HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND CALLINAN JJ

ABDUS SAMAD & ORS — APPELLANTS

AND

DISTRICT COURT OF NEW SOUTH WALES & ANOR — RESPONDENTS

Samad v District Court of New South Wales
[2002] HCA 24
20 June 2002
S189/2001

ORDER

1. *Appeal allowed.*

2. *Set aside order of the Court of Appeal of New South Wales dated 28 November 2000.*

3. *Order in the nature of certiorari quashing orders 1, 2 and 3 made by the District Court of New South Wales on 14 April 2000.*

4. *Remit matter to the District Court of New South Wales for rehearing according to law.*

5. *Second respondent to pay the costs of the appeal, and of the proceedings in the Court of Appeal and in the District Court to date.*

On appeal from the Supreme Court of New South Wales

Representation:

A Robertson SC with G L Turner for the appellants (instructed by Yandell Wright Stell)

No appearance for the first respondent

J Basten QC with R P L Lancaster for the second respondent (instructed by Phillips Fox)

CATCHWORDS

Samad v District Court of New South Wales

Statutes – Construction – Power to suspend or cancel a licence to supply a drug of addiction – Whether cl 149 of the Poisons and Therapeutic Goods Regulation 1994 (NSW) confers on the Director-General of the Department of Health a power of suspension or cancellation which must be exercised if one or more of the specified grounds for suspension or cancellation are established – Whether provision that Director-General "may suspend or cancel" licence on specified grounds conferred a power to be exercised not a discretion to be weighed – Whether circumstances obliged Director-General to exercise discretion in favour of cancellation.

Courts and tribunals – Error of law – Whether decision based upon that error.

Words and phrases – "may" – "based upon".

Poisons and Therapeutic Goods Act 1966 (NSW).
Poisons and Therapeutic Goods Regulation 1994 (NSW), cl 149.

1 GLEESON CJ AND McHUGH J. This appeal arises out of a decision by a licensing authority to cancel a licence to supply methadone (a drug of addiction), the licensee's unsuccessful appeal against that decision to a judge, and a claim to have the judge's decision quashed upon the ground that it was based upon a misconception of the nature and limits of the jurisdiction being exercised.

2 The licence was issued pursuant to regulations made under the *Poisons and Therapeutic Goods Act* 1966 (NSW) ("the Act"). The Act regulates the supply and use of various poisons, restricted substances, and drugs of addiction. It contains, in s 24, a power to make regulations, for the purpose of preventing the improper use of drugs of addiction, with respect to regulating and controlling the manufacture, possession and supply of such drugs. In particular, there is power to make regulations with respect to the issue, grant and renewal of licences by the Director-General of the New South Wales Department of Health on such terms and conditions as the Director-General thinks proper, and with respect to the withdrawal and suspension of any such licence by the Director-General. There is also a power in s 45C(1B)(c) to make regulations conferring rights of appeal on persons aggrieved by decisions of the Director-General relating to the issue, suspension, withdrawal or cancellation of licences.

3 At the time relevant to this appeal cl 149 of the Poisons and Therapeutic Goods Regulation 1994 (NSW) ("the Regulation") provided:

> "149. The Director-General may suspend or cancel a licence or authority on any one or more of the following grounds:
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> (a) the holder of the licence or authority requests or agrees in writing to the suspension or cancellation of the licence or authority,
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> (b) the holder of the licence or authority contravenes any condition of the licence or authority,
>
> (c) the holder of the licence or authority is convicted of an offence against the Act or this regulation, or of an offence against the *Drug Misuse and Trafficking Act 1985* or any regulation in force under that Act, or an order is made under section 556A(1) of the *Crimes Act 1900* in respect of such an offence,
>
> (d) the holder of the licence or authority is, in the opinion of the Director-General, no longer a fit and proper person to hold the licence or authority,
>
> (e) the annual fee for the licence is not duly paid,

(f) in the case of a licence or authority to supply methadone, the supply of methadone is causing disruption to the amenity of the area in which the premises from which it is being supplied are situated."

4 Clause 150 of the Regulation specified the procedure to be followed by the Director-General before suspending or cancelling a licence. There was a requirement to give the licensee a reasonable opportunity to make representations. Clause 152 provided for an appeal to the District Court from a decision of the Director-General to suspend or cancel a licence. It was in the following terms:

"(1) Any person who is aggrieved by a decision of the Director-General relating to:

(a) the issue or renewal of, or the refusal to issue or renew, a licence or authority, or

(b) the suspension, withdrawal or cancellation of a licence or authority,

may appeal to the District Court against the decision.

(2) An appeal is to be made, in accordance with rules of court, within 14 days after written notice of the decision is served on the person.

(3) An appeal is to be heard by way of a new hearing, and fresh evidence, or evidence additional to the evidence available to the Director-General when the decision was made, may be admitted in the hearing.

(4) Subject to any order made by the District Court, the lodging of an appeal does not operate to stay the decision appealed against.

(5) The decision of the District Court on an appeal is final and is to be given effect to as if it were the decision of the Director-General."

5 An appeal to the District Court from a decision of the Director-General to cancel or suspend a licence is one in which the Court undertakes a hearing de novo[1].

6 On 22 October 1996, the Director-General issued to Barbara Street Clinic Pty Ltd ("the licensee") a licence to supply drugs of addiction on or from

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1 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622 per Mason J.

premises situated at 34 Barbara Street, Fairfield, a suburb of Sydney. The licence was issued for the purpose of enabling the licensee to conduct a methadone clinic. It was subject to a number of conditions, covering the nature of the drugs that could be supplied, the circumstances under which they could be supplied, and related matters. For reasons that will be referred to in more detail below, the licence was cancelled by notice dated 22 December 1998. The cancellation was to be effective from 23 June 1999. On 6 April 1999, the licensee appealed to the District Court. Pending the hearing, the term of the licence was extended. The appeal was heard before Herron DCJ in April 2000. The learned judge, for reasons set out in a lengthy ex tempore judgment, dismissed the appeal, but deferred the effect of the cancellation. The licensee then brought proceedings in the Court of Appeal of New South Wales seeking, primarily, an order in the nature of certiorari quashing the decision of Herron DCJ and an order remitting the matter to the District Court to rehear the licensee's appeal according to law. The Court of Appeal gave its judgment on 28 November 2000[2]. It found against the licensee on a legal basis that will be examined below. In the formulation of the orders of the Court of Appeal, the proceedings before that Court were erroneously characterised as an appeal. It was ordered that the appeal be dismissed, and that the licence be cancelled with effect from four months from 28 November 2000. It was common ground in this Court that if the decision of the Court of Appeal were otherwise correct, the proper order for it to have made was that the summons before it be dismissed.

