HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY AND HAYNE JJ

CORPORATION OF THE CITY OF ENFIELD APPELLANT

AND

DEVELOPMENT ASSESSMENT
COMMISSION & ANOR RESPONDENTS

Corporation of the City of Enfield v Development Assessment Commission
[2000] HCA 5
10 February 2000
A37/1998

ORDER

1. *Appeal allowed.*

2. *Set aside Orders 2 and 3 of the orders made by the Full Court of the Supreme Court of South Australia on 25 July 1997.*

3. *Set aside Order 4 of the orders made by the Full Court on 25 July 1997 in so far as it deals with the payment of costs by the appellant to the second respondent.*

4. *Remit the matter to the Full Court of the Supreme Court of South Australia for the determination of the remaining grounds of appeal to that Court.*

5. *Second respondent to pay the costs of the appellant in this Court and any costs of the first respondent in this Court.*

6. *Costs of the proceedings before Debelle J in the Supreme Court of South Australia and in the Full Court to abide the outcome of the appeal to the Full Court, and to be determined by that Court.*

On appeal from the Supreme Court of South Australia

Representation:

A J Besanko QC with G K Feary for the appellant (instructed by Piper Alderman)

No appearance for the first respondent

D F Jackson QC with B R M Hayes QC for the second respondent (instructed by Johnson Lawyers)

CATCHWORDS

Corporation of the City of Enfield v Development Assessment Commission

Administrative law – Judicial review of administrative discretion – Jurisdictional facts – Consent of statutory authority to provisional development plan – Consent prohibited if development "non-complying" – Classification a jurisdictional fact – Whether statutory authority exceeded power – Whether weight to be accorded to opinion of statutory authority upon judicial review – Whether court restricted to evidence before statutory authority.

Courts and judges – Jurisdiction – Equity – Public law – Restraint of apprehended breach of law – Error with respect to jurisdictional fact.

Administrative law – Remedies – Error with respect to jurisdictional fact – Availability of prerogative writs and equitable remedies.

Words and phrases – "Jurisdictional fact" – "special industry" – "non-complying development".

Development Act 1993 (SA), ss 32, 33, 35(3), 38, 44, 108.
Development Regulations (SA), regs 16, 17, Sched 1.

1 GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. This is an appeal from the Full Court of the Supreme Court of South Australia (Doyle CJ, Lander and Bleby JJ)[1], which allowed an appeal from a decision of Debelle J[2]. The appeal to this Court raises issues respecting the grant of injunctive and declaratory relief to restrain conduct which is alleged to contravene prohibitions imposed by the statute which regulates planning and development in South Australia.

2 The second respondent, Collex Waste Management Services Pty Ltd ("Collex") applied pursuant to the *Development Act* 1993 (SA) ("the Act") to the first respondent, the Development Assessment Commission ("the Commission"), for a Provisional Development Plan to alter and add to an existing liquid waste treatment plant on its land so that it might treat some additional kinds of liquid waste. The land is situated within the local government area of the appellant, the Corporation of the City of Enfield ("Enfield"). The Commission was not represented at the hearing in this Court and will abide the outcome, save as to costs.

The Act

3 Part 4 of the Act (ss 32-56) is headed "DEVELOPMENT CONTROL". Section 32 is the first provision in Div 1 of Pt 4 (ss 32-45), which is headed "GENERAL CONTROL". Subject to the Act, s 32 forbids the undertaking of any development unless the development is an approved development. The term "development" is defined in s 4 in terms which include "building work" and "a change in the use of land". In addition to the general prohibition imposed by s 32, s 44 prescribes various offences. One is the undertaking of development contrary to Div 1 (s 44(1)). Another is the undertaking of development contrary to a development authorisation under Div 1 (s 44(2)).

4 Section 33(1) provides that a development is an approved development "if, and only if" the "relevant authority" has assessed that development against, and granted consent in respect of, each of various matters in so far as they are relevant to the particular development. These matters are listed in pars (a)-(f) of s 33(1). Paragraph (a), which is material here, requires assessment of the proposed development against the provisions of the appropriate Development Plan and identifies this assessment process by the phrase "provisional development plan consent". The Commission was the "relevant authority" in question. This followed from the operation of s 34 of the Act, reg 38 of the

---

1 *Corporation of the City of Enfield v Development Assessment Commission* (1997) 69 SASR 99.

2 *Enfield City v Development Assessment Commission* (1996) 91 LGERA 277.

Development Regulations made by the Governor under the power conferred by s 108 of the Act ("the Regulations") and Item 2 of Sched 10 thereof.

5 The Commission also was obliged to comply with reg 16(1) of the Regulations. This states:

> "If an application will require a relevant authority to assess a proposed development against the provisions of a Development Plan, the relevant authority *must determine the nature of the development, and proceed to deal with the application according to that determination*." (emphasis added)

It follows that, before carrying out the assessment, the Commission was required to "determine the nature of the development, and proceed to deal with the application according to that determination".

The "special industry" criterion

6 If under the terms of the existing Development Plan the proposed development was for "special industry"[3], it would be prohibited by that Development Plan and it would be a "*non-complying*" development for the

---

3 The applicable definition of "special industry" was in Sched 1 of the Regulations. It stated:

> "'**special industry**' means an industry where the processes carried on, the methods of manufacture adopted or the particular materials or goods used, produced or stored, are likely
>
> (a) to cause or create dust, fumes, vapours, smells or gases; or
>
> (b) to discharge foul liquid or blood or other substance or impurities liable to become foul,
>
> and thereby–
>
> (c) to endanger, injure or detrimentally affect the life, health or property of any person (other than any person employed or engaged in the industry); or
>
> (d) to produce conditions which are, or may become, offensive or repugnant to the occupiers or users of land in the locality of or within the vicinity of the locality of the land on which (whether wholly or partly) the industry is conducted".

purposes of the Act[4]. The consequence would be that the Commission was required by s 35(3) not to grant a provisional development plan consent unless the concurrences specified in s 35(3) were given. Section 35(3) states:

> "A development that is of a kind described as a *non-complying* development under the relevant Development Plan must not be granted a provisional development plan consent unless–
>
> (a) where the relevant authority is the Development Assessment Commission – the Minister and, if the development is to be undertaken in the area of a council, that council, concur in the granting of the consent;
>
> (b) in any other case – the Development Assessment Commission concurs in the granting of the consent."

