HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

NEAT DOMESTIC TRADING PTY LIMITED APPELLANT

AND

AWB LIMITED & ANOR RESPONDENTS

NEAT Domestic Trading Pty Limited v AWB Limited
[2003] HCA 35
19 June 2003
S225/2002

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

S J Gageler SC with J K Kirk for the appellant (instructed by Withnell Hetherington)

A Robertson SC with A I Tonking for the respondents (instructed by Allens Arthur Robinson)

CATCHWORDS

NEAT Domestic Trading Pty Limited v AWB Limited

Administrative law – Judicial review – Statutory scheme regulating export of wheat – Consent of statutory authority required for export – Authority precluded from giving consent without approval of nominated company incorporated under Corporations Law – Whether company's withholding of approval was decision of an administrative character made under an enactment – Whether in withholding approval nominated company exercised discretionary power in accordance with a rule or policy without regard to merits of particular case.

Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 3(1), 5(2)(f), 6(2)(f).
Trade Practices Act 1974 (Cth), s 51(1).
Wheat Marketing Act 1989 (Cth), ss 57(1), (1A), (3A), (3B), (6), (7).

1 GLEESON CJ. This appeal concerns a statutory scheme regulating the export of wheat, and the administrative law principles governing the role in that scheme of a corporation representing growers' interests.

2 The regulatory scheme took effect from 1 July 1999. The background, and the government policy, were set out in an Explanatory Memorandum relating to the *Wheat Marketing Legislation Amendment Act* 1998 (Cth), which amended the *Wheat Marketing Act* 1989 (Cth) ("the Act"). The Explanatory Memorandum stated:

> "17. The AWB was established in 1939 to control the marketing of wheat in Australia. It has operated under various Commonwealth statutes with details of wheat marketing changing over time, including deregulation of the domestic market in 1989. The most recent legislation is the *Wheat Marketing Act* 1989. Under that Act, the AWB has the sole right to export wheat. It also has responsibility for the commercial aspects of wheat marketing through operating wheat pools.
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> 18. Following lengthy discussion, Government and industry have agreed that from 1 July 1999 responsibility for all commercial aspects of wheat marketing will be taken over by a new grower owned and controlled Corporations Law company structure. Consequently, from 1 July 1999, the only ongoing Government involvement (and therefore regulatory impact) in wheat marketing will be in relation to the export monopoly on wheat which will be managed, from that time, by a small independent statutory body.
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> 19. The international market for wheat is distorted by the interventionist policies of other grain producing countries such as the US and EU which use varying forms of domestic support and export subsidy programs. Aggressive use of these programs can substantially reduce international wheat prices.
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> 20. The export monopoly, therefore, provides a tool to conduct the export marketing of Australian wheat to maximise the net returns to growers. It is also considered that the export monopoly provides a net benefit to the wider Australian community.
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> ...
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> 32. The most appropriate option is to legislate the export monopoly on wheat to an independent statutory body to be known as the Wheat Export Authority (WEA). For an initial period of five years the legislation will provide that the new grower company pool subsidiary has an automatic right to export wheat. Requests to export wheat from other than the grower company (as currently

happens) would be managed by the WEA to separate regulatory and commercial functions.

33. The WEA would be formed by retaining the 'shell' of the existing statutory AWB as a suitably renamed and reshaped independent body. Its functions would be limited to: managing and approving requests to export wheat from organisations other than the pool subsidiary; monitoring the use of the monopoly; and accounting to Government and industry as required on performance of its functions.

34. The WEA would monitor and assess the pool subsidiary's use of its wheat export rights to ensure that the company was using them in accordance with the intentions of Parliament.

...

98. The WEA must consult Company B about all requests for consent to export wheat. In the case of proposed exports in bulk, ie other than by means of bags or containers, a consent may not be given unless nominated company B has first approved the export. This requirement supports the automatic right given by the Bill to Company B to export wheat and reflects the importance of bulk exports in the overall marketing arrangements."

3 The policy of the legislation appears from par 18. The reason for the policy is stated in pars 19 and 20. Surveillance of the administration of the policy is contemplated in par 34.

4 In the above paragraphs, AWB is the Australian Wheat Board. The "new grower company pool subsidiary" referred to in par 32, which is also "nominated company B" referred to in par 98, is AWB (International) Limited ("AWBI"), which is, in turn, a wholly owned subsidiary of AWB Limited. Both are companies limited by shares, and incorporated under the Corporations Law of Victoria. The shares in AWB are divided into classes. One class of shares, whose holders control the board of directors, and which carry voting rights, but not the right to receive dividends, can only be held by wheat growers. AWB and AWBI together make up the "new grower owned and controlled Corporations Law company structure" referred to in par 18.

5 The statutory provision enacted to give effect to the policy explained above is s 57 of the Act, which is as follows:

"57 **Control of export of wheat**

(1) A person shall not export wheat unless:

(a) the [Wheat Export] Authority has given its written consent to the export of the wheat; and

(b) the export of the wheat is in accordance with the terms of that consent.

Penalty:

(a) in the case of a natural person - $60,000; or

(b) in the case of a body corporate - $300,000.

(1A) The prohibition in subsection (1) does not apply to nominated company B.

(2) An offence against subsection (1) is an indictable offence.

(3) The Authority's consent to the export of wheat may be limited to the export of the wheat in specified circumstances, in accordance with specified requirements or by a specified person.

(3A) Before giving a consent, the Authority must consult nominated company B.

(3B) The Authority must not give a bulk-export consent without the prior approval in writing of nominated company B. For this purpose a consent is a ***bulk-export consent*** unless it is limited to export in bags or containers.

(3D) An application for a consent under this section must be accompanied by such fee (if any) as is prescribed by the regulations. The fee is payable to the Authority.

(3E) The Authority must issue guidelines about the matters it will take into account in exercising its powers under this section.

(4) In proceedings for an offence against subsection (1), a certificate signed by the Chairperson and:

(a) stating that the Authority did not consent to the export of particular wheat; or

(b) setting out the terms of a consent given by the Authority;

is *prima facie* evidence of the matters set out in the certificate.

(5) The prohibition in subsection (1) is in addition to, and not in substitution for, any prohibition by or under the *Customs Act 1901* or the *Export Control Act 1982.*

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

(a) the export of wheat by nominated company B;

(b) anything that is done by nominated company B under this section or for the purposes of this section.

(7) Before the end of 2004, the Authority must conduct a review of the following matters, and give the Minister a report on the review:

(a) the operation of subsection (1A) in relation to nominated company B;

(b) the conduct of nominated company B in relation to:

(i) consultations for the purposes of subsection (3A); and

(ii) the granting or withholding of approvals for the purposes of subsection (3B)."

6 Section 57(7) reflects the reference in par 32 of the Explanatory Memorandum to "an initial period of five years". Of course, the review and report might not result in any alteration of the scheme, but in considering the meaning and effect of s 57, it is material to note that the conduct of AWBI (nominated company B) in the granting or withholding of approvals for the purposes of sub-s (3B) is to be the subject of political review and accountability.

7 Sub-sections (3A), (3B) and (6) are of direct relevance to this appeal.

8 The appellant is a domestic and international grain trader. On a number of occasions before 1 July 1999 the appellant was granted permits for the bulk export of wheat. On six occasions between November 1999 and January 2000 the appellant sought the consent of the Wheat Export Authority to the bulk export of durum wheat. In five cases, the proposed destination was Italy; in one case it

was Morocco. In each case AWBI declined to give its approval, and the Authority was obliged to withhold consent.