7 The licensee now appeals to this Court, contending that both Herron DCJ and the Court of Appeal misconstrued the regulations to be applied, and that the Court of Appeal should have quashed the decision of Herron DCJ.

The cancellation of the licence

8 The decision of the Director-General to cancel the licence was made under par (f) of cl 149, on the ground that the supply of methadone was causing disruption to the amenity of the area in which the premises from which it was being supplied were situated.

9 The evidence showed that there had been a long history of complaints from residents, and people who conducted commercial and professional activities, in the neighbourhood. The Director-General set up a Review Committee to investigate the complaints, and the activities of the licensee.

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2 *Samad v District Court of NSW* (2000) 50 NSWLR 270.

On 4 September 1998, the Director-General wrote to Dr Samad, a director of the licensee, informing him of the Report of the Review Committee. The Director-General said:

> "As you are aware, I established the Review of the Barbara Street Clinic (the Clinic) following complaints alleging a negative impact by the operation of the Clinic on the amenity of the local area. I understand that you have had the opportunity to present data and to make other representations in your submission to the Committee and have also had the opportunity to comment on the draft report and its recommendations.
>
> The Report finds that the present location of the Clinic is not desirable. It also contains evidence that the Clinic disrupts the amenity of the local area. A number of submissions to the Review Committee also highlight disruption to the amenity of the area, and the Department has received some letters in this regard.
>
> In summary, the main points relating to disruption of the amenity of the area which have been brought to my attention are as follows:
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> . the Report finding that the present location of the Clinic adjacent to a residential area is not desirable;
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> . the Report finding that a small core of drug dealers are apparently attracted to Fairfield in order to buy takeaway doses of methadone and to sell other drugs, and these persons contribute to a significant loss of amenity to visitors and businesses in Barbara Street and to residents in the immediate surrounding area;
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> . concerns raised by community stakeholders, (which are identified in the Report and submissions) including:
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> - unsightly congregation around the clinic;
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> - aggressive and violent behaviour by those congregating around the clinic;
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> - drug dealing by patients and their associates;
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> - diversion of takeaway methadone;
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> - drug injecting in public places and on private property;
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> - disposal of syringes and takeaway methadone bottles on residents' private property.

> These concerns have led to submissions on behalf of local businesses that customers are too frightened to attend the business' premises, and on behalf of local residents who suffer harassment and obstruction in their daily activities as a result of the Clinic premises near their homes."

11 The Director-General went on to say that he considered that there were reasonable grounds for concluding that the clinic disrupted, and would continue to disrupt, the amenity of the area in which it was situated and that he was considering cancelling the licence. He gave the licensee an opportunity to make further submissions. He added: "As the Report makes clear, there is a need for continuing methadone services in the south western Sydney area. The Report considered the most favourable outcome to be the re-location of the Barbara Street Clinic. I accept that there is a need for methadone services in the area, and I do not rule out the possibility of the re-location of the Barbara Street Clinic, or the opening of a clinic administered by a different legal entity." The letter stated that, in the meantime, pending a decision as to cancellation, further conditions were imposed upon the licence. Those conditions limited the number of clients who could be treated by the clinic, and restricted its hours of operation.

12 The licensee made further submissions. These were unsuccessful. On 8 December, the Director-General wrote another letter to Dr Samad informing him of his intention to cancel the licence. In order to minimise harm to clients of the clinic that might result from the cancellation, the Director-General informed the licensee that the cancellation was not to take effect for three months, and invited the licensee to make further submissions as to the length of that period. On 22 December, the Director-General issued a formal Notice of Cancellation, effective 23 June 1999. The notice included the following statement of the reasons for the decision to cancel the licence:

> "1. The supply of methadone from 34 Barbara Street, Fairfield disrupts the amenity of the surrounding area through:
>
> . the attraction of drug dealers to the area in order to buy takeaway doses of methadone and sell other drugs;
>
> . unsightly congregation around the premises;
>
> . aggressive and violent behaviour and harassment and obstruction of local residents by those congregating around the premises;
>
> . drug dealing by patients and their associates;
>
> . diversion of takeaway methadone;

. drug injecting in public places and on private property;

. disposal of syringes and takeaway methadone bottles on residents' private property.

2. The disruption to the amenity of the area is largely a result of the location of the premises and its physical attributes.

3. There is no other mechanism available to effectively prevent the disruption to the amenity of the area.

4. Barbara Street Clinic Pty Ltd has been unable to resolve amenity issues to date, despite being aware of those issues for several years. The internal disputations within Barbara Street Clinic Pty Ltd further support the view that such issues will be unable to be resolved in the future."

13 It is to be noted that the Director-General approached the question of the cancellation of the licence upon the basis that he had a discretion in relation to the matter, and he, and the Review Committee, evidently took considerable pains to evaluate what were regarded as relevant discretionary considerations. The matter was not approached upon the basis, that, once it was determined that there was some degree of disruption to the amenity of the area in which the premises were situated, it necessarily followed that the licence had to either be cancelled or suspended. On the contrary, consideration was given to the nature and extent of the disruption to the amenity of the area, the question whether any steps, including imposition of appropriate conditions, could be taken to alleviate the problem, and the possibility of making alternative arrangements in the interests of persons who relied upon the clinic for treatment of problems of drug dependency. Nevertheless, in defending the Director-General's decision before Herron DCJ and in the Court of Appeal, (although not in this Court), the legal representatives of the Director-General put, in the forefront of their submissions, an argument that, once the Director-General was satisfied that there was disruption to the amenity of the area in which the premises were situated, then he was legally obliged either to cancel or suspend the licence. His only discretion, it was contended, was to choose between suspension and cancellation.

