.

Again, a matter may 'arise under' a law made by the Parliament within the meaning of s 76(ii) of the *Constitution* if the right or duty in question owes its existence to federal law or if it depends upon federal law for its enforcement [*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154]; this is so notwithstanding that the action in question is brought, for example, for breach of a contract or to enforce a trust. Thus, in *LNC Industries Ltd v BMW (Australia) Ltd* [(1983) 151 CLR 575], a declaration was sought that a trust existed in respect of property, being import quotas created by federal law. An order was sought to enforce the trust by requiring transfer of the quotas and, in one sense, the source of the right to obtain the order for transfer was the general law respecting trusts. Nevertheless, the subject matter of the trust owed its existence to federal law so that the litigious proceeding 'arose under' that law [at 581].

[...]

### Decisions of the High Court

Three decisions of this Court require attention, although none is necessarily determinative of the present appeal. They are *Glasson, Minister for Immigration and Ethnic Affairs v Mayer* [(1985) 157 CLR 290] and *NEAT Domestic Trading Pty Ltd v AWB Ltd* [(2003) 216 CLR 277]. All of the decisions were concerned with the phrase 'made ... under an enactment' in the definition of 'decision to which this Act applies' in s 3(1) of the AD(JR) Act.

*Mayer* is authority for the proposition that a power to make a determination may be discerned as a matter of implication in a particular statute. This follows from what was said by Mason, Deane and Dawson JJ as follows [at 303]:

[T]he preferable construction of s 6A(1)(c) [of the *Migration Act 1958* (Cth)] is that it impliedly confers upon the Minister the function of determining, for the purposes of the paragraph, whether a particular applicant for an entry permit 'has the status of refugee' within the meaning of the [Convention relating to the Status of Refugees] or [the 1967 Protocol relating to the Status of Refugees]. It follows that the Minister's decision was a decision made in the performance of the statutory function which that paragraph impliedly confers upon him. It was, within s 3(1) of the [AD(JR) Act], a decision made 'under' an 'enactment'.

[127] The minority in *Mayer* (Gibbs CJ and Brennan J) was unable to construe s 6A as impliedly conferring any relevant power upon the Minister. As Brennan J put it, a determination of

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 Griffith University v Tang *continued*

refugee status within the meaning of the Convention produces an effect in international law but required no statutory authority or power to make it. It followed that there was in the migration legislation to be found no source of a power to make a determination of refugee status and there was no decision made under that legislation to attract the AD(JR) Act. A distinction was drawn by Brennan J between ‘the source of a decision’s legal effect’ and ‘the source of a power to make a decision having that effect’ [at 307].

The earlier decision in *Glasson* concerned federal legislation and a scheme formulated thereunder by a Minister of the Commonwealth which provided for the making of payments by the Commonwealth to New South Wales and by that State to distributors of certain petroleum products. The scheme provided for a system whereby officers authorised under State legislation certified that amounts were payable to the distributors, but only the State statute authorised the giving of a certificate and its effect. The Court said [at 241; cf *Salerno v National Crime Authority* (1997) 75 FCR 133 where search warrants were issued under the *Summary Offences Act 1953* (SA) and supplied the only lawful authority for what otherwise were acts of trespass and conversion by State police officers ‘attached’ to the National Crime Authority]:

When neither the Commonwealth Act nor the scheme is the source of the power to appoint the decision-maker, or *the source of his power to make the decision, or the source of the decision’s legal effect*, it cannot be said that the decision was made under that enactment. (Emphasis added.)

This was so even though the issue of the certificate might have a significant practical effect leading to the adjustment of accounts between the Commonwealth and the State.

In *NEAT*, the written approval of AWB (International) Ltd (AWB) was a statutory condition which had to be satisfied before the authority established by the *Wheat Marketing Act 1989* (Cth) might give its consent to the bulk export of wheat. It was held in the joint judgment in *NEAT* that the circumstance that the production of the written approval by AWB was given statutory significance did not provide the basis for an implication of the conferral by the statute of authority upon AWB to give approval and to express its decision in writing; that power derived from the incorporation of AWB under the applicable companies legislation, s 124 of the *Corporations Law* (Vict). The determination to give written approval was not a decision under an enactment for the purposes of the AD(JR) Act; rather, the provision of [128] the approval was a condition precedent to consideration by the authority as to whether it would give its consent to export [at 298].

### The preferred construction

There is a line of authority in the Federal Court, beginning with the judgment of Lockhart and Morling JJ in *Chittick v Ackland* [(1984) 1 FCR 254, 264] and including the judgments of Kiefel J and Lehane J in *Australian National University v Lewins* [(1996) 68 FCR 87, 96–7, 101–3], which assists in fixing the proper construction of the phrase ‘decision of an administrative character made ... under an enactment’. As noted earlier in these reasons, the presence in the

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definition in the AD(JR) Act of the words '(whether in the exercise of a discretion or not ...)' indicates that the decision be either required or authorised by the enactment. *Mayer* shows that this requirement or authority may appear sufficiently as a matter of necessary implication. However, whilst this requirement or authority is a necessary condition for the operation of the definition, it is not, by itself, sufficient.

The decision so required or authorised must be 'of an administrative character'. This element of the definition casts some light on the force to be given by the phrase 'under an enactment'. What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?