9 The appellant, being a competitor of AWBI in relation to the export of wheat, complained that AWBI was contravening the *Trade Practices Act* 1974 (Cth). It was confronted with the problem of s 57(6) of the Act, which refers to s 51(1) of the *Trade Practices Act*. That section provides that, in determining whether there has been a contravention of the *Trade Practices Act* of a kind of possible relevance to the present case, anything specifically authorised by legislation must be disregarded. The appellant endeavoured to overcome that obstacle by claiming relief under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the Judicial Review Act"), contending that the refusal of AWBI to give approval was a decision of an administrative character under an enactment (Judicial Review Act, s 3(1)), and that it involved an improper exercise of power, being an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the case (Judicial Review Act, ss 5(2)(f) and 6(2)(f)).

10 The appellant commenced proceedings in the Federal Court. Those proceedings failed at first instance before Mathews J[1], and again on appeal to the Full Court (Heerey, Mansfield and Gyles JJ)[2].

11 There is some difficulty in relating the conduct of AWBI, and the complaint of the appellant, to the context of administrative law. AWB and AWBI are trading corporations, operated for the benefit of their corporators. However, the Act gives each a statutory role which may affect the interests of members of the public, such as the appellant. A question arises as to the extent to which that role is circumscribed. When a statute confers a discretionary power which is capable of affecting rights or interests, the identity and nature of the repository of the power may be a factor to be taken into account in deciding what are intended to be matters that must necessarily, or might properly, be considered in decision-making or whether it is intended that the power is at large[3].

12 It is important to note provisions of the corporate constitutions of AWB and AWBI, and to relate them, in turn, to the commercial and regulatory context in which s 57 operates.

13 Article 3.1(b) of the constitution of AWB is as follows:

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1 *Neat Domestic Trading Pty Ltd v Wheat Export Authority* (2000) 64 ALD 29.

2 *Neat Domestic Trading Pty Ltd v AWB Ltd* (2001) 114 FCR 1.

3 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177.

"3.1 In the exercise of their powers the Directors must ensure that:

(a) ...

(b) the business of the Pool [sic] Subsidiary is managed with the objective of:

(i) maximising the net pool return for Growers who sell wheat into the pools run by the Pools Subsidiary by securing, developing and maintaining markets for wheat and by minimising costs as far as practicable;

(ii) distributing the net pool return to Growers who have sold wheat into the relevant pool".

14 Article 13.2 of the constitution of AWBI provides that, in the exercise of their powers, the directors of AWBI must ensure that the business of AWBI is managed in a manner which complies with Art 3.1(b) of the constitution of AWB.

15 Thus the businesses of AWB, and AWBI, are to be conducted in the interests of maximising returns to growers who sell wheat into the pools. That is part of the background to s 57(3B). The consent of the Wheat Export Authority (the "small independent statutory body" referred to in par 18 of the Explanatory Memorandum) is necessary for anyone, except AWBI, wanting to export bulk wheat. The Wheat Export Authority must not give that consent unless it has the prior written approval of AWBI. The guidelines which the Authority will take into account under s 57(3E) are not said to be binding on AWBI. There is nothing in the legislation to indicate what, apart from the matters it is required by its own constitution to consider, AWBI may or may not take into account in giving, or declining to give, approval. The constitution of AWBI requires its directors, in the exercise of their powers, to have regard to the maximising of returns to growers who sell into the pools.

16 Behind all this is what was described in evidence as the single desk system of export marketing. Mathews J explained the system, and the marketing policy which it reflected, by quoting from a document of 31 March 2000 addressed to the Wheat Export Authority by AWBI, commenting on "issues surrounding bulk permit applications":

> "The document commented on a number of 'broader Single Desk issues in relation to the impact of bulk permits' which it said needed to be taken into consideration. It was pointed out that AWBI undertakes an annual export marketing program of many million tonnes. Its marketing programs and strategies are based on being the sole exporter of Australia's wheat crop in order to maximise returns to some 45,000 growers. The issuing of bulk permits, the document said, would lead AWBI to lose

control of a number of advantages provided under the single desk system with consequent negative impact on growers who deliver to the National Pool. These advantages were described as follows:

- Strength of Unity - Branding and Product Differentiation

- Strategic Marketing and Price Discrimination

  Under this head the document made the following points:

  > 'As the operator of the single desk, AWB(I) maintains control over the export of Australia's entire bulk export program. Because this situation also affords AWB(I) a level of control over the price expectation for Australian wheat in each of our individual markets (by limiting buyers' ability to "shop around" between different suppliers), this allows AWB(I) to price discriminate across markets thereby maximising returns which necessarily are passed onto growers who deliver to the National Pool. The issuing of a bulk permit may breakdown this advantage by allowing other players into the market and reducing the ability of AWB(I) to price discriminate because it cannot be guaranteed of its pricing strategy in other markets.'

- Perception of Sole Exporter

  Under this head, AWBI commented that the fact that all bulk exports are conducted by the one body removes the ability for buyers to 'play' Australian parties off against each other.

- AWBI's Charter to Maximise Return to Growers

  Under this head, it was pointed out that issuing of bulk permits would generally run counter to this charter as it would provide returns to a select group of growers to the detriment of those growers who delivered their grain to the national pool.

- Quality Reputation

- AWBI's R & D Investment

  Under this head, it was pointed out that AWBI had undertaken significant research and development programs across numerous overseas markets, thereby increasing the market for Australian wheat in those countries. This had been possible only because of AWBI's position as the sole supplier of Australian wheat to these markets.

> The above material sets out the course of dealings between NEAT and AWBI over the relevant period, and AWBI's stated attitudes towards its single desk policy."

17 The appellant's complaint about AWBI's withholding of approval of the bulk-export consents sought by it from the Wheat Export Authority is that AWBI was acting in accordance with a rule or policy without regard to the merits of the case. In putting its case in that way, the appellant was invoking ss 5(2)(f) and 6(2)(f) of the Judicial Review Act. The language of those provisions reflects established principles of administrative law expressed, for example, by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department; Ex parte Venables*[4]:

> "When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future ... By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.
>
> These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases ... But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful."

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

19 The reference in the appellant's submissions to the merits of its applications for bulk-export consent requires further analysis. The information provided by the appellant to the Wheat Export Authority in support of each application for consent was relatively sparse. It amounted to little more than information that there was a purchaser in a certain country for a certain quantity

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4 [1998] AC 407 at 496-497.

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

20 In such a context, where there is at least a potential conflict between the interests of the exporter seeking approval and the interests AWBI is required by its constitution to pursue, the concept of the merits of an application for approval must be related to considerations, if any, that AWBI is required or entitled to take into account, or considerations that are extraneous to its decision. It is to the provisions of the Act that one must look for some warrant for concluding that a particular consideration is obligatory, or available, or extraneous[5]. Judicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function conferred upon AWBI. The appellant might genuinely believe that the system itself is unfair. A judge might share that opinion. Nothing follows from that. The question is what, if anything, the Act requires, or permits, or forbids AWBI to take into account in giving effect to its role in the system.