The reasoning of the District Court

14 Herron DCJ commenced his reasons for judgment with a statement of his conclusion. He said:

> "For the reasons which I shall give I have with some reservations, because of the undoubted interests of people receiving treatment at the clinic, and the need for the clinic in the area and indeed the interest of the appellants, especially Dr Samad against whom no complaint is made, [concluded

that] the Director-General was justified in giving a notice cancelling the licence of the clinic."

15 That conclusion was expressed in terms that appeared to assume, not that the Director-General was bound to give a notice cancelling the licence once it was found that there was disruption to the amenity of the area, but that the question to be considered was whether he was justified in giving the notice bearing in mind countervailing considerations such as the interests of the people receiving treatment, the interests of the licensee, and the need for a clinic in the area. It is not contended by the licensee that such an approach would involve any legal error.

16 When it came to his Honour's reasons, he began by saying that he agreed with the conclusions of the Review Committee. As appears from the material set out above, those conclusions covered a range of discretionary considerations, and addressed, amongst other things, the extent of the disruption to the amenity of the area and whether the disruption could be alleviated to an acceptable extent by the imposition of suitable conditions, and the needs of users of the clinic.

17 His Honour then set out the grounds of appeal that were relied on before him by the licensee. They were as follows:

"(1) The cancellation was against the merits;

(2) The cancellation did not take into account or did not give proper weight to the need for a methadone clinic in the Fairfield area;

…

(5) Any disruption to the amenity of the area in which the Barbara Street Clinic Pty Ltd operates is outweighed by the service that the Barbara Street Clinic Pty Ltd provided to the area."

18 Later in his reasons, Herron DCJ addressed those grounds. He considered in detail the nature and extent of the disruption to the amenity of the area. He repeated that he agreed with the conclusions of the Review Committee. He recited the evidence of residents, operators of commercial and professional premises, and police, as to what was going on in and around the clinic. He considered the needs and problems of users of the clinic. He said, for example "I bear in mind the problems that Sabrina might well have when this clinic is closed. Likewise, I think that Mr Yuan, for example, could well be disadvantaged." He said "I also do not ignore the cri de coeur, as it were, of Jill and her statements about the advantages which the clinic offers to her son." He referred to the evidence of the Deputy Director of Health about what was proposed to be done in re-location of the services by the clinic, and he said that

he had been assured that everything would be done to meet the needs of the patients at the clinic if it were closed.

19 The appellants contend that the discretion conferred by the opening words of cl 149 extended beyond merely making a choice between suspension and cancellation once there was a finding of disruption to amenity. They contend that the Director-General, or a judge on appeal upon finding that the ground in (5) was made out, was both entitled and required to consider wider discretionary matters, including the nature and extent of the disruption to the amenity of the area, the possibility of alleviating the disruption by imposing conditions on the licence, the needs of users of the clinic, the possibility of catering for those needs elsewhere, and (perhaps) the interests of the licensee. Let it be assumed, for the moment, that the contention is correct. If the reasoning of Herron DCJ had been confined to that summarised above, his decision would have been unassailable. If the competing contention, ultimately preferred by the Court of Appeal, were correct, his reasoning dealt, at considerable length, with a number of irrelevant considerations. The difficulty is that Herron DCJ appeared to vacillate in the approach he took to the nature and scope of the power he was exercising.

20 At an early stage of his reasons, Herron DCJ referred to the competing arguments of counsel. He said:

> "Mr Turner pressed upon me that the use of the word 'may' in the regulation involve[s] my weighing the attribute of the clinic together with its need, and having done so notwithstanding a finding that there was a disruption of the amenity, I should find in favour of the appellants. It seems to me, however, that once I found that the supply of methadone by the clinic was 'causing a disruption to the amenity of the area', I would have to confirm the cancellation. Any discretion given by the regulation 'must be exercised having regard to the policy and purpose' of the regulations which confer the authority and duties of the Director-General and therefore, of course, me.
>
> I refer to the judgment of Windeyer J in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[3], and to the cases referred to there by his Honour. He, in particular, referred to the words of Jervis CJ in *Julius v Bishop of Oxford*[4] [sic], namely, that 'the word "may" is merely used to confer the authority: And the authority must be exercised, if the circumstances are such as to call for its exercise'. I would also refer to

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3 (1971) 127 CLR 106.

4 (1880) 5 App Cas 214.

> Messrs Pearce and Geddes: *Statutory Interpretation in Australia*[5]. From the discussion there it can be said that an apparent discretion to act can be rendered obligatory, according to the circumstances of the case, and I think that this is the position with regard to regulation 149. But in any event I think that if the interests of the clinic and its users were to be weighed, as against the interests of the members of the community, including visitors to the area, the scales, I feel, would have to tip in favour of the members of the community."

21 That passage was followed by the reasoning earlier summarised. Much of that reasoning can only have been directed to the concluding sentence in the passage just quoted.

22 This gives rise to a difficulty that this Court has to face. For reasons that will appear, we agree with the appellants' contention that the second sentence in the first of the two paragraphs just quoted involves legal error. But there is a question as to the consequence, having regard to the last sentence in the second paragraph, and the reasoning subsequently advanced in support of it. Before coming to that question, it is necessary to examine the reasoning of the Court of Appeal.

The decision of the Court of Appeal

23 The licensee applied to the Court of Appeal for an order in the nature of certiorari quashing the decision of Herron DCJ and for an order remitting the matter to the District Court to be re-heard according to law. Other declarations and orders were sought, but that was the principal relief claimed. Notwithstanding the form of the orders ultimately made by the Court of Appeal, the proceedings were not an appeal. The grounds upon which relief was claimed, so far as presently relevant, were as follows:

> "(a) His Honour erred in law in construing the words 'may cancel' in clause 149 of the Regulation as excluding a discretion not to cancel a licence where the ground in clause 149 (f) is made out.
>
> (b) His Honour erred in law in failing to have regard to matters which he was bound by clause 149 of the Regulation to take into account, in particular the effect of a cancellation of the Licence on the Claimants or any of them and on the users of the clinic and the public interest in the continued operation of the clinic."

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5 4th ed (1996) at 268.

24 As has already been observed, when attention is paid to the actual reasoning of Herron DCJ, understood in the light of the findings of the Review Committee, with which he twice expressed agreement, it is not correct to say that he failed to address the matters referred to in ground (b). He formed, and expressed, conclusions about them. However, the Court of Appeal did not get to ground (b). It concluded that the construction of cl 149 attributed to Herron DCJ in ground (a) was correct. On that basis, no error of law was shown.