The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? [cf *Barrett* (1945) 70 CLR 141, 154] To adapt what was said by Lehane J in *Lewins* [at 103], does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute? [*General Newspapers* (1993) 45 FCR 164, 169]

If the decision derives its capacity to bind from contract or some other private law source, then the decision is not 'made under' the enactment in question. Thus, in *Lewins*, a decision not to promote to Reader a member of the staff of the Australian National University was not 'made under' the *Australian National University Act 1991* (Cth) (the ANU Act). Lehane J explained [at 103]:

**[129]** In this case, the relevant statutory power (in s 6(2)(k) of the ANU Act) is simply one 'to employ staff'. Obviously that, taken together with the general power to contract, empowers the University to enter into contracts of employment, to make consensual variations of employment contracts and to enter into new contracts with existing employees. But I cannot see how it is possible to construe a mere power to employ staff as enabling the University unilaterally to vary its contracts with its employees or to impose on them, without their consent, conditions which legally bind them—except, of course, to the extent that contracts of employment may themselves empower the University to make determinations which will be binding on the employees concerned.

For these reasons, a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties.

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 Griffith University v Tang *continued*

To the extent that the Federal Court decided otherwise in *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* [(1985) 7 FCR 575], that case and decisions relying upon it should be regarded as having proceeded on an incorrect interpretation of the AD(JR) Act. Given the absence in this case of any suggested contractual relationship between the parties, a matter to which attention was drawn earlier in these reasons, what has been said above respecting the contract cases cannot be determinative of the outcome.

Reference has been made earlier in these reasons to the significance attached in *Hutchins* to the relationship between the income tax legislation and the decision to vote at the creditors meeting as being ‘too remote and non-specific’. However, Black CJ also based his decision on the sound ground that ‘the decision was not given statutory effect by the sections relied upon’ [at 273]. Lockhart J [at 277] said that the decision to vote could not have conferred any benefit or imposed any disadvantage when it was made; any affection of legal rights arose from the cumulative effect of the votes later cast against the special resolution at the meeting of creditors.

**[130]** The legal rights and obligations which are affected by the authority of the decision derived from the enactment in question may be those rights and obligations founded in the general or unwritten law. For example, in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* [(1997) 188 CLR 501, 565], it was the decision to issue the search warrants pursuant to s 10 of the *Crimes Act 1914* (Cth) which provided the police officers executing them with lawful authority to commit what otherwise were acts of trespass and conversion and attracted the operation of the AD(JR) Act.

However, that which is affected in the fashion required by the statutory definition may also be statutory rights and obligations. An example is that given by Toohey and Gaudron JJ in *Bond* [at 377] of a requirement, as a condition precedent to the exercise of a substantive statutory power to confer or withdraw rights (eg, a licence), that a particular finding be made. The decision to make or not to make that finding controls the coming into existence or continuation of the statutory licence and itself is a decision under an enactment.

In *Mayer*, the making of a determination of refugee status (under the power impliedly conferred by the statute) was a necessary condition for the grant of an entry permit. The determination of refugee status was a decision under the migration legislation which controlled the coming into existence of the entry permit to this country. On the other hand, in *Glasson* and *NEAT*, the statutory condition precedent was a decision made de hors the federal statute, although, once made, it had a critical effect for the operation of the federal statute. In *Mayer*, both the determination of refugee status and the grant of an entry permit were authorised by the *Migration Act 1958* (Cth).

The Review Act recognises such cases and takes them further. It does so in s 6, which states [section 3(3) of the AD(JR) Act is to similar effect]:

If provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision.

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*Griffith University v Tang continued*

The determination of whether a decision is ‘made ... under an enactment’ involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be ‘made ... under an enactment’ if [131] both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter existing rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice.

The character of the AD(JR) Act as a law of the Commonwealth which confers federal jurisdiction to hear and determine applications for review supports the construction of the critical phrase ‘decision ... made ... under an enactment’ in these reasons. Reference has been made earlier in these reasons under the heading ‘The definition’ to the importance in construing this phrase of the expression in s 76(ii) of the *Constitution* ‘arising under any laws made by the Parliament’. There must be a ‘matter’ so arising. The meaning of the constitutional term ‘matter’ requires some immediate right, duty or liability to be established by the court dealing with an application for review under the AD(JR) Act [*In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 389, 404–7, 459]. A recent example of the practical operation of the constitutional requirements of a ‘matter’ is provided by *Re McBain; Ex parte Australian Catholic Bishops Conference*. As a State law, the Review Act does not have the constitutional underpinning which controls the interpretation of the AD(JR) Act. However, as noted at the beginning of these reasons, s 16(1) of the Review Act explicitly links the text and structure of that statute to the AD(JR) Act.

### The present case

Counsel for the University correctly submitted that, given the manner in which the respondent had framed her application for judicial review, there had subsisted between the parties no legal rights and obligations under private law which were susceptible of affection by the decisions in question. There was at best a consensual relationship, the continuation of which was dependent upon the presence of mutuality. That mutual consensus had been brought to an end, but there had been no decision made by the University under the University Act. Nor, indeed, would there have been such a decision had the respondent been allowed to continue in the PhD programme.

It may, for the purposes of argument, be accepted that the circumstances had created an expectation in the respondent that any withdrawal from the PhD candidature programme would only follow [132] upon the fair treatment of complaints against her. But such an expectation would create in the respondent no substantive rights under the general law, the affecting of which rendered the decisions she challenged decisions made under the University Act. What was said by Kiefel J and Lehane J on the point in *Lewins* [at 96–7; 103–4], and

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 Griffith University v Tang *continued*

subsequently by this Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [(2003) 214 CLR 1, 27–8, 48], supports that conclusion.

Nor were there any presently subsisting statutory rights of the respondent, or statutory rights the coming into existence of which would be contingent solely upon her re-admission to the PhD candidature programme. The respondent would still have had to satisfy the requirements for award of the degree. Had she done so, a question (which it is unnecessary to decide) may have arisen as to whether she had a statutory or other right to the award.

### The result

It may be accepted that the Higher Education Act required the respondent to obtain the ‘higher education award’, which she sought by her PhD candidature, from an authorised educational institution such as the University. But the circumstance that the University was not doing ‘what anyone in the community could do’ does not render the exclusion of the respondent a decision made under the University Act.