21 It is possible that, in a given case, an exporter, applying for consent from the Wheat Export Authority, might seek to make out a case to show that the granting of the consent could not possibly have any adverse effect upon the single desk system of marketing, or upon AWBI, or the growers whose interests it represented. Given that AWBI was entitled, indeed bound, to pursue grower interests, an exporter might seek to show that a particular application promoted those interests, or was at least incapable of affecting them adversely, either

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5 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

directly or indirectly. That is not the present case. As noted above, the appellant provided little information in support of each application. It did not present information or argument in support of a change of the single desk policy, or seek to show that the policy was irrelevant to its particular proposals.

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

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

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

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

> "[The] material shows that AWBI's reason for maintaining its policy against bulk export permits can be encapsulated into a very simple proposition, which is this: the grant of bulk export permits might well benefit individual growers who sell their wheat under the permits, but this will be at the likely expense of growers who deliver their wheat to the National Pool. It is against AWBI's constitutional mandate to prefer

individual growers who are outside the pool system to growers who are within it. Therefore bulk export permits should not be approved."

26 Mathews J considered, and I agree, that there is nothing about such a policy that is inconsistent with the Act, or with the role it assigned to AWB. Furthermore, there was nothing about the particular circumstances of any of the appellant's applications that required re-consideration of the policy, or that rendered the policy irrelevant, or potentially irrelevant, to those applications. The policy was a proper policy, available to AWBI consistently with the legislative scheme, and there was nothing in the circumstances of the case that demonstrated a refusal to entertain the possibility that a particular case might fall outside the policy, or require its re-consideration[6]. No such case was advanced on behalf of the appellant, either to the Wheat Export Authority, or to AWBI, or in this Court. There was nothing contrary to the Act in the adoption by AWBI of a general policy; a policy which so closely reflected the legislative purpose. The complaint that the policy was administered in an unduly inflexible manner was rejected by Mathews J. It is entirely theoretical, no reason having been advanced as to why the policy should have been relaxed in the case of the appellant other than that it would have been in the interests of the appellant, and its suppliers, for that to be done. As Mathews J found, "no material was put before AWBI which could be expected to persuade it to deviate from its policy."

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

28 In *Burns v Australian National University*[7], Ellicott J said, in relation to the meaning of "administrative" in the context of s 3 of the Judicial Review Act:

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6 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 624-625.

7 (1982) 40 ALR 707 at 714.

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

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

Conclusion

30 The appeal should be dismissed with costs.

31 McHUGH, HAYNE AND CALLINAN JJ. Over the years, Australia has had many different marketing schemes for its primary products. Some[8] have been established by State legislation; some[9] have been established by federal legislation. This appeal relates to the federal regulation of some aspects of the export marketing of wheat. The particular questions raised concern the operation of s 57 of the *Wheat Marketing Act* 1989 (Cth) ("the 1989 Act").

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

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

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

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8 See, for example, *Dried Fruits Act* 1958 (Vic).

9 See, for example, *Apple and Pear Organization Act* 1938 (Cth); *Dairy Produce Export Control Act* 1924 (Cth).

The reference to "pool return wheat" was a reference to arrangements by which Growers and others sold wheat to a single purchaser which would then negotiate the sale of that wheat overseas. At the times relevant to these proceedings that purchaser, or pool company, was AWBI[10]. The pool company would take the amounts it received from sales of wheat of a particular type or grade and divide the returns (net of costs) rateably among those who had supplied the grain that was sold. These arrangements were often referred to as "Single Desk" selling arrangements. There was to be a single seller of Australian wheat in overseas markets and thus no competition between sellers of Australian wheat in those markets.

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

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

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

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

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10 *Wheat Marketing Act* 1989 (Cth), s 84.

The proceedings below

36 At first instance, the primary judge (Mathews J) dismissed the appellant's proceeding[11]. The primary judge found[12] that "the effective reason" for AWBI's refusal to approve the application for the consents the appellant sought was, in each case, the existence of its policy that "in the current market environment" no bulk-export consents would be approved. Her Honour further found that AWBI had arrived at this policy because to approve bulk-export consents would not be consistent with the obligation, imposed on AWBI by its constituent document, to maximise returns to growers who sold wheat into AWBI wheat marketing pools[13]. That being so, her Honour found[14] that AWBI, in making its decisions to refuse approval, did not fail to take account of relevant considerations.

37 The appellant appealed to the Full Court of the Federal Court. That Court (Heerey, Mansfield and Gyles JJ) dismissed the appeal[15]. Heerey J concluded[16] that AWBI's decisions were "outside the province of administrative law". Because AWBI was a company incorporated under the Corporations Law, engaged in trade and commerce, it "must be free as a matter of commercial judgment to adopt what might be regarded in administrative law terms as an inflexible policy"[17]. There was, in his Honour's view[18], "no breach of any rule or principle of administrative law which had the effect that AWBI was acting outside s 57(3B)" in refusing its approval.

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11 *Neat Domestic Trading Pty Ltd v Wheat Export Authority* (2000) 64 ALD 29.

12 (2000) 64 ALD 29 at 56 [119]-[120].

13 (2000) 64 ALD 29 at 58 [131], 62-63 [154], 63 [158].

14 (2000) 64 ALD 29 at 63 [158].

15 *Neat Domestic Trading Pty Ltd v AWB Ltd* (2001) 114 FCR 1.

16 (2001) 114 FCR 1 at 8 [26].

17 (2001) 114 FCR 1 at 9 [30].

18 (2001) 114 FCR 1 at 9 [32].

38 Neither Mansfield J[19] nor Gyles J[20] considered it necessary to decide whether decisions to grant or withhold approval for the purposes of s 57(3B) were decisions of an administrative character made under an enactment, or were beyond the reach of administrative law. Their Honours preferred to rest their conclusion on the proposition that, as a commercial entity, AWBI could lawfully consult only its own interests in deciding whether to grant approval[21].

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

Regulation of wheat marketing

40 Since the end of World War 2 there has been a series of federal Acts dealing with aspects of the marketing of wheat[22]. (There had been earlier federal legislation affecting the wheat industry[23] but the War of 1939-45 marks a convenient point at which to begin reference to past legislation.) As originally enacted, the 1989 Act provided a very different regime for the marketing of wheat from that provided by it at the times relevant to this matter. The Australian Wheat Board, a statutory corporation tracing its roots to the *Wheat Industry Stabilization Act* 1948 (Cth)[24], played a central role in the marketing scheme for which the 1989 Act originally provided. As enacted, the 1989 Act

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19 (2001) 114 FCR 1 at 10 [38].

20 (2001) 114 FCR 1 at 13 [53].

21 (2001) 114 FCR 1 at 11 [43] per Mansfield J, 12-13 [52] per Gyles J.

22 *Wheat Industry Stabilization Act* 1946 (Cth); *Wheat Industry Stabilization Act* 1948 (Cth); *Wheat Industry Stabilization Act* 1954 (Cth); *Wheat Industry Stabilization Act* 1958 (Cth); *Wheat Industry Stabilization Act* 1963 (Cth); *Wheat Industry Stabilization Act* 1974 (Cth); *Wheat Marketing Act* 1979 (Cth); *Wheat Marketing Act* 1984 (Cth).