Enfield's case is that the proposed Collex development attracted par (a) of s 35(3).

7 The land upon which the proposed development by Collex was to take place was within a "General Industry Zone" under the existing Development Plan. This had the consequence that, if (as Enfield contended) the development was for "special industry" and therefore was a "*non-complying*" development, there were attracted the requirements with respect to public notice and consultation specified in s 38 of the Act for a "Category 3 development". Section 38(5) states:

> "Where a person applies for a development assessment of a Category 3 development, notice of the application must be given, in accordance with the regulations, to–
>
> (a) the persons referred to in subsection (4); and
>
> (b) any other owner or occupier of land which, according to the determination of the relevant authority, would be directly affected

---

4 *Enfield City v Development Assessment Commission* (1996) 91 LGERA 277 at 279. Debelle J said on this point:

> "A use which is described as 'prohibited' by the *Development Plan* is deemed to be a non-complying use: see s 16(10) of the *Statutes Repeal and Amendment (Development) Act* 1993 (SA)."

to a significant degree by the development if it were to proceed; and

(c) the public generally."

The persons referred to in s 38(4) are the owners or occupiers of each piece of adjacent land and any other members of a "prescribed class".

8 Persons to whom, by force of s 38(12), there is a requirement for the giving of notice of a decision in respect of a Category 3 development (those who, after notice of an application for consent has been given, have made representations in writing to the relevant authority under s 38(7) in relation to the granting or refusal of consent) have the right conferred by s 86(1)(b) to appeal against the decision to the Environment, Resources and Development Court ("the Environment Court"). On the other hand, the applicant for consent in general has no right of appeal against a refusal of consent or concurrence, or against the imposition of a condition attached to a consent in respect of a "*non-complying*" development. This is the effect of s 35(4) of the Act.

Determination by the Commission

9 On 12 September 1995, the Commission, acting under reg 16(1), determined that the proposed development was "general industry" within the definition contained in the Regulations and that, for the purposes of public notification, it was a Category 2 development. The proposed development was not classified as "special industry". The consequence was that the proposed development was not a "*non-complying*" development. This meant that s 35(3)(a) of the Act did not require the Commission to refuse consent unless Enfield concurred in it. On 13 November 1995, the Commission granted to Collex a provisional development plan consent to undertake the development and to use its land for the purpose of a liquid waste treatment plant. It imposed 22 conditions on the grant of consent.

10 The Commission's treatment of the development as "general industry" rather than as a "*non-complying*" development had a further consequence. Whilst notice of the application had to be given to owners or occupiers of adjacent land, notice to the public generally was not required. This is because s 38(4) merely obliges the giving of notice of a Category 2 development to a limited class. The differences in the regimes for the giving of notice and in those respecting appeals to the Environment Court emphasise the significance which the statute attaches to the classification of a proposal as one for a "*non-complying*" development.

11 Enfield maintained its assertion that the development was "special industry" within the definitions contained in the Regulations so that the development was a "*non-complying*" development and Enfield's concurrence was required, together with public notice of the application under s 38(3) of the Act. Enfield instituted a proceeding in the Supreme Court against the Commission and Collex. It sought against both defendants a declaration to the effect that the provisional Development Plan consent was ultra vires and void and against Collex injunctive relief preventing it from taking action pursuant to or in reliance upon that consent. Debelle J granted the relief sought.

12 The substance of Enfield's complaint was that the provisional Development Plan consent was invalid because the Commission had erred in determining the "jurisdictional facts" upon which depended its power to grant the consent, in particular by its classification of the proposed development as not "special industry".

Judgment of the primary judge

13 Debelle J identified the question to be decided as turning upon par (d) of the definition of "special industry". This speaks of the production of conditions which are, or may become, offensive or repugnant to the occupiers or users of land in the locality of or within the vicinity of the locality of the land on which (whether wholly or partly) the industry is conducted. Debelle J said[5]:

> "The expression 'which are, or may become' refers to at least two possible events. The first is that it is proved that the industry will produce conditions which are and will continue to remain offensive. The second is that the industry produces conditions which will on occasions be offensive. In other words, the expression 'may become' is being used in a temporal sense referring to the likelihood that at some future date the conditions will be offensive."

14 His Honour heard evidence on this aspect of the case from three expert witnesses, Mr Gray (called by Enfield), Dr Grynberg and Mr Whitworth (both called by the Commission). Debelle J concluded that the evidence[6]:

---

5 (1996) 91 LGERA 277 at 282.

6 (1996) 91 LGERA 277 at 299.

> "unquestionably demonstrates the probability of odours which will be offensive to the residents. The only issue is on how many occasions those offensive conditions will exist. The disagreement between the experts as to the frequency of the offensive emissions is slight. It ranges between an assessment of offensive conditions on about three occasions in each year to about five occasions in each year. Mr Gray was the only expert who considered in any detail the extent to which offensive odours would be detected at the industrial premises and on his estimate that would occur at least once in each month."

Mr Gray had made several reports to Enfield and Dr Grynberg had prepared a report to the Commission on which Mr Whitworth had relied for his representations as to why he thought the proposed development by Collex was not "special industry" at the meeting of the Commission on 12 September 1995.