Nor is it to the point that the Council, rather than exercise its powers of delegation to the Committees involved, might have exercised its power to make university statutes or rules. The exercise of one rather than another concurrent power available to the University is insufficient to attract the Review Act to decisions later made by the Committees.

The decisions of which the respondent complains were authorised, albeit not required, by the University Act. The Committees involved depended for their existence and powers upon the delegation by the Council of the University under ss 6 and 11 of the University Act. But that does not mean that the decisions of which the respondent complains were ‘made under’ the University Act in the sense required to make them reviewable under the Review Act. The decisions did not affect legal rights and obligations. They had no impact upon matters to which the University Act gave legal force and effect. The respondent enjoyed no relevant legal rights and the University had no obligations under the University Act with respect to the course of action the latter adopted towards the former.

*[Gleeson CJ agreed with the joint judgment’s ultimate conclusions, and with the basic characterisation of the relationship between the university and Ms Tang. In his view this relationship was a ‘voluntary association’. He held that the termination decision was ‘not a decision which took legal force or effect, in whole or in part, from the terms of [the] statute’. Rather it was a decision which occurred under the ‘general law’.*

*In a dissent, Kirby J characterised the approach of the majority to statutory judicial review as ‘unduly narrow’. Kirby J emphasised the serious consequences of the university’s decision for the respondent and continued:]*

**KIRBY J: [134]** These serious consequences notwithstanding, the respondent is now held by this Court to be disentitled to a statutory order of review on the basis that the ‘decisions’ of the University which she challenges were not made ‘under’ the University Act. This conclusion is reached because, it is said, in order to be made ‘under’ that Act ‘legal rights and obligations’ between the University and the respondent had to be affected, but were not.

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 Griffith University v Tang *continued*

This outcome has, in my respectful view, only to be stated to demonstrate its flaws. There is nothing in the *Judicial Review Act 1991* (Q) (the Review Act) to warrant such a gloss upon its beneficial and facultative terms. It is a gloss that defeats the attainment of important reformatory purposes of that Act. It destroys the capacity of the Review Act to render the exercise of public power accountable to the law where a breach can be shown. Moreover, it is incompatible with the express provision of the Review Act affording remedies to those whose 'interests' are adversely affected by the challenged [135] decision. There was never a dispute that the respondent's 'interests' were so affected. Nor was it contested that she was, within the Review Act, a 'person aggrieved'. The gloss favoured by the majority is contrary to the text and the purposes of the Review Act. Properly construed, that Act is applicable to this case. The University's appeal should be dismissed.

[...]

### The applicable test and inapplicable attempts

[151] *The proper approach*: Obviously, none of the Federal Court decisions, nor the several approaches they have successively favoured, bind this Court. Whilst assistance may be derived from reading them, the foregoing digest and lengthier analyses elsewhere of their reasoning show, with all respect, the confusion into which this corner of the law has fallen. It is not sufficient to resolve the present case simply by reference to 'the circumstances of each case' as was [152] suggested in *Burns* [(1982) 43 ALR 25, 34]. Clearly, this Court should adopt an approach that will help resolve not only this case but other cases in other courts in the future. It must be an approach that is consistent with the language, structure and purposes of the Review Act (and, in similar cases to which it applies, the AD(JR) Act) ...

The other provisions of the Review Act that are relevant include the broad connotation of 'decision'; the large ambit of 'enactment' as defined; and the very large scope afforded to persons to establish standing so as to invoke the remedies provided by that Act. These considerations help to identify the serious flaw in the new test propounded in the joint reasons.

No view could be taken of the phrase 'made ... under an enactment' that is inconsistent with the clear parliamentary purpose that 'persons aggrieved' by an administrative decision are entitled by law to enliven the Review Act if they can show no more than that their 'interests' are 'adversely affected by the decision'. To provide such a wide definition of 'person aggrieved' and then, by a judicial gloss, to narrow severely the parliamentary purpose in so providing (by obliging demonstrations of the 'affecting of legal rights and obligations' as a precondition to relief) is unacceptable as a simple matter of statutory construction. The text is not then internally harmonious and consistent as it should be assumed the Parliament intended. Judges must not impose interpretations on parliamentary law that contradict express provisions of such law or deny, or frustrate, its application. There is no textual foundation for glossing the Review Act in this way. To the contrary, there are clear textual provisions that forbid it.

[...]

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 Griffith University v Tang *continued*

*[Kirby J argued that the ADJR Act was not limited to decisions affecting 'legal rights and obligations' but was concerned also with 'interests', a much broader notion. He went on to argue that the university's power to provide education and confer degrees derived only from the University Act. It followed that the university's power to expel a candidate from a higher education degree program also derived from the University Act and that, therefore, the decision was made under an enactment. He concluded as follows.]*

**[155]** *No other source of power:* As noted by the Court of Appeal and by this Court, it was common ground between the parties that there was no contract in existence between the respondent and the University, and thus no contractual source of power (as in *Burns*) by which the University could have purported to act so as to permit the action taken against the respondent to be characterised as taken under a contract (assuming that to be a valid distinction) and not under the enactment. In the Court of Appeal it was held, correctly in my opinion, that in the absence of contract in this case the only possible source of power for the decision to exclude the respondent from the programme was the University Act. No competing statutory or other source of a relevant power existed.

The majority in this Court now holds that the University was acting only in its capacity under 'general law' as a private entity, terminating a private 'relationship' or 'arrangement' with another entity (the respondent), as any person may do, without recourse to a statutory power. Such a characterisation conceals the reality that the relevant 'arrangement' between the University and the respondent consisted solely in the exercise by the University of its statutory powers under the Higher Education and University Acts with respect to the respondent, namely the powers to 'provide education at university standard' and ultimately to 'confer higher education awards' upon valid enrolment and undertaking of the relevant course.