23 See, for example, *Wheat Industry Assistance Act* 1938 (Cth); *Wheat Industry (War-time Control) Act* 1939 (Cth).

24 The Board of the same name created by the *Wheat Industry Stabilization Act* 1946 (Cth) was not continued in existence by the 1948 Act. The latter Act created a new Board.

provided for the Australian Wheat Board to control the export of wheat. By s 57, as it then stood, export of wheat, without the Board's consent, was forbidden.

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

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

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

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

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

It was said that this third option had been chosen.

43 The apparent complexity of this history may be contrasted with the brevity of the legislative expression of the scheme that was introduced in 1997 and 1998. The central provisions of that legislation have already been mentioned. They are

the prohibition on export of wheat without the Authority's consent[25], the exemption of AWBI from that prohibition[26], and the provisions of s 57(3A) and (3B) that required the Authority, before giving a consent to export, to consult with AWBI, and provided that the Authority not give a bulk-export consent without AWBI's prior approval in writing. To those provisions there may be added reference to s 57(3E) which required the Authority to "issue guidelines about the matters it will take into account in exercising its powers" under s 57, and reference to s 57(7) requiring the Authority, before the end of 2004, to conduct a review, and report to the Minister about, among other things, AWBI's conduct in relation to consultations for the purposes of s 57(3A) and the granting or withholding of approvals for the purposes of s 57(3B). Reference should also be made to s 57(6) which provided that:

> "For the purposes of subsection 51(1) of the *Trade Practices Act 1974*, the following things are to be regarded as specified in this section and specifically authorised by this section:
>
> (a) the export of wheat by [AWBI];
>
> (b) anything that is done by [AWBI] under this section or for the purposes of this section."

The appellant's contentions

44 The appellant had contended at trial that, because AWBI had not acted *lawfully* in failing or refusing to give its written approval, s 57(6) did not apply and that the appellant could, therefore, maintain claims that AWBI had contravened the *Trade Practices Act*. That issue may, however, be put aside.

45 Although put in a number of different ways, central to the appellant's contentions was the proposition that AWBI did not consider, but should have considered, "the merits" of each application which the appellant had made to the Authority for a bulk-export consent. It was said that, had the merits been considered, AWBI could have, indeed should have, concluded that to approve the giving of consent would not have detracted from the "single desk" selling arrangements or the pursuit of AWBI's legitimate commercial objectives. In the language of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the Judicial Review Act") it was said that there had been "an exercise of a

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25 s 57(1).

26 s 57(1A).

discretionary power in accordance with a rule or policy without regard to the merits of the particular case"[27].

46 These contentions proceeded from the premise that AWBI's decision to give or not give approval to the grant of an authority to export was regulated by the 1989 Act. Again, to adopt the language of the Judicial Review Act, the appellant's contentions were premised on the proposition that to give or not give approval in writing was "a decision of an administrative character made ... (whether in the exercise of a discretion or not) under an enactment"[28]. The validity of this premise must be examined.

AWBI and the Act

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

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

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27 s 5(2)(f) and s 6(2)(f).

28 s 3(1), definition of "decision to which this Act applies".

a power of veto. No matter which construction is correct, it is necessary to recognise that, under s 57 of the 1989 Act, a company incorporated under ordinary companies legislation for the pursuit of commercial purposes is given a role to play in connection with permitting what otherwise is conduct (exporting wheat) forbidden by federal statute on pain of penalty. And the company given this role is itself exempted from the operation of this prohibition.

49 At the least, then, there is an intersection between the private and the public. A private corporation is given a role in a scheme of public regulation. The parties could point to no other federal legislation in which there was a similar intersection. If processes of privatisation and corporatisation continue, it may be that an intersection of this kind will be encountered more frequently[29]. At its most general this presents the question whether public law remedies may be granted against private bodies. More particularly, do public law remedies lie where AWBI fulfils the role which it plays under the 1989 Act?

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

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

The roles of the Authority and AWBI

52 Section 57 gives the Authority, not AWBI, the power to give the consent to export without which an offence is committed. It is the Authority's decision to give its consent which is the operative and determinative decision which the 1989 Act requires or authorises[30].

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29 Beermann, "Administrative-Law-Like Obligations on Private[Ized] Entities", (2002) 49 *UCLA Law Review* 1717.

30 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-337 per Mason CJ.

53 The Authority is created by the 1989 Act and derives its functions and powers entirely from that Act. In that sense it is a creature of the 1989 Act. The Authority may not give consent without AWBI's prior approval in writing. That approval was a condition which must be satisfied before the Authority might give its consent. It was, in that sense, a condition precedent which had to be met before the Authority could lawfully exercise the power which the 1989 Act conferred on it to give its consent to the proposed export[31].

54 Unlike the Authority, AWBI needed no statutory power to give it capacity to provide an approval in writing. As a company, AWBI had power to create such a document. No doubt the production of such a document was given statutory significance by s 57(3B) but that sub-section did not, by implication, confer statutory authority on AWBI to make the decision to give its approval or to express that decision in writing. Power, both to make the decision, and to express it in writing, derived from AWBI's incorporation and the applicable companies legislation[32]. Unlike a statutory corporation, or an office holder such as a Minister[33], it was neither necessary nor appropriate to read s 57(3B) as impliedly conferring those powers on AWBI.

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

56 If the Authority had any discretion about giving a consent once AWBI had given its approval, the Authority would have had to exercise that discretion having regard to the nature, scope and purpose of the power and the context in which it is found[34]. It is those matters which would be relevant for the decision-maker to take into account. It is in these "public" considerations that the "merits" which the appellant said had not been considered would be found.

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31 cf *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at 171-172 [16] and *Byrne v Garrisson* [1965] VR 523 at 532.

32 Corporations Law of Victoria, s 124.

33 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 301. See also *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at 171-172 [16].

34 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38-40 per Mason J.

AWBI

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

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

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

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

61 Under the 1989 Act AWBI could export without consent. It could, indeed it should, have been seeking to maximise returns to those who sold wheat

through the pool arrangements. One way of doing that was to remain the *sole* bulk exporter of wheat. Remaining the sole bulk exporter was consistent with the form of export monopoly preferred in the Explanatory Memorandum to the 1998 Bill – a monopoly managed by the Authority but possessed by AWBI ("the new grower company") pursuant to its "wheat export rights".

62 If remaining the sole bulk exporter of wheat was a consideration that might legitimately be taken into account by AWBI when deciding whether to give approval to the Authority consenting to bulk export of wheat (and the appellant did not submit to the contrary) it is a consideration which could outweigh *any* countervailing consideration which an applicant for consent could advance. It could outweigh *any* countervailing consideration derived from the context of the 1989 Act, or from the nature, scope or purpose of the 1989 Act's provision that AWBI's prior written approval was a necessary condition for the Authority's giving its consent.

63 That being so, there is no sensible accommodation that could be made between the public and the private considerations which would have had to be taken to account if the 1989 Act were read as obliging AWBI to take account of public considerations.

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

65 The appeal should be dismissed with costs.

66 KIRBY J. In *Gerlach v Clifton Bricks Pty Ltd*[35], Callinan J and I said:

> "All repositories of public power in Australia, certainly those exercising such power under laws made by an Australian legislature, are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No Parliament of Australia could confer absolute power on anyone ... [T]here are legal controls which it is the duty of courts to uphold when their jurisdiction is invoked for that purpose."