25 The jurisdiction invoked was that given by s 69 of the *Supreme Court Act* 1970 (NSW). Sub-section (1) provides that, where formerly the Supreme Court had jurisdiction to grant any relief or remedy, including relief by way of certiorari, then the Court shall continue to have such jurisdiction, but shall not issue such a writ and shall grant that relief by way of judgment or order. Hence the claim for "an order in the nature of certiorari". Sub-section (3) declares that the jurisdiction to grant relief in the nature of a writ of certiorari includes jurisdiction to quash a determination "if that determination has been made *on the basis* of an error of law that appears on the face of the record of the proceedings" (emphasis added). Sub-section (4) deals with what constitutes the face of the record.

26 It was unnecessary for the applicants, if their ground (a) were otherwise made out, to rely upon s 69(3). The error they attributed to Herron DCJ was in any event jurisdictional error. In *Craig v South Australia*, this Court said[6]:

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) *which is based upon* a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction." (emphasis added)

27 If Herron DCJ based his decision upon a conclusion that, once he found there was disruption to the amenity of the area, the words "may suspend or cancel" in cl 149 meant that he may suspend, or may cancel, but must do one or

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6 (1995) 184 CLR 163 at 177 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

the other, and if that conclusion was erroneous in law, then he based his decision upon a misconception of the nature or limits of his jurisdiction. There was also an error of law on the face of the record. Either way, two questions arise. Did Herron DCJ make an error of law, as asserted in ground (a)? If so, was his decision based on that error? If both of those questions were answered in the affirmative, a further discretionary consideration could arise, but that may be put to one side for the moment.

28 In the Court of Appeal, Beazley JA, with whom Stein and Heydon JJA agreed, concluded as follows:

> "In my opinion, upon its proper construction, cl 149 confers on the Director-General a power which must be exercised if one or more of the matters in the clause are established.
>
> …
>
> The word '*may*' is directed, not to a discretionary exercise of the power as such but to its manner of exercise. It empowers the Director-General to engage one of two alternative sanctions: suspension or cancellation."

29 Thus, the Court of Appeal answered the first of the two questions stated above in the negative and, on that basis, (after dealing with other presently irrelevant complaints about the decision of Herron DCJ), found against the present appellants.

30 The conclusion of Beazley JA as to the meaning of cl 149 was based upon an examination of the legislative and regulatory scheme. The result of that examination was summarised in the following paragraph from her Honour's reasons:

> "The licensing system created by the Regulations is to permit and control the circumstances in which addictive drugs may be supplied to the community. It reflects and implements important public policy considerations in relation to drugs of addiction. The matters specified in cl 149 in relation to cancellation are a reflection of those same public policy considerations; the strict control of the supply of drugs of addiction with[in] the community requires that conditions of a licence be complied with and that the regulatory regime, including the payment of licence fees, be respected; that persons who are not fit or proper persons to hold a licence should not hold a licence; that persons who commit drug related offences or offences against the Act or Regulations should not hold a licence. Likewise, if the amenity of the area is disrupted by the supply of methadone, then the public interest is adversely affected."

The nature of the discretion conferred by cl 149

31 Even on the approach adopted by the Court of Appeal, the opening words of cl 149 confer upon the Director-General (or a judge on appeal) a capacity to choose between alternative courses of action: a choice that must be made in the exercise of a discretion. The competing views concern the width of the available choices, and, therefore, the scope of the discretionary power.

32 When a statutory power is conferred by the use of words of permission, there may arise a question whether the effect is to impose an obligation, or, at least, an obligation that must be performed in certain circumstances. Even where it is plain that the intention of the legislature was permissive, questions may arise as to the nature of the considerations that the person in whom the power is confided may be entitled or bound to take into account in the exercise of the discretion conferred. Issues of this kind are to be resolved as a matter of statutory interpretation, having regard to the language of the statute, the context of the relevant provision, and the general scope and objects of the legislation[7].

33 As was pointed out in *Ward v Williams*[8] there is a long history of legislative intervention in New South Wales "to restrain the development of the notion that permissive words may have a compulsive effect." The current provision is s 9 of the *Interpretation Act* 1987 (NSW) which, except in so far as the contrary intention appears in an Act or instrument (s 5), provides that the word "may", if used to confer a power, indicates that the power may be exercised or not, at discretion.

34 An example of a statutory provision in which a contrary intention appeared may be seen in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[9]. Section 46(3) of the *Income Tax Assessment Act* 1936 (Cth) provided that, if the Commissioner was satisfied that certain conditions as to non-payment of dividends were fulfilled, the Commissioner "may allow" a private company a rebate in its assessment. This Court held that, if the Commissioner was satisfied of the specified condition, then he was obliged to allow the rebate. The taxpayer had a right or entitlement. The context indicated that it was not intended that the Commissioner should have a discretionary power to defeat that right or

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7 *Ward v Williams* (1955) 92 CLR 496 at 505 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ.

8 (1955) 92 CLR 496 at 506.

9 (1971) 127 CLR 106.

entitlement. The word "may" conferred a power; and the statutory intention was that the power be exercised if the condition was fulfilled. That decision may be compared with *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*[10], where this Court was divided on the question whether a provision empowering a revenue authority to refund overpaid duty conferred a discretion, or whether it merely gave authority to make a payment which had to be exercised in the circumstances indicated.

35 Whether a statute, which confers a power, on its true construction also imposes a duty to exercise the power in certain circumstances, may also affect the form of relief that is appropriate where there has been a failure to exercise the power; it may affect the question whether the appropriate order is an order to make a certain decision, or to do a certain act, or merely to consider the matter according to law. And, even if a statute does not impose a duty to exercise the power, it may circumscribe the considerations that are relevant to the exercise of a discretion. In every case the task is to construe and apply the statute.

36 The statutory context may be crucial. Where a statute confers rights or entitlements, as in *Finance Facilities*, it may be easy to conclude that the legislature did not intend that they could be taken away by the exercise of a discretion reposed in an administrative authority. In the present case, the Court of Appeal found, in the statutory context, what it regarded as a strong indication that the scope of the discretion conferred by cl 149 was narrowly confined in the manner earlier mentioned.