The 'arrangement' and 'relationship' in question were co-extensive with the University's powers and obligations under the University Act. Here, they involved nothing else. The termination of that 'arrangement' or 'relationship' was nothing less than the refusal by the University to exercise its powers in the respondent's case. Put affirmatively, it was the withdrawal from an already accepted **[156]** student of the University's facilities of education and the conferral of its degree. Describing the events as the termination of an 'arrangement' or 'relationship' at general law cannot alter the basic character of the University's actions: the termination was, and remains, indistinguishable from the University's refusal to exercise the relevant statutory powers [Under the *Review Act*, as under the *AD(JR) Act*, 'making ... a decision' is defined to include refusing to make a decision: s 5(a). See also *AD(JR) Act*, s 3(2).].

The University could have entered into, or withdrawn from, various 'arrangements' or 'relationships' with students as it wished. But what gave this withdrawal its 'bite', and its impact on the respondent, was the denial, inflicted on a person with an interest, of access to a tertiary education and eventually to a degree, which relevantly only the University could award, pursuant to the Higher Education Act.

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Griffith University v Tang *continued*

*Summary and conclusion:* The foregoing approach, which I favour, is wholly consistent with this Court's decision in *NEAT Trading*, much as I disagree with that decision. It is firmly anchored in an analysis of the statutory provisions relevant to this case. Unlike the approach in the joint reasons, it does not contradict, but fulfils, the remedial language, structure and purpose of the Review Act. It avoids glossing the phrase 'under an enactment' with an additional vague and opaque requirement that is not in the Act and that contradicts the standing and interest provisions that are there. It follows that the University's appeal to this Court should be dismissed.

## JUDICIAL REVIEW AND THE PUBLIC/PRIVATE DISTINCTION

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### *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc*

[1987] QB 815

Court of Appeal (UK)

In this case, the UK Court of Appeal extended the common law 'supervisory' or 'inherent' jurisdiction to issue judicial review remedies to the actions of a non-statutory entity in the UK financial sector. A 'functional' approach to determining the reach of public law norms to ostensibly 'private' bodies was central to the Court's reasoning.

#### READING QUESTIONS

- 1 In what sense was the Take-overs Panel a remarkable body?
- 2 Is the panel an example of the trends in contemporary governance associated with contracting out and privatisation (see *PAL* 2.3)?
- 3 What approach did the English Court of Appeal take to defining the scope of administrative law (in particular, judicial review) in *Datafin*? (That is, how is the question of whether administrative law principles apply answered?)
- 4 Why did the *Datafin* court think that, even if decisions of the panel were in principle subject to judicial review, it may in practice be difficult for aggrieved persons to get a remedy?
- 5 How does Lord Donaldson describe the difference between judicial review and an 'appeal'?
- 6 Is the extension of administrative law norms to non-state decision-makers exercising so-called public functions the only way for law to regulate their decisions? What other approaches might be possible? (See *PAL* 2.7)

**DONALDSON MR:** [824] The Panel on Take-overs and Mergers is a truly remarkable body. Perched on the 20th floor of the Stock Exchange building in the City of London, both literally

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R v Panel on Take-overs and Mergers, Ex parte Datafin Plc *continued*

and metaphorically it oversees and regulates a very important part of the United Kingdom financial market. Yet it performs this function without visible means of legal support.

The panel is an unincorporated association without legal personality and, so far as can be seen, has only about twelve members. But those members are appointed by and represent the Accepting Houses [825] Committee, the Association of Investment Trust Companies, the Association of British Insurers, the Committee of London and Scottish Bankers, the Confederation of British Industry, the Council of the Stock Exchange, the Institute of Chartered Accountants in England and Wales, the Issuing Houses Association, the National Association of Pension Funds, the Financial Intermediaries Managers and Brokers Regulatory Association, and the Unit Trust Association; the chairman and deputy chairman being appointed by the Bank of England. Furthermore, the panel is supported by the Foreign Bankers in London, the Foreign Brokers in London and the Consultative Committee of Accountancy Bodies.

It has no statutory, prerogative or common law powers and it is not in contractual relationship with the financial market or with those who deal in that market. According to the introduction to the City Code on Take-overs and Mergers, which it promulgates:

The code has not, and does not seek to have, the force of law, but those who wish to take advantage of the facilities of the securities markets in the United Kingdom should conduct themselves in matters relating to take-overs according to the code. Those who do not so conduct themselves cannot expect to enjoy those facilities and may find that they are withheld. The responsibilities described herein apply most directly to those who are actively engaged in all aspects of the securities markets, but they are also regarded by the panel as applying to directors of companies subject to the code, to persons or groups of persons who seek to gain control (as defined) of such companies, and to all professional advisers (insofar as they advise on the transactions in question), even where they are not directly affiliated to the bodies named in section (1)(a). Equally, where persons other than those referred to above issue circulars to shareholders in connection with take-overs the panel expects the highest standards of care to be observed. The provisions of the code fall into two categories. On the one hand, the code enunciates general principles of conduct to be observed in take-over transactions: these general principles are a codification of good standards of commercial behaviour and should have an obvious and universal application. On the other hand, the code lays down a series of rules, some of which are no more than examples of the application of the general principles whilst others are rules of procedure designed to govern specific forms of take-over. Some of the general principles, based as they are upon a concept of equity between one shareholder and another, while readily understandable in the City and by those concerned with the securities markets generally, would not easily lend themselves to legislation. The code is therefore framed in non-technical language

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**R v Panel on Take-overs and Mergers, Ex parte Datafin Plc *continued***

and is, primarily as a measure of self-discipline, administered and enforced by the panel, a body representative of those using the securities markets and concerned with the observance of good business standards, rather than the enforcement of the law. As indicated above, the panel executive is always available to be consulted and where there is doubt this should be done in advance of any action. Taking legal or other [826] professional advice on matters of interpretation under the code is not an appropriate alternative to obtaining a view or a ruling from the executive.