Although we were in dissent as to its application to the circumstances of that case, the general principle so stated was not questioned.

67 This appeal[36] presents an opportunity for this Court to reaffirm that principle in circumstances, now increasingly common, where the exercise of public power, contemplated by legislation, is "outsourced" to a body having the features of a private sector corporation. The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules.

68 Given the changes in the delivery of governmental services in recent times, performed earlier and elsewhere by ministries and public agencies, this question could scarcely be more important for the future of administrative law[37]. It is a question upon which this Court should not take a wrong turning[38].

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35 (2002) 209 CLR 478 at 503-504 [70]; cf *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70 at 85-86 [94]-[96]; 193 ALR 90 at 111-112.

36 From the Full Court of the Federal Court of Australia: *Neat Domestic Trading Pty Ltd v AWB Ltd* (2001) 114 FCR 1.

37 Administrative Review Council, *The Scope of Judicial Review*, Discussion Paper, (2003) at 112-114 [5.196]-[5.207].

38 cf *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] QB 815 at 838-839. See also Mason, "Australian Administrative Law Compared with Overseas Models of Administrative Law", (2001) 31 *AIAL Forum* 45 at 59-60.

The facts

69 *Wheat export arrangements*: Most of the relevant facts are set out in other reasons[39]. The necessary background includes the history of governmental regulation of the marketing of wheat in and from Australia. That cereal, from earliest colonial times, has been the most important crop grown in (and one of the chief exports from) Australia[40].

70 Australian durum wheat is a special variety of wheat, mainly grown in northern New South Wales. Its characteristics make it suitable for the production of semolina-based products such as macaroni, spaghetti and vermicelli[41]. It is graded in quality from ADR1 (prime quality grain) to ADR6 and then to ADRF (or ADR Feed) at the lowest end of the quality scale[42]. NEAT Domestic Trading Pty Limited ("NEAT"), the appellant in this Court, has for many years been involved in marketing durum within Australia and overseas. In this regard, it participates in a specialist market.

71 Before the coming into effect of the present statutory arrangements for the marketing of export wheat, the Australian Wheat Board ("the Board") had control over the wheat export monopoly under the *Wheat Marketing Act* 1989 (Cth) ("the Act"). Within its sole right to control the export of wheat, the Board had given consent to NEAT on a number of occasions to export large quantities of durum to Libya, Morocco and Turkey (1996), Tunisia and Morocco (1998) and Italy (1999). Such approvals were inferentially to the advantage of NEAT, the wheat growers who dealt with it, as well as the Australian national interest, without adversely affecting the monopoly marketing of wheat exports from Australia by the Board.

72 *The 1998 amending Act*: On 1 July 1999 the *Wheat Marketing Legislation Amendment Act* 1998 (Cth) came into effect. That statute amended the Act to substitute a new scheme of wheat marketing that envisaged a public body, the Wheat Export Authority ("the Authority"), and three companies incorporated under corporations law replacing the Board. The purpose of the restructure was not to alter the wheat export arrangements in a fundamental way. The export

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39 Reasons of Gleeson CJ at [8]-[16]; reasons of McHugh, Hayne and Callinan JJ ("joint reasons") at [32]-[35].

40 Dunsdorfs, *The Australian Wheat-growing Industry 1788-1948*, (1956).

41 *Neat Domestic Trading Pty Ltd v Wheat Export Authority* (2000) 64 ALD 29 at 43 [52].

42 (2000) 64 ALD 29 at 43 [53].

monopoly was to be maintained[43]. The aim was to reduce the government's involvement to the regulatory aspects of the monopoly through the Authority, while the responsibility for the marketing and commercial aspects of the scheme was to rest with a private company, owned, at least in part, by growers.

73 However, as will become apparent, this separation of the regulatory and commercial aspects of the scheme was not complete. AWBI[44], a wholly owned subsidiary of AWB, was the only supplier that did not require the Authority's consent to export wheat from Australia[45]. In key aspects, AWBI remained intimately involved in the regulatory scheme established by the Act. Not only did the Authority have to consult AWBI in the process of evaluating an application for export consent[46], but the "prior approval in writing" of AWBI was required before the Authority could grant such a consent to any other supplier[47].

74 On 14 July 1999, after the commencement of the legislative amendments and following approval for such export granted by AWBI, the Authority gave consent for a proposed bulk export of wheat to India by a company other than NEAT. However, so far as the evidence disclosed, that was the end of the individual consideration by AWBI of applications for the bulk export of wheat. Thereafter, no approvals whatever for bulk export of wheat were given. On the contrary, a minute to the Board of AWBI, only a week after the above instance of consent, recorded that "[t]he existence of a bulk permit is in direct contravention of AWB's current policy not to issue such permits". There ensued correspondence between AWB and the Authority seeking revocation of the Authority's consent for the proposed export to India. The Authority asserted that the consent could not be revoked. An information paper was prepared for the AWBI Board discussing the case, asserting that the issuance of the "permit" had been "erroneous" and proposing guidelines and protocols to ensure that "it does not happen again".

75 It is against the background of this dispute within the successor bodies to the Board that NEAT's subsequent applications to continue its specialised export of durum to willing overseas buyers must be understood.

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43 Explanatory Memorandum at [20].

44 This is "nominated company B". The same descriptions are used to refer to the respondent companies as are used in the reasons of Gleeson CJ at [4].

45 See the Act, ss 57(1) and (1A).

46 The Act, s 57(3A).

47 The Act, s 57(3B).

76 *NEAT's applications*: Six of NEAT's applications for the bulk export of durum were the subject of these proceedings. The first two of those were made on 4 November 1999. NEAT wrote to the Authority for consent to export quantities of ADR3 respectively to Italy and Morocco. The Authority forwarded the request to AWBI. AWBI refused to give approval and the Authority immediately signified its refusal of consent. There followed two similar requests on 9 December 1999 for the export of ADR Feed and ADR6 to a buyer in Italy. These were rejected by AWBI which again refused to give its approval. A facsimile from AWB to NEAT stated in general terms that "AWB will not be issuing export permits for bulk wheat shipments". In consequence of AWBI's refusal of approval, the Authority refused to give its consent to the proposed export.

77 The identical outcome ensued with a fifth application by NEAT in January 2000. There were written exchanges evidencing heightened frustration on the part of NEAT over the apparent intransigence of AWB acting on behalf of AWBI. NEAT explained to AWB that its grower clients had been "unable to obtain a satisfactory price from AWB Limited and … want[ed] NEAT to immediately conclude this business". According to the evidence, in the midst of the consideration of this application, AWB's Chairman, Mr Flügge, on 24 January 2000, told a meeting of local durum growers at Gunnedah chaired by the Deputy Prime Minister:

> "I have two things to say to you, the first is good afternoon and the second is there will be no permits granted for the bulk export of any types of wheat."

78 Mr Flügge later wrote in similar terms to the Deputy Prime Minister stating that AWBI "will not approve the issue of a permit for the bulk export of durum, or any other wheat at this time". He insisted that this was "our responsibility *under legislation*" (emphasis added). He justified this approach as necessary "to preserve the integrity of the single desk", that is a single market control over the sale of wheat of all types exported from Australia. Putting it bluntly, the searching out of specialist, niche markets for the sale of particular varieties of wheat, to particular countries, for particular uses, at particular times was not open to consideration by AWBI "at this time". To those who wanted to submit otherwise, all that AWB and AWBI would say, in effect, was "Good afternoon", and then "Good-bye".