37 We are unable to agree. There are two aspects of the regulatory scheme that are, to our minds, compelling. The first is the immediate context in which par (f) of cl 149 appears. If the Court of Appeal is right, then the same conclusion (ie that the only choice available to the Director-General is either to suspend or cancel a licence) must follow whichever of the grounds set out in the clause applies. The opening words of the clause must have the same meaning in their application to each ground. Consider pars (b) and (e). A contravention of a licence condition, or a failure to make due payment of a licence fee, could occur in circumstances that are technical, or trivial, or accidental, or readily excusable. What legislative purpose would be served by depriving the Director-General of the capacity to excuse such a contravention or failure, or to seek to deal with it by some means short of suspension or cancellation? Secondly, as the possibilities examined by the Review Committee and the Director-General in the present case show, the more appropriate remedy in any particular case might be, not the suspension or cancellation of a licence, but in the imposition or variation of

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10 (1994) 182 CLR 51.

licence conditions. Suppose, for example, that the disruption to the amenity of an area in which a methadone clinic is operating could be eliminated, or reduced to an acceptable level, by altering the hours of operation of the clinic, or reducing the number of people it could serve. The capacity of the Director-General to deal with problems in that way is an important part of the regulatory scheme. The possibility of such a solution in the present case was apparently the first thing that occurred to the authorities. That strongly suggests that the discretion conferred by cl 149 is not as narrow as appeared to the Court of Appeal.

38 There may be cases, of which the present might be an example, where the extent of the disruption to the amenity of an area in which a methadone clinic is situated, considered in the light of the availability of possible alternatives, and the impossibility of alleviating the problem by appropriate conditions, means that, as a practical matter, the case for cancellation of a licence is overwhelming. That may be how the Review Committee and the Director-General saw the matter. In this Court, it was urged on behalf of the Director-General that this is really all that Herron DCJ intended to say, or, alternatively, that in any event it is clearly the case, and that certiorari should be refused for that reason.

The case for an order in the nature of certiorari

39 The Court of Appeal made clear its understanding of the scope of the discretion conferred by cl 149. The same cannot be said of the reasons of Herron DCJ. It is possible that he meant no more than counsel for the Director-General now claims. However, it seems reasonable to infer that the argument advanced by counsel for the Director-General before the Court of Appeal was to the same effect as the argument that had been put to Herron DCJ. In the passage from the reasons of Herron DCJ quoted earlier, in which reference was made to *Finance Facilities* and *Julius v Bishop of Oxford*, the learned judge indicated disagreement with the proposition "that the use of the word 'may' in the regulation involve[s] … weighing the attribute of the clinic together with its need, and having done so notwithstanding a finding that there was a disruption of the amenity [permitting a finding] in favour of the appellants."

40 Although it is not completely clear, we think this Court should proceed upon the basis that Herron DCJ accepted the argument as to the meaning and effect of cl 149 that was successful in the Court of Appeal, and that, in the passage from his reasons earlier quoted, up until the last sentence of the second paragraph, he was indicating that he regarded his discretion as limited to choosing between suspension and cancellation if he found that par (f) was satisfied. His rejection of the argument advanced by Mr Turner on behalf of the appellants, followed by the references to *Finance Facilities* and *Julius v Bishop of Oxford*, indicates that he was not merely intending to say that, while the matters adverted to by Mr Turner were relevant discretionary considerations, they were so heavily outweighed by the extent of the disruption to the amenity in

the present case that there was only one possible outcome of a proper exercise of discretion.

41 In that respect, Herron DCJ's reasons disclose an error of law. It was a jurisdictional error involving a misconception of the nature and limits of his discretionary power.

42 But was the decision of Herron DCJ based upon that error? In that respect, what is the significance of the concluding sentence in the passage quoted, and of the later reasoning addressing such matters as the degree of disruption to amenity, the needs of users of the clinic, the possibility of alternative locations for the clinic, the possibility of dealing with the problem by the imposition of conditions, and the interests of persons associated with the licensee?

43 Counsel for the appellants sought to answer these questions by reference to *Wade v Burns*[11]. We are not persuaded that the answer is so simple. In that case, a mining warden was found to have erred in law in considering the powers available to him under the relevant legislation. He wrongly assumed that he had a particular discretion, and exercised it against an applicant. This appeared to justify an order of mandamus to hear and determine the application according to law. An attempt was made to resist such an order on the basis that, although he did not consider he had any other relevant discretion, the warden, in delivering his reasons, said that had he a general discretion to refuse the application he would do so. It was argued that an order of mandamus would be futile. Barwick CJ dismissed the warden's statement as having "no weight"[12]. Owen J said[13]:

> "It may be that a wider discretion than that which he thought was conferred upon him is vested in the warden. We did not hear full argument on the point or on the question whether, if he had such a discretion, the ground upon which he said he would have exercised it afforded any justification for refusing the application."

In other words, the brief reasons given by the warden as to why he would have exercised a general discretion against the applicant, if he had one, may or may not have been good reasons. That question not having been argued or decided,

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11 (1966) 115 CLR 537.

12 (1966) 115 CLR 537 at 555.

13 (1966) 115 CLR 537 at 568.

the warden's statement was not a reason for declining to order that the application be heard and determined according to law. We do not regard *Wade v Burns* as providing an authoritative answer to the present problem.

44 To vitiate the decision of an administrative tribunal an error must be material; it must affect the decision itself[14]. To use the language of this Court in *Craig*, and of s 69(3) of the *Supreme Court Act*, the decision must be based upon the error.

45 The difficulty for the respondents, in seeking to resist an order in the nature of certiorari on the basis that Herron DCJ gave a second, independent, and unassailable, reason for his decision, is that it is impossible to be satisfied that his second reason was unaffected by the error involved in his first reason. His first reason was based on a view as to importance to be attached to any finding of disruption to amenity, having regard to the policy and purpose of the regulatory scheme. He regarded that as depriving him of any effective discretion when he came to consider cancellation. It is at least likely that his reasoning on the alternative approach was influenced by the same view of the regulatory policy and purpose. His primary view, that nothing could stand between a finding of disruption to amenity and a decision to cancel the licence, reflected an approach to the overriding importance of amenity that is likely to have been influential when he undertook the task of weighing the disruption to amenity against the interests of the clinic and its users.