15 Debelle J concluded that the proposed development was to be characterised as "special industry" even if it complied with the conditions imposed by the Commission. His Honour rejected a submission by Collex that the regulatory system prescribed by the Act and the Regulations left a limited scope for the Supreme Court to examine the issue. It was contended that the Supreme Court should only interfere "if it was manifest that this was not a special industry". His Honour said[7]:

> "This submission must fail, first because, for the reasons already expressed, the classification of the proposal ought to have been made by the Commission before it imposed any conditions. It is manifest on the evidence that, absent these conditions, the proposed development would have caused odours which were offensive to neighbours so that the proposal was for a special industry. Secondly, even if the proposal was to be considered in conjunction with the conditions imposed by the Commission, the evidence clearly demonstrates that it will cause offensive odours on several occasions in each year. Thirdly, if the Commission has erred and its decision is promptly challenged, the error should be corrected particularly where, as here, there is a jurisdictional error which adversely affects the interests of others."

---

7 (1996) 91 LGERA 277 at 300.

Jurisdiction of the Supreme Court

16 Rule 98 of the South Australian Supreme Court Rules ("the Rules") was considered in *Craig v South Australia*[8]. Rule 98.01 provides that an order in the nature of mandamus, prohibition, certiorari or quo warranto shall be sought by way of judicial review by summons in accordance with the provisions of that rule. Declarations and injunctions may be sought in such a summons and equitable relief of this nature may be granted if the court considers that it would be just and convenient to do so, having regard, among other things, to all the circumstances of the case (r 98.01(3)). The existence of a remedy by way of judicial review does not exclude the jurisdiction of the Supreme Court to grant other relief (r 98.01(4)).

17 Significant questions of public law, including those respecting ultra vires activities of public officers and authorities, are determined in litigation which does not answer the description of judicial review of administrative action by the medium of the prerogative writs or statutory regimes such as that provided by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). Examples of other vehicles are the actions for recovery of moneys exacted *colore officii* or paid by mistake[9], and those for trespass, detinue and conversion where the plaintiff challenges the validity of the authority relied upon by the defendant as an answer to the allegedly tortious acts[10].

18 No such common law action was in issue in this litigation. Nor was the proceeding instituted by Enfield one to which r 98 of the Rules applied. The jurisdiction of the Supreme Court which Enfield invoked was its jurisdiction as a court of equity[11] to grant equitable relief to restrain apprehended breaches of the law and to declare rights and obligations in respect thereto.

---

8 (1995) 184 CLR 163 at 174-175.

9 For example, *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 at 144; *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 at 596-597.

10 See *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558.

11 *Supreme Court Act* 1935 (SA), s 17(2).

19 The nature of this jurisdiction was explained by Bray CJ in *Attorney-General v Huber*[12]. In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[13], Gaudron, Gummow and Kirby JJ referred to the part played by the declaration and the injunction in the shaping of modern administrative law and continued[14]:

> "In this field, equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies[15]) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration[16]."

20 The authorities supporting the use of equitable remedies to restrain breaches of prohibitions imposed by or pursuant to planning laws were discussed by Menzies J in *Cooney v Ku-ring-gai Corporation*[17]. That case[18] and *Morris v*

---

12 (1971) 2 SASR 142 at 159-161. Nothing turns upon the consideration that Bray CJ dissented as to the outcome in that case.

13 (1998) 194 CLR 247.

14 (1998) 194 CLR 247 at 257.

15 *de Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 429; Schwartz, *Administrative Law*, 3rd ed (1991), §9.8. The declaratory relief given in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 where certiorari and mandamus were not available is a recent example.

16 See *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-51; Hanbury, "Equity in Public Law" in *Essays in Equity*, (1934) 80 at 112; Sykes, "The Injunction in Public Law", (1954) 2 *University of Queensland Law Journal* 114 at 117.

17 (1963) 114 CLR 582 at 603-605. See also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35, 36, 46; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 555.

18 See the report of the decision of Jacobs J in the equitable jurisdiction of the Supreme Court of New South Wales: *Ku-ring-gai Municipal Council v Cooney* (1962) 8 LGRA 8 at 13-14. The finding by Jacobs J of invalidity was reversed by the Full Court: *Ku-ring-gai Municipal Council v Cooney* (1962) 8 LGRA 144; and that reversal was affirmed by this Court: (1963) 114 CLR 582 at 595-601.

Woollahra Corporation[19] show that it is open to the defendant in such a proceeding to contend that the application for equitable relief should be dismissed on the ground that the ordinance or proclamation is invalid and so ineffective to impose the prohibition the defendant is said to contravene. The term "invalid" tends to be the preferred expression in these authorities. In *Baxter v New South Wales Clickers' Association*, Isaacs J said[20]:

> "Now, 'validity' is a well known technical expression, and is equivalent to legality or not being *ultra vires*. If without jurisdiction, a decision is certainly invalid."

21 That is the sense in which "invalid" is used in the present litigation. The substance of the matter is that Enfield asserts apprehended breach by Collex of the statutory provisions which forbid the proposed development without the approval of the relevant authority (the Commission) together with the concurrence of Enfield. Enfield seeks a declaration as to the invalidity of the approval upon which Collex relies as establishing the legality of its development. The cast of the litigation thus resembles that in authorities such as *Thompson v Randwick Corporation*[21], *Marsh v Shire of Serpentine-Jarrahdale*[22], *City of Port Melbourne v Hamer*[23], *Electronic Industries Ltd v The Mayor, Councillors and Citizens of the City of Oakleigh*[24] and *Wingecarribee Shire Council v Minister for Local Government*[25]. In his oral submissions in this Court counsel for Collex did not dissent from this understanding of the nature of the proceedings. However, he rightly pointed out that Enfield itself had tended to confuse matters in its Notice of Appeal by categorising the Full Court as having dealt with the litigation as an application for "judicial review".

---

19 (1966) 116 CLR 23 at 34-36.

20 (1909) 10 CLR 114 at 157.

21 (1950) 81 CLR 87.