79 In this Court, NEAT went in some detail through the circumstances of the fifth application as disclosed in the evidence. It involved a proposal to sell 50,000 tonnes of ADR Feed to a buyer in Italy. As indicated, ADR Feed is at the lowest end of the scale of durum quality. However, apparently, NEAT had found a particular purchaser in Italy willing to accept Australian ADR Feed not for animal consumption but to make pasta for human consumption. The wheat in question was available for sale in what NEAT regarded as outside the ordinary

AWBI markets for the sale of ADR Feed. In a letter to the Authority, in support of the fifth application, NEAT pointed out that the wheat in question was "stored on the ground in uncovered stacks" because local silos were full or shut. NEAT could offer a significantly higher price to growers than was available from the domestic company (AWB) for ADR Feed quality wheat. The price differential was about $35 per tonne. However, it required prompt action and segregation of the ADR Feed to meet the buyer's requirements. The letter pointed out that the buyer "currently has US Feed durum offered to it and it will buy US Feed durum unless NEAT can confirm it has obtained a permit for ADR Feed in the very near future". On the face of things, this application therefore presented a particular deal, not in competition with AWBI or other Australian wheat exports to Italy or other Australian exports of ADR Feed. However, as on the previous occasions (save for the one case in July 1999 that was "never to be repeated") AWBI refused to give its approval. The Authority, as it was bound, declined to give its consent to the export bid.

80 NEAT's final attempt to obtain approval for export of durum was at the end of January 2000. This was a proposed sale of 25,000 tonnes of ADR Feed to Italy. It was essentially a repetition of the previous application, but with a considerably lower tonnage. As with the prior applications, within two days AWBI sent a letter to the Authority withholding approval and, as required, the Authority refused its consent. It was in those circumstances that NEAT commenced its proceedings in the Federal Court.

81 Before closing this chronicle, it is worth referring to the communications by AWBI informing the Authority of its refusal to approve the export applications. The letters by AWBI refusing NEAT's first five applications were in identical terms, stating as the only reason for refusal:

> "Approval is not granted on the basis that the issuing of the permit would jeopardise [AWBI's] marketing strategy and adversely impact on the net returns received by growers who deliver to the National Pool."

Applications for bulk export of durum or any other types of wheat by other traders were treated in the same way. AWBI would refuse approval in virtually identical terms to those set out above, regardless of the nominated export destination, and regardless of the type of wheat proposed for export, or other special circumstances.

The findings of the primary judge

82 In the Federal Court, before the primary judge (Mathews J), AWB and AWBI attempted to present a case that, in refusing to give approval, AWBI, in every instance, had examined carefully the individual merits of the application. Indeed, Mr Gomersall and Mr Richardson, the officers who had made the decisions to refuse approval for NEAT's applications, gave oral evidence stating

that they had taken into account various considerations special to each request. It was suggested that five or six considerations had been carefully weighed by AWB and AWBI in reaching each decision. Reference was also made to the statement in the internal records of AWBI limiting the refusal of export approval to "the current market environment" and the claim made that each request for approval would be dealt with on a "case by case" basis.

83 The primary judge rejected the assertions of individualised decision-making. Her Honour regarded the suggested qualification that the policy would be maintained in current market conditions as being of "little relevance"[48]. She categorised the assurance that each application was considered individually as a "hollow one"[49] which, in the light of all the evidence, represented "a meaningless exercise"[50]. She rejected the evidence of the respondents' witnesses about other factors that they allegedly took into account[51]:

> "I have difficulty in accepting that they played any realistic part in the rejection of the applications. The evidence indicates that these factors probably did exist. If considered, they would no doubt have provided further grounds for declining to approve the applications. But I cannot accept that they were in fact given any realistic consideration at that stage. The *applications were bound to be rejected in any event* in pursuance of the overall policy [of AWBI]."

84 The primary judge accepted that some of the general considerations postulated by the AWB and AWBI witnesses may have played a part in the formulation of the "policy". But it was the "policy" that caused the rejection of NEAT's applications[52]:

> "AWBI was, as Mr Gomersall conceded, concerned more with its overall marketing strategy than with the merits of individual cases. Its decisions in this case were clearly made in the inflexible application of its policy against bulk export permits."

85 In this Court, by a notice of contention, AWB and AWBI sought to uphold the Full Court's decision on the basis that that Court should have held that each of

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48 (2000) 64 ALD 29 at 60 [140].

49 (2000) 64 ALD 29 at 57 [122].

50 (2000) 64 ALD 29 at 57 [122].

51 (2000) 64 ALD 29 at 56-57 [121] (emphasis added).

52 (2000) 64 ALD 29 at 63 [157].

the decisions made by AWBI, not to give approval for NEAT's application to the Authority, did not involve the exercise of a discretionary power in accordance with a policy without regard to the merits of the particular applications. However, in the light of the primary judge's conclusions, and having regard to the advantages which she enjoyed in reaching those conclusions, this contention fails. It would be impermissible for this Court to reopen the issue, determined as it was by the factual findings at trial. The primary judge's conclusion was based in part on her assessment of the credibility of the oral evidence of the officers and, more importantly, it is reinforced by the contemporary records from which her Honour quoted. Far from being palpably erroneous or contrary to incontrovertible facts[53], her Honour's findings in this regard were fully consistent with the contemporary evidence. The lawfulness of what the respondents did must therefore be judged in accordance with the terms of the "policy" that AWB and AWBI were found to have adopted and applied.

The legislation and common ground

86 The relevant provisions of the Act and of the *Trade Practices Act* 1974 (Cth) ("the TPA") are set out, or sufficiently referred to, in other reasons[54].

87 Because NEAT had, by the time the matter was argued in the Full Court (as in this Court), abandoned the application for various remedies under s 16 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), the real question litigated was whether AWBI's actions left it exposed to NEAT's proceeding for breach of s 46 of the TPA[55]. As a defence to the suggested contravention of the TPA, AWB and AWBI invoked s 57(6) of the Act. This refers to s 51(1) of the TPA. That provision exempts anything specified or specifically authorised by the provisions of the Act from founding a contravention of the TPA.

88 In the Full Court, and by notice of contention in this Court, AWB and AWBI asserted that s 57(6) covered any of their actions pursuant to or broadly referable to the functions specified for them in the Act. However, such an argument cannot succeed, stated so broadly. When the Act refers to "things ... to be regarded as specified ... and specifically authorised by this section" (including "anything that is done by [AWBI] under this section or for the purposes of this

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53 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 321 [63], 331-332 [93], 338 [139]; 160 ALR 588 at 607, 620-622, 630; *Fox v Percy* (2003) 197 ALR 201 at 209 [29], 225 [96]-[97].

54 Reasons of Gleeson CJ at [5], [9]; joint reasons at [42]-[43].

55 (2001) 114 FCR 1 at 9-10 [37].

section")[56] such references are obviously confined to things done validly; not merely purported to be so done[57]. It follows that the second contention of the respondents also fails.