46 We would conclude that the decision was based upon the error earlier identified. There remains a question whether relief should be refused, as a matter of discretion, because the decision of Herron DCJ was virtually inevitable[15]. The evidence before Herron DCJ, as recounted in his reasons for judgment, made out a very strong case for cancellation of the licence. According to that evidence, the disruption to the amenity of the area was severe. Even so, we are not persuaded that, in the proper exercise of a discretion, there was only one possible outcome. The appellants were, and remain, entitled to have their case determined according to law.

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14 *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 702 per Lord Browne-Wilkinson; cf the reference by Lord Denning MR in *Pearlman v Harrow School* [1979] QB 56 at 70 to "an error of law on which the decision of the case depends".

15 *Said v District Court (NSW)* (1996) 39 NSWLR 47 at 57.

Conclusion

47 The appeal should be allowed. The orders of the Court of Appeal should be set aside. There should be an order in the nature of certiorari to quash orders 1, 2 and 3 made by the District Court on 14 April 2000. The matter should be remitted to the District Court to be re-heard according to law. The second respondent should pay the costs of this appeal, of the proceedings in the Court of Appeal, and of the proceedings to date in the District Court.

48 GAUDRON, GUMMOW AND CALLINAN JJ. This appeal turns upon the application of well established principles of statutory construction to a particular licensing regime under New South Wales legislation. The appellants challenge the central holding by the New South Wales Court of Appeal[16] that, upon its proper construction, cl 149 of the Poisons and Therapeutic Goods Regulation 1994 (NSW) ("the Regulation") made under the *Poisons and Therapeutic Goods Act* 1966 (NSW) ("the Poisons Act") "confers on the Director-General [of the Department of Health ('the Director-General')] a power [to suspend or cancel a licence] which *must* be exercised if one or more of the matters in the clause are established" (emphasis added).

49 Part 4 (ss 24-30B) of the Poisons Act is headed "Drugs of addiction". Division 1 of Pt 4 (ss 24-26) is headed "Restrictions on possession, manufacture, supply, etc, of drugs of addiction". The regulation-making power in s 24(2) extends to making provision for or with respect to the issue, grant and renewal of licences and authorities for the purposes of Div 1 by the Director-General and the withdrawal and suspension of any such licence or authority by the Director-General.

50 Clause 102 of the Regulation forbids manufacture or supply of a drug of addiction without, amongst other things, an authority or licence under Pt 7 of the Regulation. Part 7 (cll 137-150) is headed "Licences and authorities". Division 2 of Pt 7 (cll 142-146) deals with "Licences to manufacture or supply drugs of addiction". A licence remains in force until suspended, cancelled or surrendered (cl 144). Provision for suspension and cancellation is made in Div 4 (cll 149-150). As indicated above, this appeal turns upon the construction of cl 149.

51 The first and second appellants, Dr Samad and Mrs Samad, are shareholders in and directors of the third appellant, the Barbara Street Clinic Pty Ltd ("BSC"). The Regulation was introduced in 1994. On 22 October 1996, a delegate of the Director-General issued to BSC a licence under cl 144 of the Regulation to supply only on or from premises situated at 34 Barbara Street, Fairfield, New South Wales ("the Barbara Street premises") substances to which Sched 8 of the Poisons List applied. The Poisons List identifies the list proclaimed under s 8 of the Poisons Act as in force for the time being. So far as is presently significant, what was involved by the grant of the licence was the conferral of permission to supply from the Barbara Street premises methadone to registered users.

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16 *Samad v District Court of New South Wales* (2000) 50 NSWLR 270 at 288.

52 The power of cancellation conferred by cl 149 was in the following terms:

"The Director-General may suspend or cancel a licence or authority on any one or more of the following grounds:

(a) the holder of the licence or authority requests or agrees in writing to the suspension or cancellation of the licence or authority,

(b) the holder of the licence or authority contravenes any condition of the licence or authority,

(c) the holder of the licence or authority is convicted of an offence against [the Poisons Act] or this Regulation, or of an offence against the *Drug Misuse and Trafficking Act 1985* or any regulation in force under that Act, or an order is made under section 556A(1) of the *Crimes Act 1900* in respect of such an offence,

(d) the holder of the licence or authority is, in the opinion of the Director-General, no longer a fit and proper person to hold the licence or authority,

(e) the annual fee for the licence is not duly paid,

(f) in the case of a licence or authority to supply methadone, the supply of methadone is causing disruption to the amenity of the area in which the premises from which it is being supplied are situated."

53 The conditions referred to in par (b), in the case of the Barbara Street premises, varied from time to time. Clause 145 empowers the Director-General from time to time to add, vary or revoke conditions. At the time of the purported cancellation of the BSC licence, the conditions attached to that licence included requirements that not more than 300 clients be dosed from the Barbara Street premises[17]; that the premises operate no earlier than 6.30 am and no later than 8.00 pm and be open for the dosing of clients seven days a week.

54 By notice given under cl 150 and dated 22 December 1998, the Director-General cancelled the licence held by BSC, effective from 23 June 1999. The cancellation was made on the stated ground that the supply of methadone from the Barbara Street premises was "causing disruption to the amenity of the area in which those premises are situated". That was an invocation of par (f) of cl 149.

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17 This appears later to have been reduced to 200.

55 Clause 152(1) provides for an appeal to the District Court by any person aggrieved by a decision of the Director-General relating, amongst other things, to the cancellation of a licence. The appeal is by way of a new hearing and fresh evidence or additional evidence to that available to the Director-General may be admitted (cl 152(3)). Effect is to be given to the decision of the District Court as if it were the decision of the Director-General (cl 152(5)).

56 An appeal was taken to the District Court by Dr and Mrs Samad and, on 14 April 2000, Herron DCJ dismissed the appeal.

57 It was submitted by the appellants to the District Court that, even if the Court found that there was disruption to the amenity of the area within the meaning of par (f) of cl 149, nevertheless, having regard to the service given by the Clinic to its patients and the obvious need for the supply of methadone in the Fairfield area, the Court should exercise a discretion in favour of the appellants. It was submitted that cl 149 conferred such a discretionary power. However, his Honour held that, once he found, as he did, that the supply of methadone by the Clinic was causing a disruption within the meaning of par (f), he was obliged to confirm the cancellation.