22 (1966) 120 CLR 572. See also in this Court *Drummoyne Municipal Council v Lebnan* (1974) 131 CLR 350; *Twist v Randwick Municipal Council* (1976) 136 CLR 106; *Vumbaca v Baulkham Hills Shire Council* (1979) 141 CLR 614.

23 [1971] VR 66.

24 [1973] VR 177.

25 [1975] 2 NSWLR 779.

22 There will be differences between, on the one hand, the availability in public law of equitable remedies, and judicial review by mandamus, prohibition and certiorari on the other. At least under s 75(v) of the Constitution, rules as to standing may be more generous for prohibition[26] and certiorari[27]. However, an applicant with standing still may fail to obtain an order absolute for reasons which would not have precluded the availability of a declaration. This was the case in *Ainsworth v Criminal Justice Commission*[28]. *FAI Insurances Ltd v Winneke*[29] decided that, whilst certiorari and mandamus were not available against the Governor in Council, a declaration might be made against the Attorney-General of Victoria as representative of the Crown. Again, with certiorari, there are technicalities attending the requirement of an error of law on the face of the record; these are exemplified by *Craig v South Australia*[30]. However, where the question is whether the decision-maker has erred as to the jurisdictional facts, as in this case, that question has to be answered by the court in which it is litigated upon the evidence before that court. In this respect, where the issue requires determination of whether jurisdictional facts existed, the task of the court to determine that question is essentially the same whether the relief sought be equitable or, for example, prohibition.

23 In the present case, no question arises as to the sufficiency of the interest of Enfield in the absence of the Attorney-General's fiat[31]. Section 85(1) of the Act provides:

---

26 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263.

27 *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482 at 516-518 per Isaacs and Rich JJ. The jurisdiction of this Court had been attracted by the claim for prohibition; cf *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 630.

28 (1992) 175 CLR 564.

29 (1982) 151 CLR 342 at 351, 372, 386-387, 404, 419-421.

30 (1995) 184 CLR 163 at 175-183.

31 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; *Australian Conservation Foundation Inc v South Australia* (1989) 52 SASR 288 at 301-302.

> "Any person may apply to the [Environment] Court for an order to remedy or restrain a breach of this Act ... (whether or not any right of that person has been or may be infringed by or as a consequence of that breach)."

That section does not purport to displace or limit the jurisdiction of the Supreme Court, nor does it do so by implication[32]. However, in administrative law, as elsewhere, the grant of injunctive and declaratory relief is attended by discretionary considerations. As Menzies J put it in *Cooney*[33], "[t]he wide discretion of the Court is an adequate safeguard against abuse of a salutary procedure".

Judgment of the Full Court

24 Before Debelle J, the parties agreed upon certain facts and, as we have indicated, called evidence designed to assist in the determination of whether the development was "special industry"[34]. The Full Court proceeded on the basis that evidence bearing upon the existence or otherwise of a "jurisdictional fact" could be received only if Enfield first could show that, on the information before the Commission itself, there had been an obvious and clear departure from the relevant statutory provisions or an obvious dereliction of its planning duty[35]. Enfield challenges those propositions.

25 After correctly observing that the proceedings before Debelle J had not been proceedings by way of judicial review[36], Bleby J (with whom Doyle CJ and Lander J agreed) said that little turned on the nature and form of the relief claimed "as the procedural distinctions between judicial review proceedings and proceedings by way of declaration and injunction have become blurred"[37]. The Full Court said that "the same approach should apply where the challenge is by

---

32 cf *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552; *Oil Basins Ltd v The Commonwealth* (1993) 178 CLR 643 at 650-654.

33 (1963) 114 CLR 582 at 605.

34 cf *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389.

35 (1997) 69 SASR 99 at 124.

36 (1997) 69 SASR 99 at 115.

37 (1997) 69 SASR 99 at 115.

way of declaration and injunction" as applies where relief is sought by way of judicial review[38]. The Full Court concluded[39]:

> "Even where there is alleged to have been a serious departure (in planning terms) from the requirements of the Act and Regulations, such departure ... will have to be discerned plainly by the court without the necessity of its descending into the planning merits. This is even more so in this case bearing in mind the time at which the determination had to be made. In deciding whether such a departure can be shown, the court will obviously have regard to what the [Commission] knew, or if that is unclear, what it ought to have known, from the information before it. But without such an obvious and clear departure, the court on judicial review will defer to the judgment of the planning authority on planning issues."

The Full Court added that it had not been appropriate for Debelle J to express a view as to whether, on the facts before him, the development was properly classified as "special industry". The Full Court said[40]:

> "The limited role of this Court on judicial review in the circumstances of this case rendered that an unnecessary and irrelevant inquiry. The conclusion of the learned trial judge as to that question cannot affect the outcome of the application, and this Full Court's views on that question would be equally irrelevant."

In the result, the Full Court allowed the appeal, set aside the orders of Debelle J and dismissed the application by Enfield.

26 By reason of the approach it took to the appeal, the Full Court did not fully dispose of all the grounds of appeal on which Collex had relied. In particular, in grounds 2 and 3 of its Notice of Appeal to the Full Court, Collex had contended that the evidence before Debelle J had not justified the finding that the industry in question was "special industry". Collex accepts that, if Enfield is successful in the appeal to this Court, the result will be that an order should be made setting aside the orders of the Full Court and remitting to the Full Court the appeal from

---

38 (1997) 69 SASR 99 at 118-119.

39 (1997) 69 SASR 99 at 121.

40 (1997) 69 SASR 99 at 124.

Debelle J for the determination of the outstanding grounds of appeal relating to his Honour's determination that the development was "special industry".

27 As we have indicated, Collex's primary submission turns upon the construction of s 35(3) of the Act. If this construction be accepted, it would follow that Debelle J erred in embarking upon a dispute as to the meaning of "special industry". It also would follow that the outcome in the Full Court was correct and Enfield's appeal to this Court must fail.