89 NEAT argued that AWBI's successive refusals to approve its bulk export applications were not done validly under s 57(6) of the Act or for the purposes of that section. It invoked ss 5(1)(e) and 5(2)(f) of the ADJR Act. Section 5(1)(e) provides that an application for an order of review of a decision pursuant to the ADJR Act can be made where "the making of the decision was an improper exercise of the power conferred … in pursuance of which it was purported to be made". Section 5(2)(f) provides that the reference to an "improper exercise of a power" includes "an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case".

90 It was in this roundabout way that an important issue of principle was tendered to the Federal Court. It was whether the decisions to withhold approval, made by AWBI, were reviewable under the ADJR Act. If they were, NEAT pressed its argument that the ground of invalidity referred to in s 5(2)(f) of the ADJR Act was established and that, on that basis, the Federal Court should have set aside the purported decisions so as to leave AWBI bereft of the immunity it claimed from the operation of the TPA.

The issues

91 It is appropriate to note that some of NEAT's arguments in the courts below were not pressed on this Court. One was NEAT's argument that AWBI had impermissibly delegated its functions under the statute to AWB. The primary judge rejected that suggestion and it was likewise dismissed in the Full Court[58]. Similarly, by the time the matter reached this Court, any complaints against the validity of the decisions of the Authority were also abandoned. In effect, this course of argument left the focus exclusively upon AWBI's decisions.

92 AWBI sought to have this Court consider the application of the TPA, on the assumption that NEAT could make good its administrative law complaints. However, that contention must also be rejected. Given the course that the

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56 The Act, s 57(6).

57 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 635. See also *Little v The Commonwealth* (1947) 75 CLR 94 at 108, 110, 112; *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 471; G *Scammell & Nephew Ltd v Hurley* [1929] 1 KB 419 at 427-429.

58 (2001) 114 FCR 1 at 9 [33], 12 [47], 13 [54].

proceedings followed in the Federal Court, AWBI's arguments based on the TPA were not resolved. It would be inappropriate for this Court to consider them, effectively for the first time. If NEAT were to succeed in this Court, the proceedings would have to be returned to the Full Court for the determination of the outstanding issues under the TPA.

93 Two remaining issues are therefore now presented for decision by this Court. They are:

(1) Were AWBI's refusals to give its approval for NEAT's applications as stipulated in s 57(3B) of the Act, administrative decisions that fall within the scope of the ADJR Act? ("The nature of the decision" issue)

(2) If so, given the findings of the primary judge, undisturbed on appeal, and the evidence adduced at trial, were the decisions an "improper exercise of the power" conferred by the Act in accordance with ss 5(1)(e) and 5(2)(f) of the ADJR Act? ("The exercise of power" issue)

The nature of the decision: context

94 It is impossible to approach the classification of the contested decisions of AWBI to refuse to give approval to NEAT's requests addressed to the Authority, without considering the constitutional and statutory context in which such decisions were made. It is the context that helps to resolve the question whether AWBI's decisions were purely acts of a private corporation, pursuing its own commercial interests in accordance with corporations law, or were decisions of a public, administrative character, rendering them amenable to review under the ADJR Act.

95 As with so many legal questions in Australia, the starting point for analysis must be the Constitution[59]. It sets the ultimate boundaries within which the exercise of public or governmental power must take place in this country. As Gummow J pointed out in *Airservices Australia v Canadian Airlines International Ltd*[60], the character of the provisions of an Act designed to involve private sector bodies in the "exercise [of] what once may have been and elsewhere may be regarded as governmental functions" is to be determined by reference to the operation of such provisions. They must also be read in the context of the constitutional features of "the nature of responsible government, in particular with respect to the position of the Minister charged with the

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59 *Roberts v Bass* (2002) 77 ALJR 292 at 320-321 [143]-[146]; 194 ALR 161 at 199-200.

60 (1999) 202 CLR 133 at 261 [374]-[375].

administration of the statute constituting the entity in question"[61]. His Honour referred to certain "significant fissures in Australian jurisprudence", including[62]:

> "the extent to which the manner of scrutiny of the formally 'non-governmental' action of a statutory corporation (that is, entering into a 'commercial' contract) can or should be affected by the considerations that it nonetheless is a public body that is so acting and that in so doing it is exercising a public function."

96 The character of the decisions of bodies assigned important public functions is not determined conclusively by the structure of such bodies (for instance as private or statutory corporations), still less by arguments about the merits or demerits, advantages or disadvantages of privatisation or private sector management[63]. In so far as such decisions derive their necessity or effectiveness, and the bodies making them derive their existence or particular functions, from federal legislation, they may involve the exercise of public power. In so far as they do this, under the Constitution, a Minister must be accountable to the Parliament in respect of such exercise. In turn, through the Parliament, the Minister, and the government of which he or she is part, are responsible to the electors. This appeal was argued as if the Constitution was silent on the issues for decision. In my view, the Constitution cannot be ignored in resolving the first issue. It is a critical matter of context.

The nature of the decision: the ADJR Act

97 *The statutory foundation*: In order to invoke the grounds of review in s 5 of the ADJR Act, an applicant must be "a person aggrieved by a decision to which this Act applies"[64]. In s 3(1) of the ADJR Act a "decision to which this Act applies" is defined as:

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61 (1999) 202 CLR 133 at 262 [376] with reference to *Egan v Willis* (1998) 195 CLR 424.

62 (1999) 202 CLR 133 at 262 [377] citing *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 179-180 per Finn J. See also Finn, "A Sovereign People, A Public Trust", in Finn (ed), *Essays on Law and Government*, vol 1 (1995) 1 at 12-13.

63 Freeman, "Extending Public Law Norms Through Privatization", (2003) 116 *Harvard Law Review* 1285 at 1302-1303.

64 ADJR Act, s 5(1).

> "a decision of an administrative character made ... or required to be made ... (whether in the exercise of a discretion or not) under an enactment, other than a decision ... included in any of the classes of decisions set out in Schedule 1."

The decisions made under the Act in question here are not listed in Sched 1 of the ADJR Act. They are thus not expressly exempted from the operation of that Act.

98 It was not disputed that NEAT was a "person aggrieved" by AWBI's refusals to approve its applications. Further, there was no challenge to the holding of the primary judge that AWBI's approval determinations were "substantive, final and determinative of the issues falling for consideration" and were therefore to be characterised as "decisions" for the purposes of the ADJR Act[65]. But before this Court, AWBI disputed that such decisions were either to be classified as "administrative", or "made … under an enactment". Different, though related, questions may arise where review of such decisions is sought under the common law.

99 Before turning to examine the issues in dispute, I pause to make reference to a point that is easy to overlook. The focus of s 5(1) of the ADJR Act is upon a given "decision". It is the "decision" that must be characterised by reference to whether, within s 3(1) of the ADJR Act, it is of "an administrative character" and one made or required to be made "under an enactment". The question is not whether AWBI, as the decision-maker, is a body of a particular character[66], including whether generally speaking it performs its functions as a private corporation conforming to corporations law or otherwise and is committed to maximising its profits. Whilst such features of AWBI may be *relevant* to the character of particular decisions that it makes, they are not *determinative*. In a particular case, a statutory scheme may have entrusted decisions of a public, governmental or regulatory character to a private corporation, involving that body, to that extent, in the exercise of public power.