58 The District Court referred to the judgment of Windeyer J in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[18] and to Pearce and Geddes, *Statutory Interpretation in Australia*[19], and then said:

> "From the discussion there it can be said that an apparent discretion to act can be rendered obligatory, according to the circumstances of the case, and I think that this is the position with regard to [cl] 149."

59 The District Court went on to say that, even if the interests of the Clinic and its users were to be weighed against the interests of the members of the community, including visitors to the area, the scales "would have to tip in favour of the members of the community". However, if the true position is that the District Court erred in denying the existence of a discretion, observations by Barwick CJ in *Wade v Burns*[20] would be decisive. His Honour said[21]:

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18 (1971) 127 CLR 106.

19 4th ed (1996) at 268.

20 (1966) 115 CLR 537.

21 (1966) 115 CLR 537 at 555.

> "It was sought to be said that the grant of a mandamus was futile because the warden in delivering his reasons for the course he took said that had he a general discretion to refuse the application he would do so. It is sufficient to say that this statement by the warden as to what he would do if he had a power which, according to his own view, he did not have has no weight, in my opinion, when the court is considering whether a writ of mandamus, which otherwise it is satisfied should issue, would be futile."

60 Dr Samad, Mrs Samad and BSC then invoked the jurisdiction of the Supreme Court of New South Wales which is declared and restated in s 69(3) and (4) of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act"). It is thereby provided that the jurisdiction of the Supreme Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash where the determination has been made on the basis of an error of law appearing on the face of the record of the proceedings and that the "face of the record" includes the reasons expressed for the ultimate determination. The jurisdiction thus invoked was assigned by the Supreme Court Act to the Court of Appeal[22]. The District Court, the present first respondent, was joined as the "first opponent" in the Court of Appeal and the Director-General, the present second respondent, was the "second opponent".

61 The judgment of the Court of Appeal commenced by indicating the nature of the relief sought[23] but the orders that were made were inapt to the nature of the jurisdiction exercised. The order was that the appeal be dismissed with costs and that the licence granted in favour of BSC be cancelled with effect from four months from 28 November 2000, the date of the order. It is apparent for that reason alone that the appeal to this Court must be allowed and the orders made by the Court of Appeal set aside. However, what is at stake are substantial questions respecting the construction of cl 149. As has been indicated, the Court of Appeal decided that cl 149 conferred on the Director-General a power which must be exercised if one or more of the matters in that clause be established.

62 In this Court, the appellants renewed their claim to relief including an order in the nature of certiorari quashing or setting aside the substantive orders made by the District Court and an order remitting the matter to the District Court for a rehearing according to law of the appeal under cl 152 of the Regulation.

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22 Sub-paragraph (iv) of s 48(1)(a) of the Supreme Court Act.

23 (2000) 50 NSWLR 270 at 271-272.

63 In the meantime, there have been changes to the legislation. Clause 149 was omitted by the Poisons and Therapeutic Goods Amendment (Suspension and Cancellation of Licences and Authorities) Regulation 2001 (NSW). A new cl 149 was inserted. Clause 149(1) now provides that the Director-General "must suspend or cancel" a licence if any one or more of pars (a) to (d) applies. Paragraph (d) states:

> "(d) in the case of a licence or authority to supply methadone, the Director-General forms the opinion that the supply of methadone has a significant adverse effect on the amenity of the area in which the premises from which it is being supplied are situated".

The references to the formation of an opinion and to significant adverse effect did not appear in the previous cl 149(f). The new cl 149(2) provides that "at the Director-General's discretion" that officer "may … suspend or cancel" a licence if any one or more of pars (a) to (d) apply. These deal with breaches of licence conditions (par (a)), failure to pay licence fees (par (d)) and other matters.

64 Further, a new cl 162 was inserted. This provides that the new cl 149 extends to any cause of cancellation occurring before the commencement of that clause but does not do so if:

> "the Director-General has, before that commencement, caused written notice to be served on a holder of a licence or authority in accordance with clause 150 in respect of that cause of … cancellation".

65 The facts of the present litigation fall within these words of exception. The result is that the changes that have been made do not affect the determination of the present litigation.

66 In *Re Carl Zeiss Pty Ltd's Application*[24], Kitto J observed of a provision that the Court or the Registrar "may" order removal of a trade mark that "[t]his is the language of authorization and not of command". Further, in *Ward v Williams*[25], reference was made to authorities indicating that it lies on those who assert that the word "may" conveys a command to show that this is so, as a matter of construction of the statute taken as a whole.

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24 (1969) 122 CLR 1 at 5.

25 (1955) 92 CLR 496 at 505-506.

67 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*, upon which reliance was placed, both in the District Court and in the Court of Appeal, was such a case in which the word "may" conferred a power to be exercised not a discretion to be weighed[26]. The key to the decision, that the Commissioner was bound to allow a further rebate if satisfied of the conditions spelled out in s 46(3) of the *Income Tax Assessment Act* 1936 (Cth), is found in the statement by Windeyer J, one of the majority. His Honour said[27]:

> "The right of a taxpayer to a discount or rebate arising from facts objectively determinable is quite properly called an entitlement. A claim to a discount or rebate dependent upon the Commissioner being satisfied of certain fact is equally properly called an allowance, something to be allowed. In some contexts the word 'allow' in the phrase 'may allow' might enhance a discretion said to be embodied by the word 'may'. But not, I think, in this context. The Act is filled with provisions about allowable deductions which are mandatory."

68 The precept referred to in *Ward v Williams* is reflected in s 9 of the *Interpretation Act* 1987 (NSW), when read with s 5(2) of that statute. In any statute or instrument, except in so far as the contrary intention appears, the word "may" if used to confer a power indicates "that the power may be exercised or not, at discretion" and that the word "shall" if used to impose a duty, indicates that the duty must be performed.