'Self-regulation' is an emotive term. It is also ambiguous. An individual who voluntarily regulates his life in accordance with stated principles, because he believes that this is morally right and also, perhaps, in his own long term interests, or a group of individuals who do so, [is] practising self-regulation. But it can mean something quite different. It can connote a system whereby a group of people, acting in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising. This is not necessarily morally wrong or contrary to the public interest, unlawful or even undesirable. But it is very different.

The panel is a self-regulating body in the latter sense. Lacking any authority *de jure*, it exercises immense power *de facto* by devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions. These sanctions are no less effective because they are applied indirectly and lack a legally enforceable base. Thus, to quote again from the introduction to the code:

If there appears to have been a material breach of the code, the executive invites the person concerned to appear before the panel for a hearing. He is informed by letter of the nature of the alleged breach and of the matters which the director general will present. If any other matters are raised he is allowed to ask for an adjournment. If the panel finds that there has been a breach, it may have recourse to private reprimand or public censure or, in a more flagrant case, to further action designed to deprive the offender temporarily or permanently of his ability to enjoy the facilities of the securities markets. The panel may refer certain aspects of a case to the Department of Trade and Industry, the Stock Exchange or other appropriate body. No reprimand, censure or further action will take place without the person concerned having the opportunity to appeal to the appeal committee of the panel.

The unspoken assumption, which I do not doubt is a reality, is that the Department of Trade and Industry or, as the case may be, the Stock Exchange or other appropriate body would in fact exercise statutory or contractual powers to penalise the transgressors. Thus, for example, rules 22 to 24 of the Rules of the Stock Exchange (1984) provide for the severest penalties, up to and including expulsion, for acts of misconduct and by rule 23.1:

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R v Panel on Take-overs and Mergers, Ex parte Datafin Plc *continued*

Acts of misconduct may consist of any of the following ... (g) Any action which has been found by the Panel on Take-overs and Mergers (including where reference has been made to it, the appeal committee of the panel) to have been in breach of the City Code on Take-overs and Mergers. The findings of the panel, subject [827] to any modification by the appeal committee of the panel, shall not be re-opened in proceedings taken under rules 22 to 24.

The principal issue in this appeal, and only issue which may matter in the longer term, is whether this remarkable body is above the law. Its respectability is beyond question. So is its bona fides. I do not doubt for one moment that it is intended to, and does, operate in the public interest and that the enormously wide discretion which it arrogates to itself is necessary if it is to function efficiently and effectively. Whilst not wishing to become involved in the political controversy on the relative merits of self-regulation and governmental or statutory regulation, I am content to assume for the purposes of this appeal that self-regulation is preferable in the public interest. But that said, what is to happen if the panel goes off the rails? Suppose, perish the thought, that it were to use its powers in a way which was manifestly unfair. What then? Mr Alexander submits that the panel would lose the support of public opinion in the financial markets and would be unable to continue to operate. Further or alternatively, Parliament could and would intervene. Maybe, but how long would that take and who in the meantime could or would come to the assistance of those who were being oppressed by such conduct?

A somewhat similar problem confronted the courts in 1922 when the Council of the Refined Sugar Association, a self-regulatory body for the sugar trade and no less respectable than the panel, made a rule which purported to preclude any trader from asking a trade arbitrator to state a case for the opinion of the court or from applying to the court for an order that such a case be stated. The matter came before a Court of Appeal consisting of Bankes, Atkin and Scrutton LJJ: see *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478. The decision has no direct application to the present situation, because the court was concerned with the law of contract, but its approach was traditional, significant and, in the case of Scrutton LJ, colourful. This approach can be illustrated by brief quotations from the judgments. Bankes LJ said, at 484:

To release real and effective control over commercial arbitration is to allow the arbitrator, or the arbitration tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words to be outside the law. At present no individual or association is, so far as I am aware, outside the law except a trade union. To put such associations as the Refined Sugar Association in a similar position would in my opinion be against public policy. Unlimited power does not conduce to reasonableness of view or conduct.

Scrutton LJ said, at 488:

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In my view to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public [828] policy. There must be no Alsatia in England where the King's writ does not run.

Atkin LJ said, at 491:

I think that it is still a principle of English law that an agreement to oust the jurisdiction of the courts is invalid ... In the case of powerful associations such as the present, able to impose their own arbitration clauses upon their members, and, by their uniform contract, conditions upon all non-members contracting with members, the result might be that in time codes of law would come to be administered in various trades differing substantially from the English mercantile law. The policy of the law has given to the High Court large powers over inferior courts for the very purpose of maintaining a uniform standard of justice and one uniform system of law ... If an agreement to oust the common law jurisdiction of the court is invalid every reason appears to me to exist for holding that an agreement to oust the court of this statutory jurisdiction is invalid.

Thus far I have made no mention of the facts underlying this application or of the parties, other than the panel. This is not accidental, but reflects the fact that the major issue of whether the courts of this country have any jurisdiction to control the activities of a body which de facto exercises what can only be characterised as powers in the nature of public law powers does not depend upon those particular facts. Nor has the issue of jurisdiction vel non any connection with the quite distinct issue of how, in principle, the court should exercise any jurisdiction which it may have. The facts are only relevant to whether this is an appropriate case in which, in accordance with such general principles, to exercise any such jurisdiction. However, I should now remedy the deficiency.