"Jurisdictional facts"

28 The term "jurisdictional fact" (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion. Used here, it identifies a criterion, satisfaction of which mandates a particular outcome. Section 35(3) forbids the relevant authority granting a provisional development plan consent to a "*non-complying*" development unless, in a case such as the present, the Minister and the Council concur in the granting of the consent. The determination of the question whether Collex proposed a "*non-complying*" development, which turned upon the application of the criterion of "special industry", was a condition upon the existence of which there operated the obligation that the Commission not grant consent.

29 Collex contends that the refusal to grant consent by the Commission is required only if, upon the material before the Commission, it classifies the development as a "*non-complying*" development. A corollary of this proposition is said to be that, in any examination of the question in an action such as that before Debelle J, the court is restricted to the material that was before the relevant authority.

30 The ultimate question in the litigation before Debelle J was whether the prohibition placed upon Collex by s 32 of the Act had not been lifted because the Commission had exceeded its powers by acting without the consent of Enfield to the proposed development. The effect of these submissions by Collex is that the answer depended, not upon the combined operation of fact and law, but upon the opinion on the matter of the Commission; an opinion based on the evidentiary material before the Commission. As counsel for Collex put it, this would still have left to the Supreme Court such questions as whether the Commission made the relevant assessment under s 33, whether statutory procedures were followed, whether the granting of consent could be supported on any reasonable view of

the factual material before the Commission[41] and whether a substantial purpose actuating the Commission in granting consent was a purpose ulterior to that for which the Act granted the Commission its powers[42].

31 Counsel for Collex referred to s 33 as throwing light on s 35(3). The effect of s 33 is to stipulate as necessary conditions for the lifting of the prohibition otherwise imposed by s 32 upon development, (i) the granting of consent by the relevant authority after (ii) assessment by the relevant authority of the various matters specified in pars (a)-(f) of s 33(1). The relevant authority may request of an applicant the provision of such additional documents or information as it "may reasonably require to assess the application" (s 39(2)(a)). The relevant authority may grant consent subject to such conditions as it "thinks fit to impose in relation to the development" (s 42(1)(a)). Where there is a right of appeal to the Environment Court, for example against refusal to grant a development authorisation or the imposition of conditions, the powers of that Court include confirmation, variation or reversal (s 88(a)).

32 Section 35 occupies a position which is in the statutory scheme different to that occupied by these provisions. Unlike s 33, s 35 is not directed to what the Full Court identified as "the planning merits"[43] involved in the satisfaction of conditions for the lifting of the prohibition imposed by s 32. Rather, s 35 mandates circumstances in which the relevant authority must give (s 35(1)) or refuse (s 35(2), (3)) that consent. A development that is assessed by the relevant authority as being seriously at variance with the relevant Development Plan must not be granted consent (s 35(2)). This is subject to the requirement in s 35(1) that consent must be granted if the proposed development is of a kind described as a *complying* development under the relevant Development Plan or the Regulations. Nothing for present purposes directly turns upon either sub-s (1) or sub-s (2), rather than sub-s (3).

33 However, taken as a whole, the text of s 35 does not suggest that the determination whether, upon the criteria specified in s 35, the responsible authority is or is not obliged to consent rests upon its own classification of the relevant circumstances. Rather, it indicates that it is not for the relevant authority itself to determine, as a matter of its opinion, whether the restriction imposed

---

41 *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1 at 11.

42 *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 105-107.

43 (1997) 69 SASR 99 at 121.

upon it by s 35(3) applies because the development is a "*non-complying*" development. Section 35(3) does not define the criterion of operation as the opinion of the relevant authority as to the classification of the development.

34 Had s 35(3) been expressed so as to turn upon the satisfaction or opinion of the relevant authority as to a state of affairs, or were it to be so understood, as Collex submitted, further questions would have arisen. In particular, the existence of the opinion or satisfaction would be treated as requiring an opinion or satisfaction formed reasonably upon the material before the decision-maker[44]. But that is not what s 35(3) involves. It stipulates in direct terms a precondition which obliges, without certain concurrences, refusal of a grant of consent.

35 Collex also supported its submissions as to the construction of the Act by reference to reg 16 of the Regulations. This operates at the first stage of the assessment process in respect of development applications. Regulation 16(1) is set out earlier in these reasons. It obliges ("must determine") the relevant authority to classify the nature of the development and to proceed to deal with it accordingly.

36 If the determination is that the development is *non-complying*, certain procedural consequences follow under reg 17, as well as under s 35 of the Act. A brief statement in support must be furnished by the applicant (reg 17(1)), but failure initially to do so, if remedied, will not trigger the limitation period within which applications must be decided (reg 17(2)). The effect of reg 16(2) is that, upon determination that an application is for "*non-complying*" development (although not so identified by the applicant), the relevant authority is obliged to so notify the applicant, thereby giving the applicant the opportunity to intercept the limitation provisions which otherwise are running. Regulation 16(2) uses the phrase "[i]f … of the opinion" to describe the outcome of the process under reg 16(1) whereby the authority "must determine" the nature of the development.

---

44 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 57-58; *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Foley v Padley* (1984) 154 CLR 349 at 369-377; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276; *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303, 308; *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 73 ALJR 746 at 768-771; 162 ALR 577 at 607-611.

37 Collex has submitted that reg 16(2) thus inferentially shifts the imperative element in reg 16(1) to the expression of an opinion. However, this inference does not throw any light on the construction of s 35(3) of the Act, even assuming delegated legislation could do so. Moreover, reg 16(2) is more properly characterised as describing, by way of the shorthand phrase "[i]f … of the opinion", the outcome of the process which is prescribed by s 35(3) by way of an unqualified imperative. The imperative nature of the determination under reg 16(1), as is to be expected, is consistent with the character of the prohibition upon the grant of consent imposed by s 35(3) without the concurrence, in the present case, of Enfield.