69 The Court of Appeal referred to several factors or indicators supporting its conclusion as to the correct construction of cl 149[28]. In his argument in this Court, counsel for the second respondent, the Director-General, accepted (and properly so) that what was there said was not in its terms convincing. The first of the matters so described was identified by the Court of Appeal as "the very fact that the circumstances of its exercise are clearly and unambiguously circumscribed by the provision itself"[29], a reference to the various matters set out in pars (a) to (f) of cl 149. The second indicator was that s 24(2) of the Poisons Act, the regulation-making power, was said to reflect an intention by the

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26 See also *Mitchell v The Queen* (1996) 184 CLR 333 at 345-346; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274; *Lowndes v The Queen* (1999) 195 CLR 665 at 671 [14].

27 (1971) 127 CLR 106 at 133-134.

28 (2000) 50 NSWLR 270 at 287-288.

29 (2000) 50 NSWLR 270 at 287.

legislature that the implementation of measures controlling the supply of drugs of addiction not be left to executive discretion. The concession made for the Director-General in this Court, particularly as to the second matter referred to by the Court of Appeal, is readily understood when the terms of the new cl 149 are considered. Sub-clause (2) now specifically provides for suspension or cancellation on any one or more of four specified grounds "at the Director-General's discretion". On the approach taken by the Court of Appeal, the new provision would appear to be beyond the regulation-making power.

70 The construction favoured in the District Court and the Court of Appeal extended to cl 149 as a whole. That is to say, it appears to have been decided that any contravention of a condition of a licence would, as indicated in par (b) of the clause, enliven a duty of suspension or cancellation in cl 149. The examples of the conditions attached to the licence in question here indicate the harsh operation such an interpretation would give to the provision.

71 In submissions to this Court, the Director-General appeared to concede that, whilst there may be no duty in respect of some of the grounds specified in cl 149, that was not the case with respect to par (f). It may, for present purposes, be accepted that, as a matter of construction, the opening words of cl 149 may have such a distributive operation upon the various grounds then spelled out. That however does not mean that the submission with respect to par (f) is made good.

72 The paragraph uses the continuous present "is causing disruption". It should be accepted that, in many cases, the very grant of a licence will from the time of the grant be productive of some disruption to the amenity of the area in which the premises from which the methadone is to be supplied are situated. With the passage of time and the change of circumstances, that disruption may diminish or be exacerbated. It would be an odd construction of par (f) to require cancellation wherever there was exacerbation to any degree.

73 As it happens, that was not the approach taken by the Director-General in the course of events leading to the notice of cancellation dated 22 December 1998. The sequence of events commenced with a letter from the Director-General dated 4 September 1998 enclosing a copy of the final Report of a Review Committee, established by the Director-General, following complaints "alleging a negative impact by the operation of the Clinic on the amenity of the local area". Clause 150 of the Regulation required the Director-General to give to the holder of the licence a reasonable opportunity to make representations with respect to the proposed cancellation and obliged the Director-General to take such representations into consideration. The Director-General responded on 8 December 1998 shortly before the issue of the notice of 22 December stating

that in relation to the Report and matters set out in his earlier letter of 4 September:

> "I have carefully considered the Report of the Review Committee on Barbara Street Methadone Clinic, and the matters set out in my letter of 4 September 1998. I have also carefully considered the submissions forwarded to me in relation to the proposed closure and proposed imposition of licence conditions. I have considered: the continuing need for a methadone service in the south western Sydney area; the interests of clients presently on the methadone program at the Barbara Street Clinic; and the effect that cancellation of the licence will have upon the livelihood of the directors of the licensee, persons employed at the Clinic and prescribers who have patients dosed at the Clinic.
>
> I am satisfied that the supply of methadone from the Barbara Street Clinic disrupts the amenity of the area in which the Clinic is situated. I have come to this conclusion after considering the Review Committee's Report, the submissions made to the Review Committee, statements of the local Member of State Parliament and minutes of local council committee meetings. I consider that, although some measures may be taken to minimise the disruption caused by the supply of methadone, the primary cause of the disruption is the location of the Clinic adjacent to a residential area and the inadequate facilities of the Clinic building."

74 The references in cl 150 to the giving to the holder of a licence of a reasonable opportunity to make representations and the obligation imposed upon the Director-General to take them into consideration, together with the expression of the power in cl 149 as one either to suspend or to cancel rather than simply to cancel, and the power in cl 145 to impose further conditions and to vary or revoke them, are indicative of a legislative scheme to the opposite effect of that which was discerned in the District Court and the Court of Appeal.

75 The existence of one or more of the grounds in cl 149 is a necessary condition for the enlivening of the power there conferred upon the Director-General. So also are the obligations imposed by cl 150 with respect to the opportunity for representations and the taking of the representations into consideration before there is any suspension or cancellation. The power to suspend or to cancel is concurrent with the power conferred by cl 145 with respect to the imposition of further conditions and the variation or revocation of conditions of the licence.

76 The Director-General is empowered by cl 149, in the appropriate circumstances, either to suspend or to cancel. There is no requirement simply to cancel. Whether or not one or the other or neither option is pursued or some

other course is pursued, for example, the imposition of further licence conditions, is a matter within the discretion of the Director-General.

77 In argument in this Court, counsel for the Director-General sought to support the outcome in the District Court and the Court of Appeal by taking another tack. This was that, whilst cl 149(f) did confer a discretion upon the Director-General, in the circumstances the Director-General had been obliged to exercise the discretion in favour of cancellation because there was no permissible reason indicating why the Director-General should decide otherwise. This was said to be a case where "the discretion [had] effectively run out"[30] and, indeed, because the grounds for not deciding upon cancellation would be impermissible, mandamus would have been available to compel cancellation. Undoubtedly particular legislation and circumstances arising thereunder may call for such a remedy[31]. However, the present case is not one of them. The existence of the state of affairs identified in par (f) of cl 149 enlivens the discretion but does not dictate the outcome of its exercise.

78 The appeal should be allowed with costs of the appellants to be paid by the second respondent. The orders of the Court of Appeal should be set aside. In place of those orders it should be ordered that there be an order in the nature of certiorari quashing orders 1, 2 and 3 of the orders made by the District Court on 14 April 2000 and the matter be remitted to the first respondent to rehear the District Court appeal according to law. The costs of the proceeding in the Court of Appeal and in the District Court should be borne by the second respondent. The costs of further proceedings in the District Court will be for that Court.

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30 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 588.

31 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 187-188; *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 536-537; *Comptroller-General of Customs v ACI PET Operations Pty Ltd* (1994) 49 FCR 56 at 81-82.