The applicants for relief by way of judicial review are Datafin Plc, an English company, and Prudential-Bache Securities Inc of New York. In addition there appear, as interveners, Norton Opax Plc and Samuel Montagu & Co Ltd, their merchant bankers and financial advisers, both being English companies. Other members of the cast, albeit not parties to the proceedings, are Greenwell Montagu & Co Ltd, the stockbroking arm of Samuel Montagu; Laurence Prust, another stockbroker; the Kuwait Investment Office ('KIO'), a major investor in the United Kingdom financial market; and McCorquodale Plc, an English printing company, which was the target for the take-over bids which precipitated the present proceedings. I can take the background facts from the paper prepared by the executive of the panel:

*[Norton Opax and Datafin had made competing take-over bids for McCorquodale. Datafin and Prudential-Bache, the leading financial backer of Datafin's bid, made a complaint to the City Panel on Takeovers and Mergers regarding the conduct of Norton Opax and Kuwait Investment Office (KIO), alleging that these two companies had acted in breach of the panel's code of practice. The panel dismissed the complaint and Datafin sought judicial review of that decision.]*

[834] It will be seen that there are three principal issues, viz: (a) Are the decisions of the panel susceptible to judicial review? This is the 'jurisdictional' issue. (b) If so, how in principle

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is that jurisdiction to be exercised given the nature of the panel's activities and the fact that it is an essential part of the machinery of a market in which time is money in a very real sense? This might be described as the 'practical' issue. (c) If the jurisdictional issue is answered favourably to the applicants, is this a case in which relief should be granted and, if so, in what form?

As the new Norton Opax ordinary shares have been admitted to the Official Stock Exchange List and so can be traded, subject to allotment, any doubt as to the outcome of the present proceedings could affect the price at which these shares are or could be traded and thus the rights of those entitled to trade in them. Accordingly we thought it right to announce at the end of the argument that the application for judicial review would be refused. However, I propose to explain my reasons for reaching this conclusion by considering the three issues in the order in which I have set them out.

### The jurisdictional issue

As I have said, the panel is a truly remarkable body, performing its function without visible means of legal support. But the operative word is 'visible,' although perhaps I should have used the word 'direct.' Invisible or indirect support there is in abundance. Not only is a breach of the code, so found by the panel, ipso facto an act of misconduct by a member of the Stock Exchange, and the same may be true of other bodies represented on the panel, but the admission of shares to the Official List may be withheld in the event of such a breach. This is interesting and significant for listing of securities is a statutory function performed by the Stock Exchange in pursuance of the Stock Exchange (Listing) Regulations 1984 (SI 1984 No 716), enacted in implementation [835] of EEC directives and the matter does not stop there, because in December 1983 the Department of Trade and Industry made a statement explaining why the Licensed Dealers (Conduct of Business) Rules 1983 (SI 1983 No 585) contained no detailed provisions about take-overs. It said:

There are now no detailed provisions in these statutory rules about take-overs and the following paragraphs set out the provisions as regards public companies and private companies respectively. 2. As regards public companies (as well as private companies which have had some kind of public involvement in the ten years before the bid) the department considers it better to rely on the effectiveness and flexibility of the City Code on Take-overs and Mergers, which covers bids made for public companies and certain private companies which have had some past public involvement. The City code has the support of, and can be enforced against, professional security dealers and accordingly the department expects, as a matter of course, that those making bids for public companies (and private companies covered by the code) to use the services of a dealer in securities authorised under the *Prevention of Fraud (Investments) Act 1958* (such as a stockbroker, exempt dealer, licensed dealer, or a member of a recognised association), in which case the Secretary of State's permission for the distribution of take-over documents is not required. This is seen as an important safeguard for the shareholders of the public

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company (of which there may be several hundreds or thousands) and as a means of ensuring that such take-overs are conducted properly and fully in accordance with the provisions of the City code. It would only be in exceptional cases that the Secretary of State would consider removing this safeguard by granting permission under section 14(2) of the Act for the distribution of take-over documents in these circumstances.

The picture which emerges is clear. As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions.

No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets world wide. The explanation is that it is an historical 'happenstance,' to borrow a happy term from across the Atlantic. Prior to the years leading up to the 'Big Bang,' the City of London prided itself upon being a village community, albeit of an unique kind, which could regulate itself by pressure of professional opinion. As government increasingly accepted the necessity for intervention to prevent fraud, it [836] built on City institutions and mores, supplementing and reinforcing them as appeared necessary. It is a process which is likely to continue, but the position has already been reached in which central government has incorporated the panel into its own regulatory network built up under the *Prevention of Fraud (Investments) Act 1958* and allied statutes, such as the *Banking Act 1979*.

The issue is thus whether the historic supervisory jurisdiction of the Queen's courts extends to such a body discharging such functions, including some which are quasi-judicial in their nature, as part of such a system. Mr Alexander, for the panel, submits that it does not. He says that this jurisdiction only extends to bodies whose power is derived from legislation or the exercise of the prerogative. Mr Lever, for the applicants, submits that this is too narrow a view and that regard has to be had not only to the source of the body's power, but also to whether it operates as an integral part of a system which has a public law character, is supported by public law in that public law sanctions are applied if its edicts are ignored and performs what might be described as public law functions.

In *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q 864, 882, Lord Parker CJ, who had unrivalled experience of the prerogative remedies both on the Bench and at the Bar, said that the exact limits of the ancient remedy of certiorari had never been and ought not to be specifically defined. I respectfully agree and will not attempt such an exercise. He continued, at 882:

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They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a *lis inter partes*. Later again it extended to cases where there was no *lis* in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of *certiorari* since their authority is derived solely from contract, that is, from the agreement of the parties concerned ... We have as it seems to me reached the position when the ambit of *certiorari* can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way the board in my judgment comes fairly and squarely within the jurisdiction of this court. It is, as Mr. Bridge said, 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown.' It is clearly, therefore, performing public duties.