38 The result is that the Full Court erred in holding that Debelle J was obliged to determine the action before him, not by application of the law to the evidence, but from a standpoint that, whilst the Supreme Court should "reserve the right to itself to inquire into the relevant facts and to decide the jurisdictional facts", it would defer "in grey areas of uncertainty to the practical judgment of the planning authority"[45] and that what had to be shown was "a serious departure (in planning terms) from the requirements of the Act and Regulations"[46]. It should be added that, contrary to the approach taken by the Full Court, in whatever form the proceeding in the Supreme Court had been cast, it would have been necessary for Debelle J to determine the "jurisdictional fact" issue upon the evidence before the Supreme Court. Accordingly, the matter will have to be returned to the Full Court for determination of the outstanding issues on the appeal from Debelle J to that Court.

Judicial deference to administrative jurisdictional fact-finding

39 In order to dispose of these outstanding issues, questions will arise as to the weight (if any) which had to be given by Debelle J, in deciding whether the proposed development was "special industry", to the conclusion reached by the Commission upon the material before it.

40 In the written submissions, reference was made to the applicability to a case such as the present of the doctrine of "deference" which has developed in the United States. However, this *Chevron* doctrine[47], even on its own terms, is not

---

45 (1997) 69 SASR 99 at 119.

46 (1997) 69 SASR 99 at 121.

47 After *Chevron USA Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984).

addressed to the situation such as that which was before Debelle J. *Chevron* is concerned with competing interpretations of a statutory provision not, as here, jurisdictional fact-finding at the administrative and judicial levels.

41 *Chevron* applies in the United States where the statute administered by a federal agency or regulatory authority is susceptible of several constructions, each of which may be seen to be (as it is put) a reasonable representation of Congressional intent[48]. It is a matter of debate in the United States whether the "doctrine" applies to the interpretation by agencies of statutes which define their jurisdiction. Differing views on this subject were expressed by Scalia J, concurring with the plurality opinion of Stevens J, and by Brennan J, dissenting, in *Mississippi Power & Light Co v Mississippi*[49]. Professor Schwartz has emphasised[50]:

> "Where the agency misapplies the statute upon which its power rests, it may be acting beyond its authority. Misapplication of a statutory term may thus enable the administrator to act in excess of jurisdiction."

Writing extrajudicially, whilst a judge of the United States Court of Appeals for the First Circuit, Breyer J warned that, if taken literally, the deference doctrine would suggest "a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective"[51].

42 An undesirable consequence of the *Chevron* doctrine may be its encouragement to decision-makers to adopt one of several competing reasonable interpretations of the statute in question, so as to fit the facts to the desired result. In a situation such as the present, the undesirable consequence would be that the decision-maker might be tempted to mould the facts and to express findings about them so as to establish jurisdiction and thus to insulate that finding of jurisdiction from judicial examination. Commentary upon *Chevron* has seen it as

---

48 467 US 837 at 842-844 (1984).

49 487 US 354 at 380-382, 386-387 (1988).

50 Schwartz, *Administrative Law*, 3rd ed (1991), §10.36 at 706.

51 Breyer, "Judicial Review of Questions of Law and Policy", (1986) 38 *Administrative Law Review* 363 at 381.

indicative of a "delegalization" of the administrative process; Professor Werhan writes that[52]:

> "Except for the unusual case in which Congress unambiguously has settled the particularized meaning of an enabling act, *Chevron* gives agencies, not courts, the dominant role in interpreting and enforcing legislative authority. The Court accomplished this role reversal by reconceptualizing the process under which ambiguous statutes are interpreted. Before *Chevron*, the traditional approach viewed the interpretation of ambiguous laws to be a 'question of law';[53] after *Chevron*, this task became simply a 'policy choice.'[54] Having transformed the legal into the political, the Justices ceded interpretative authority to the agencies."

43 The fundamental consideration in this field of discourse was emphasised by Brennan J in *Attorney-General (NSW) v Quin*[55]. His Honour pointed out[56], and with reference to the judgment of Marshall CJ in *Marbury v Madison*[57], that an essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers. Of course, Marshall CJ was immediately concerned with questions of constitutional validity. But neither in its terms nor its context was his "grand conception" so limited as to exclude control over administrative interpretation of legislation[58]. However, there is a distinction to be drawn here. In Australia, the point is emphasised by the distinct provisions in ss 75(iii), 75(v) and 76(i) of the Constitution for actions against the Commonwealth, relief by mandamus, prohibition and injunction against officers

---

52 Werhan, "Delegalizing Administrative Law", (1996) *University of Illinois Law Review* 423 at 457. See also Merrill, "Judicial Deference to Executive Precedent" (1992) 101 *Yale Law Journal* 969 at 993-998.

53 See 5 USC §706 (1994).

54 See *Chervon* 467 US 837 at 844-845 (1984).

55 (1990) 170 CLR 1.

56 (1990) 170 CLR 1 at 35-36.

57 1 Cranch 137 at 177 (1803) [5 US 87 at 111].

58 Monaghan, "*Marbury* and the Administrative State", (1983) 83 *Columbia Law Review* 1 at 2.

of the Commonwealth, and matters arising under the Constitution or involving its interpretation. It has been expressed as follows[59]:

> "'[T]here is in our society,' as Professor Jaffe says, 'a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures.'[60] But judicial review of administrative action stands on a different footing from constitutional adjudication, both historically and functionally. In part no doubt because alternative methods of control, both political and administrative in nature, are available to confine agencies within bounds, there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather, the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act."

44 When stating the position in *Quin*, Brennan J also stressed[61]:

> "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."

However, in Australia this situation is the product not of any doctrine of "deference", but of basic principles of administrative law respecting the exercise of discretionary powers. Mason J spoke to similar effect in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* when he observed[62]:

> "The limited role of a court [in] reviewing the exercise of an administrative discretion must constantly be borne in mind."