Diplock LJ, who later was to make administrative law almost his own, said, at pp 884–885:

The jurisdiction of the High Court as successor of the Court of Queen's Bench to supervise the exercise of their jurisdiction by inferior tribunals has not in the past been dependent upon the [837] source of the tribunal's authority to decide issues submitted to its determination, except where such authority is derived solely from agreement of parties to the determination. The latter case falls within the field of private contract and thus within the ordinary civil jurisdiction of the High Court supplemented where appropriate by its statutory jurisdiction under the Arbitration Acts. The earlier history of the writ of *certiorari* shows that it was issued to courts whose authority was derived from the prerogative, from Royal Charter, from franchise or custom as well as from Act of Parliament. Its recent history shows that as new kinds of tribunals have been created, orders of *certiorari* have been extended to them too and to all persons who under authority of the Government have exercised quasi-judicial functions. True, since the victory of Parliament in the constitutional struggles of the 17th century, authority has been, generally if not invariably, conferred upon new kinds of tribunals by or under Act of Parliament and there has been no recent occasion for the High Court to exercise supervisory jurisdiction over persons whose ultimate authority to decide matters is derived from any other source. But I see no reason for holding that the ancient jurisdiction of the Court of Queen's Bench has been narrowed merely because there has been no occasion to exercise it. If new tribunals are established by acts of government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics upon which the subjection of inferior tribunals to the supervisory control of the High Court is based. What are these characteristics? It

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is plain on the authorities that the tribunal need not be one whose determinations give rise directly to any legally enforceable right or liability. Its determination may be subject to certiorari notwithstanding that it is merely one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates. It is not even essential that the determination must have that result, for there may be some subsequent condition to be satisfied before the determination can have any effect upon such legal rights or liabilities. That subsequent condition may be a later determination by another tribunal (see *R v Postmaster-General, Ex parte Carmichael* [1928] 1 KB 291; *R v Boycott, Ex parte Keasley* [1939] 2 KB 651). Is there any reason in principle why certiorari should not lie in respect of a determination, where the subsequent condition which must be satisfied before it can affect any legal rights or liabilities of a person to whom it relates is the exercise in favour of that person of an executive discretion, as distinct from a discretion which is required to be exercised judicially?

Ashworth J, who like Lord Parker CJ had served as junior counsel to the Treasury and as such had vast experience in this field, said, at 891–892:

It is a truism to say that the law has to adjust itself to meet changing circumstances and although a tribunal, constituted as the board, has not been the subject of consideration or decision by this [838] court in relation to an order of certiorari, I do not think that this court should shrink from entertaining this application merely because the board had no statutory origin. It cannot be suggested that the board had unlawfully usurped jurisdiction: it acts with lawful authority, albeit such authority is derived from the executive and not from an Act of Parliament. In the past this court has felt itself able to consider the conduct of a minister when he is acting judicially or quasi-judicially and while the present case may involve an extension of relief by way of certiorari I should not feel constrained to refuse such relief if the facts warranted it.

The Criminal Injuries Compensation Board, in the form which it then took, was an administrative novelty. Accordingly it would have been impossible to find a precedent for the exercise of the supervisory jurisdiction of the court which fitted the facts. Nevertheless the court not only asserted its jurisdiction, but further asserted that it was a jurisdiction which was adaptable thereafter. This process has since been taken further in *O'Reilly v Mackman* [1983] 2 AC 237, 279 (Lord Diplock) by deleting any requirement that the body should have a duty to act judicially; in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 by extending it to a person exercising purely prerogative power; and in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, where Lord Fraser of Tullybelton, at 163F and Lord Scarman, at 178F-H expressed the view obiter that judicial review would extend to guidance circulars issued by a department of state without any specific authority. In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a

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fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.

In fact, given its novelty, the panel fits surprisingly well into the format which this court had in mind in the *Criminal Injuries Compensation Board Case*. It is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centre-piece of his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense be said to have assented to this situation, eg the members of the Stock Exchange. At least in its determination of whether there has been a breach of the code, it has a duty to act judicially and it asserts that its *raison d'être* is to do equity between one shareholder and another. Its source of power is only partly based upon moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England. In this context I should be very disappointed if the courts could not recognise the realities of executive power and [839] allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted.

Given that it is really unthinkable that, in the absence of legislation such as affects trade unions, the panel should go on its way cocooned from the attention of the courts in defence of the citizenry, we sought to investigate whether it could conveniently be controlled by established forms of private law, eg torts such as actionable combinations in restraint of trade, and, to this end, pressed Mr Lever to draft a writ. Suffice it to say that the result was wholly unconvincing and, not surprisingly, Mr Alexander did not admit that it would be in the least effective.

In reaching my conclusion that the court has jurisdiction to entertain applications for the judicial review of decisions of the panel, I have said nothing about the substantial arguments of Mr Alexander based upon the practical problems which are involved. These, in my judgment, go not to the existence of the jurisdiction, but to how it should be exercised and to that I now turn.

### The practical issue

Mr. Alexander waxed eloquent upon the disastrous consequences of the court having and exercising jurisdiction to review the decisions of the panel and his submissions deserved, and have received, very serious consideration.

[...]

[840] I think that it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and

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remain fully effective unless and until they are set aside by a court of competent jurisdiction. Furthermore, the court has an ultimate discretion whether to set them aside and may refuse to do so in the public interest, notwithstanding that it holds and declares the decision to have been made *ultra vires*: see, for example, *R v Monopolies and Mergers Commission, Ex parte Argyll Group Plc* [1986] 1 WLR 763. That case also illustrates the awareness of the court of the special needs of the financial markets for speed on the part of decision-makers and for being able to rely upon those decisions as a sure basis for dealing in the market. It further illustrates an awareness that such decisions affect a very wide public which will not be parties to the dispute and that their interests have to be taken into account as much as those of the immediate disputants.