---

59 Monaghan, "*Marbury* and the Administrative State", (1983) 83 *Columbia Law Review* 1 at 32-33.

60 Jaffe, *Judicial Control of Administrative Action*, (1965) at 321. See also Chayes, "The Supreme Court, 1981 Term – Foreword: Public Law Litigation and the Burger Court", (1982) 96 *Harvard Law Review* 4 at 59-60.

61 (1990) 170 CLR 1 at 36.

62 (1986) 162 CLR 24 at 40. See also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576-578, 597-598.

Nor, as Brennan J pointed out in *Waterford v The Commonwealth*[63], is there an "error of law simply in making a wrong finding of fact". No such limitations are involved with the determination by the Supreme Court of the jurisdictional facts which circumscribed the activities of the Commission.

45 Questions may arise, within the jurisdiction of an administrative tribunal and upon a settled construction of the applicable legislation, as to the side of the line on which a case falls. The question may be one to be decided on the particular primary facts which are largely undisputed and where little can be gained from a detailed examination of previous decisions. In such instances, this Court has said that, in a proceeding in the original jurisdiction of a court on "appeal" from that tribunal, the "court should attach great weight to the opinion of the [tribunal]"[64]. That observation was made when dealing with an appeal from a refusal of registration by the Registrar of Trade Marks where the issue was whether a proposed trade mark was distinctive and ought to have been registered.

46 In *Eclipse Sleep Products Inc v The Registrar of Trade Marks*[65], Dixon CJ, Williams and Kitto JJ approved a passage from a judgment of Lloyd-Jacob J in which his Lordship had said[66]:

> "By reason of his familiarity with trade usages in this country, a familiarity which stems not only from an examination of marks applied for and of the many trade journals which he sees, but from the perusal and consideration of trade declarations and the hearing of applications or oppositions, the *Registrar* is peculiarly well fitted to assess the standards by which the trade and public must be expected to estimate the uniqueness of particular indications of trade origin."

47 The weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its

---

63 (1987) 163 CLR 54 at 77.

64 *Registrar of Trade Marks v Muller* (1980) 144 CLR 37 at 41.

65 (1957) 99 CLR 300 at 321-322.

66 *In the Matter of Ford-Werke AG's Application for a Trade Mark* (1955) 72 RPC 191 at 194.

decisions are supported by disclosed processes of reasoning. A similar view appears to be taken by the Supreme Court of Canada[67].

48 Where the question is whether the tribunal acted within jurisdiction, it must be for the court to determine independently for itself whether that is the case. Speaking with respect to jurisdictional challenges to decisions of the Australian Conciliation and Arbitration Commission, Mason J observed[68]:

> "If the evidence remains the same, if the Full Bench on appeal has confirmed the decision at first instance and if the issue of fact is one in the resolution of which the Commission's knowledge of industry specially equips it to provide an answer, greater weight will be accorded than in cases in which one or more of these factors is absent."

That statement was approved by six members of the Court in their joint judgment in *R v Williams; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation*[69]. These decisions were made by this Court in the exercise of its original jurisdiction under s 75(v) of the Constitution. The statement of Mason J was directed to the question of what was open to this Court. His Honour was not addressing the question whether a court which, in the circumstances postulated by his Honour, did not give weight to the decision of the administrative tribunal thereby fell into appealable error. What was said should be understood as permitting rather than requiring recourse to the administrative decision.

49 We would accept, as applicable to the situation which was presented to Debelle J, Mason J's statement in *Alley* with a qualification. The qualification is that the statement that the evidence "remains the same" should be read as including evidence which in all significant respects is substantially the same. In

---

67 *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd* [1993] 2 SCR 316 at 335; *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557 at 591-592; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 at 846-847; *Westcoast Energy Inc v Canada (National Energy Board)* [1998] 1 SCR 322 at 353-355; 414-415.

68 *R v Alley; Ex parte NSW Plumbers & Gasfitters Employees' Union* (1981) 153 CLR 376 at 390.

69 (1982) 153 CLR 402 at 411. See also *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183-184.

R v Ludeke; Ex parte Queensland Electricity Commission[70], six members of the Court, including Mason J, gave "considerable weight" to a finding by the Conciliation and Arbitration Commission that there was an industrial dispute where, on the application to the High Court for prohibition and certiorari, the evidence was "essentially the same"[71].

50 However, it was the task of Debelle J to determine the question of the jurisdiction of the Commission upon the evidence as to "special industry" before him, as opposed to the probative material which had been before the Commission, and upon his construction of the relevant provision. His Honour did so. If, at the end of the day, Debelle J had been in doubt upon a particular factual matter, it would have been open to his Honour to resolve that doubt by giving weight to any determination upon it by the Commission. We do not read Debelle J's reasons as indicating any doubt apt for resolution in this way.

51 On the further hearing of the appeal by the Full Court, it will be for it to determine whether, as the Notice of Appeal puts it, the evidence before Debelle J did not justify a finding of "special industry". In the determination of that inquiry, some consideration by the Full Court of the findings of the Commission upon the same or substantially the same evidence may be appropriate. However, no distinct question arises, or could arise, as to whether Debelle J erred by not having had sufficient regard to any such findings.

52 The appeal should be allowed. Orders 2 and 3 of the orders of the Full Court made on 25 July 1997 should be set aside. Order 4 should be set aside in so far as it deals with the payment of Collex's costs by Enfield. The matter should be remitted to the Full Court for the determination of the remaining grounds of appeal to that Court relating to Debelle J's determination that the development was for "special industry". Collex should pay the costs of Enfield of the appeal in this Court and any costs of the Commission. Costs of the appeal to the Full Court and the costs of the proceedings before Debelle J should abide the outcome of the appeal to the Full Court and be determined by that Court.

---

70 (1985) 159 CLR 178.

71 (1985) 159 CLR 178 at 184.

53 GAUDRON J. Subject to what follows, I agree with the joint judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ and with the orders they propose.

54 The potential for executive and administrative decisions to affect adversely the rights, interests and legitimate expectations of the individual is now well recognised[72]. So, too, is the inadequacy of the prerogative writs as general remedies to compel the executive government and administrative bodies to operate within the limits of their powers[73]. The introduction of comprehensive statutory schemes such as that embodied in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[74] owes much to the recognition of these two basic factors.

55 The other factor that informs comprehensive statutory schemes for the review of executive and administrative decisions is what is sometimes referred to as "accountability". In this context, "accountability" can be taken to refer to the need for the executive government and administrative bodies to comply with the law and, in particular, to observe relevant limitations on the exercise of their powers.

56 Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers[75].

---

72 See *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *Kioa v West* (1985) 159 CLR 550; *South Australia v O'Shea* (1987) 163 CLR 378; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.

73 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257 per Gaudron, Gummow and Kirby JJ; *Abebe v Commonwealth* (1999) 73 ALJR 584 at 607 per Gaudron J; 162 ALR 1 at 31. See also Aronson and Dyer, *Judicial Review of Administrative Action*, (1996) at 721; Sykes, Lanham, Tracey and Esser, *General Principles of Administrative Law*, 4th ed (1997) at 271.

74 See also *Administrative Law Act* 1978 (Vic), *Judicial Review Act* 1991 (Q), *Administrative Decisions (Judicial Review) Act* 1989 (ACT).

75 *Clough v Leahy* (1904) 2 CLR 139 at 155-156 per Griffith CJ; *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 272 per Windeyer J; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 per Kitto J; *A v Hayden* (1984) 156 CLR 532 at 540 per Gibbs CJ, 562 per Murphy J, 580-582, 588 per Brennan J, 592 per Deane J; *Bropho v Western Australia* (1990) 171 CLR 1 at 22-24 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 26-27 per Brennan J.

It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.

57 As already indicated, the prerogative writs are not wholly effective as general public law remedies. Nor, perhaps, are equitable remedies which, in the absence of legislative provision to the contrary, are available only at the suit of a person with a direct or special interest in the subject matter in question[76]. However, equitable remedies have long had a role to play in public law. And, because of the limitations and technicalities which beset the prerogative writs, that role is a continuing and important one.

58 Equitable remedies are available in the field of public law precisely because of the inadequacies of the prerogative writs[77]. Thus, and contrary to what seems to have been suggested by the Full Court of the Supreme Court of South Australia in this matter[78], it is not incongruous that equitable relief should be available although prerogative relief is not. What is incongruous is the notion that equitable remedies should be subject to the same or similar limitations which beset the prerogative writs. In the field of public law, equitable remedies are subject to the same considerations, including discretionary considerations, as apply in any other field. There is no need for the importation of other limitations.

---

76 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 527 per Gibbs J, 537 per Stephen J, 547-548 per Mason J; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36 per Gibbs CJ, 41 per Stephen J, 44 per Murphy J, 61 per Wilson J, 72-74 per Brennan J; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 264-265 per Gaudron, Gummow and Kirby JJ, 282-283 per McHugh J.

77 See *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 350-351 per Gibbs CJ, 386-387 per Aickin J, 419-420 per Brennan J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257 per Gaudron, Gummow and Kirby JJ; *Abebe v Commonwealth* (1999) 73 ALJR 584 at 607 per Gaudron J; 162 ALR 1 at 31.

78 See *Corporation of the City of Enfield v Development Assessment Commission* (1997) 69 SASR 99 at 116.

59 Once it is appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise, it follows that there is very limited scope for the notion of "judicial deference" with respect to findings by an administrative body of jurisdictional facts. Of course, other considerations apply with respect to non-jurisdictional facts for there is no legal error involved if an administrative body simply makes a wrong finding of fact[79]. And, again, different considerations apply where what is in issue is not a jurisdictional fact, but the decision-maker's opinion as to the existence of that fact. In that situation, the question is whether, on the available material, it was reasonably open for the decision-maker to form the opinion in question[80].

60 Where, as here, the legality of an executive or administrative decision or of action taken pursuant to a decision of that kind depends on the existence of a particular fact or factual situation, it is the function of a court, when its jurisdiction is invoked, to determine, for itself, whether the fact or the factual situation does or does not exist. To do less is to abdicate judicial responsibility. However, there may be situations where the evidence before the court is the same or substantially the same as that before the primary decision-maker and minds might reasonably differ as to the finding properly to be made on that evidence. In that situation a court may, but need not, decline to make a different finding from that made by the primary decision-maker, particularly if the latter possesses expertise in the area concerned[81]. Even so, in that situation, the question is not so

---

79 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J. See also *R v The District Court; Ex parte White* (1966) 116 CLR 644 at 654 per Menzies J; *Green v Daniels* (1977) 51 ALJR 463 at 468 per Stephen J; 13 ALR 1 at 11-12; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ; *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303 per Dawson, Gaudron, McHugh, Gummow and Kirby JJ.

80 See *Caledonian Collieries Ltd v Australasian Coal and Shale Employees' Federation [No 1]* (1930) 42 CLR 527 at 546-548 per Isaacs J; *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430-431 per Latham CJ; *R v Blakeley; Ex parte Association of Architects &c of Australia* (1950) 82 CLR 54 at 69 per Latham CJ, 92 per Fullagar J; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 118 per Dixon CJ, Williams, Webb and Fullagar JJ; *Foley v Padley* (1984) 154 CLR 349 at 369-370 per Brennan J.

81 See *R v Alley; Ex parte NSW Plumbers & Gasfitters Employees' Union* (1981) 153 CLR 376 at 390 per Mason J; *R v Williams; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402

(Footnote continues on next page)

much one of "judicial deference" as whether different weight should be given to the evidence from that given by the primary decision-maker.

---

at 411 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183-184.