In the context of judicial review, it must also be remembered that it is not even possible to apply for relief until leave has been obtained. The purpose of this provision was explained by Lord Diplock in *R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 642–643:

The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

In many cases of judicial review where the time scale is far more extended than in the financial markets, the decision-maker who learns that someone is seeking leave to challenge his decision may well seek to preserve the status quo meanwhile and, in particular, may not seek to enforce his decision pending a consideration of the matter by the court. If leave is granted, the court has the necessary authority to make orders designed to achieve this result, but usually the decision-maker will give undertakings in lieu. All this is but good administrative practice. However, against the background of the time scales of the financial market, the courts would not expect the panel or those who should comply with its decisions to act similarly. In that context the panel and those affected should treat its decisions as valid and binding, unless and until they are set aside. Above all they should ignore any application for leave to apply of which they become aware, since to do otherwise would enable such applications to be used as a mere ploy in take-over battles which would be a serious abuse of the process of the court and could not be adequately penalised by awards of costs.

**[841]** If this course is followed and the application for leave is refused, no harm will have been done. If the application is granted, it will be for the court to decide whether to make any and, if so, what orders to preserve the status quo. In doing so it will have regard to the likely outcome of the proceedings which will depend partly upon the facts as they appear from the information at that time available to the court, but also in part upon the public administrative purpose which the panel is designed to serve. This is somewhat special.

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Consistently with its character as the controlling body for the self-regulation of take-overs and mergers, the panel combines the functions of legislator, court interpreting the panel's legislation, consultant, and court investigating and imposing penalties in respect of alleged breaches of the code. As a legislator it sets out to lay down general principles, on the lines of EEC legislation, rather than specific prohibitions which those who are concerned in take-over bids and mergers can study with a view to detecting and exploiting loopholes.

Against that background, there is little scope for complaint that the panel has promulgated rules which are *ultra vires*, provided only that they do not clearly violate the principle proclaimed by the panel of being based upon the concept of doing equity between one shareholder and another. This is a somewhat unlikely eventuality.

When it comes to interpreting its own rules, it must clearly be given considerable latitude both because, as legislator, it could properly alter them at any time and because of the form which the rules take, ie laying down principles to be applied in spirit as much as in letter in specific situations. Where there might be a legitimate cause for complaint and for the intervention of the court would be if the interpretation were so far removed from the natural and ordinary meaning of the words of the rules that an ordinary user of the market could reasonably be misled. Even then it by no means follows that the court would think it appropriate to quash an interpretative decision of the panel. It might well take the view that a more appropriate course would be to declare the true meaning of the rule, leaving it to the panel to promulgate a new rule accurately expressing its intentions.

Again the panel has powers to grant dispensation from the operation of the rules: see, for example, rule 9.1 of the code. This is a discretionary power only fettered by the overriding obligation to seek, if not necessarily to achieve, equity between one shareholder and another. Again I should be surprised if the exercise of this power could be attacked, save in wholly exceptional circumstances and, even then, the court might well take the view that the proper form of relief was declaratory rather than substantive.

This leaves only the panel's disciplinary function. If it finds a breach of the rules proved, there is an internal right of appeal which, in accordance with established principles, must be exercised before, in any ordinary circumstances, the court would consider intervening. In a case, such as the present, where the complaint is that the panel should have found a breach of the rules, but did not do so, I would expect the court to be even more reluctant to move in the absence of any credible allegation of lack of *bona fides*. It is not for a court exercising a judicial [842] review jurisdiction to substitute itself for the fact-finding tribunal and error of law in the form of finding of fact for which there was no evidence or in the form of a misconstruction of the panel's own rules would normally be a matter to be dealt with by a declaratory judgment. The only circumstances in which I would anticipate the use of the remedies of *certiorari* and *mandamus* would be in the event, which I hope is unthinkable, of the panel acting in breach of the rules of natural justice—in other words, unfairly.

Nothing that I have said can fetter or is intended to or should be construed as fettering the discretion of any court to which application is made for leave to apply for judicial review of a decision of the panel or which, leave having been granted, is charged with the duty of

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*R v Panel on Take-overs and Mergers, Ex parte Datafin Plc continued*

considering such an application. Nevertheless, I wish to make it clear beyond peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules. This would provide a workable and valuable partnership between the courts and the panel in the public interest and would avoid all of the perils to which Mr Alexander alluded.

**The reasons for rejecting this application**

There was some failure on the part of the applicants to appreciate, or at least to act in recognition of the fact, that an application for judicial review is not an appeal. The panel and not the court is the body charged with the duty of evaluating the evidence and finding the facts. The role of the court is wholly different. It is, in an appropriate case, to review the decision of the panel and to consider whether there has been 'illegality,' that is, whether the panel has misdirected itself in law; 'irrationality,' that is, whether the panel's decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it; or 'procedural impropriety,' that is, a departure by the panel from any procedural rules governing its conduct or a failure to observe the basic rules of natural justice, which is probably better described as 'fundamental unfairness,' since justice in nature is conspicuous by its absence. If authority be required for propositions which are so well established, it is to be found in the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410–411 ...

[844] In conclusion, I should like to make it clear that, but for the issue as to jurisdiction, this is not a case in which leave to apply should ever have been given. All that could be said at that stage was that there was a case for considering whether the advent of core underwriting might not call for some reconsideration of the definition of 'concert party,' perhaps putting core underwriters in the category of persons in respect of whom there was a rebuttable presumption of concerted action. That was plainly a matter for the panel which was minded to add a rider to its decision pointing to the fact that core underwriting arrangement might be subjected to close scrutiny, particularly where they were associated with market purchases above the level of cash offers. The fact that the panel's conclusion might at first have appeared surprising to someone who was not in day to day contact with the financial markets and who had heard none of the evidence would not have begun to justify the grant of leave to apply.

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*[Lloyd LJ and Nicholls LJ agreed with Donaldson MR.]*