100 In my view, the primary judge was correct to conclude that a decision made by AWBI for the purposes of s 57(3B) of the Act was of an administrative character[67]. She was also correct to conclude that such a decision was made

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65 (2000) 64 ALD 29 at 35 [23] with reference to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 ("*Bond*").

66 cf Administrative Procedure Act 1946 (US): 5 USC §551(1) and the definition of "agency" to mean "each authority of the Government of the United States".

67 (2000) 64 ALD 29 at 38 [33].

under an enactment[68]. I shall address these characterisations in turn, although clearly neither is wholly divorced from the other.

101 *The decisions were administrative*: In reaching her conclusion about the character of the impugned decisions, the primary judge took into account the width of the expression "administrative" in this context. Given the remedial character of the ADJR Act, a broad criterion was selected to attract that Act's application to a vast range of decisions made in the deployment of federal governmental power[69]. It is obviously inappropriate to construe such a criterion narrowly, and in a way that would remove from the purview of the ADJR Act decisions that might otherwise be reviewable under the common law. That would defeat the purpose of that Act.

102 The primary judge acknowledged that the concept of an "administrative" decision was not susceptible to a comprehensive and universal definition[70]. In that regard, her Honour[71] referred to the observation by Ellicott J in *Burns v Australian National University*[72] that administrative decisions include at least those "made in executing or carrying into effect the laws of the Commonwealth". By that criterion, the decision concerning the grant or refusal of "prior approval in writing" of AWBI, as sought by the Authority following NEAT's request, is one made in carrying into effect a public law of the Commonwealth, namely the Act.

103 Section 57(3A) of the Act makes it a precondition for the Authority to "consult" AWBI before it gives consent for the bulk export of wheat. Without the Authority's written consent, wheat may not lawfully be exported from Australia, under sanction of a substantial penalty[73]. If AWBI does not give approval, the Authority "must not give a bulk-export consent"[74]. AWBI's approval decision is fully integrated into the regulatory scheme created by the statute. AWBI holds, in effect, a veto over the statutory consent of the Authority,

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68 (2000) 64 ALD 29 at 40 [44].

69 (2000) 64 ALD 29 at 36 [27]-[28] with reference to *Bond* (1990) 170 CLR 321 at 335-336 and *Evans v Friemann* (1981) 35 ALR 428 at 434.

70 (2000) 64 ALD 29 at 37 [29] citing *Hamblin v Duffy* (1981) 34 ALR 333.

71 (2000) 64 ALD 29 at 37 [30].

72 (1982) 40 ALR 707 at 714.

73 The Act, s 57(1)(a).

74 The Act, s 57(3B).

which is without doubt a public body. To that extent, a private corporation to a large degree controls the conduct of an independent statutory agency of the Commonwealth made up of officers of the Commonwealth answerable to this Court, amongst other ways, under the Constitution[75]. That constitutionally entrenched power of judicial review is one of the limits on the extent to which corporatisation and privatisation of federal administrative action in Australia may escape the disciplines of judicial scrutiny[76].

104 Further, the interests involved in and affected by AWBI's decisions to grant or withhold the approval required by the Act are much wider than the private interests of an ordinary corporation. The Act not only grants AWBI the privileged position of a statutory monopoly, but it involves that corporation in the scheme of regulation established. The presence of either, and certainly of both of those elements imposes upon AWBI obligations in the proper exercise of those of its functions that were relevant to the operation of the statutory regulatory scheme, and that had a substantial effect on growers. Some of those growers were not shareholders of AWB and were therefore not represented in the internal deliberations of AWB or AWBI.

105 In characterising the decisions to grant, or withhold, approval for bulk export of wheat, the relationship between AWBI and the applicant traders (and growers) seeking such approval is therefore also relevant. Grain traders seeking the Authority's, and consequently AWBI's, agreement for the export of wheat, are not in a contractual relationship with AWBI. Further, in a letter to the Authority, Mr David Mailler, the Chairman of the Durum Wheatgrowers Association (NSW), also pointed out that those growers who had not exported in the past or who joined the industry later were not shareholders of AWB. Remedies under the TPA were also foreclosed. As such, the only way that the decisions of AWBI, with their wide and significant impact, could be exposed to legal scrutiny or accountability was by way of administrative review. If such review were unavailable, AWB and AWBI, at least in this respect, would come close to possessing absolute legal power.

106 In his letter to the Authority, Mr Mailler recorded the disenchantment of many growers with AWBI's conduct and the need for transparency and accountability in the decision-making process. An internal AWB memorandum to Mr Flügge also noted the hostility of durum growers towards the conduct of

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75 Constitution, s 75(v).

76 cf Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38, (1995); Taggart, "The Impact of Corporatisation and Privatisation on Administrative Law", (1992) 51 *Australian Journal of Public Administration* 368.

AWB and AWBI. Apart from any hope that such disenchantment would result in legislative action at some point in the future, for the time being at least, in the absence of administrative review, the growers affected could not even get AWBI to listen to them.

107 If the consent decision of the Authority is characterised as "administrative" (a proposition which was not in dispute), AWBI's decision to give approval for such an application must surely be characterised in the same way[77]. Both the decision of the Authority and that of AWBI are made pursuant to the same provision in the Act regulating the export monopoly. They each relate to the same applications for bulk export. They have the same purpose and substantive effect. They interact with one another.

108 In the letters informing NEAT of its refusal of consent for the respective applications, the Authority in each case explained that such refusal followed the withholding of approval by AWBI. Those letters also referred to the rights that NEAT had under the ADJR Act to obtain a "statement of the reasons" and to "challenge the decision". However, even if asserted against the Authority, such rights would be reduced to nought if the same obligations and scrutiny mechanisms under the ADJR Act did not extend to AWBI as well.

109 It is true that different considerations might guide the Authority and AWBI in reaching their respective decisions. This was, to some extent, the object of converting the Board into different bodies. AWBI, for instance, may legitimately consider the effects of a proposed export on its own commercial interests and the returns of growers who are shareholders of AWB. The Authority may also take into account broader considerations of the public or national interest. However, judicial review, whether under the common law or under the ADJR Act, is not concerned with the decision-maker's conclusions on the merits. It is the legality of such decisions that is examined, rather than the correctness or otherwise of the considerations that guided such conclusions.

110 To determine the availability of judicial review of decisions at common law, courts have looked to the nature of the power exercised by the body in question. In *Forbes v New South Wales Trotting Club Ltd*[78], the respondent was a private club with "no statutory power or recognition" but which "controlled trotting in New South Wales by the consent of the government and all of the trotting clubs of that State". Yet for the purposes of its decisions in exercise of a power to warn off persons from courses under its control, it was held that the club was required to observe the rules of natural justice. This was because

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77 *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 481.

78 (1979) 143 CLR 242 ("*Forbes*") at 262.

trotting was a "public activity in which … large numbers of people take part" and "[m]embers of the public have the legitimate expectation" to be admitted upon paying the stated charge[79]. Gibbs J thought that it was relevant that, at least in some situations, "the person warned off might thereby be prevented from carrying on his occupation or performing the duties of his employment"[80]. Accordingly, a private club owner implementing the rules of trotting, such as the respondent in that case, could not exclude members of the public "arbitrarily and capriciously"[81].

111 Murphy J said expressly that the nature of the power exercised can be public, even if the decision-maker is a private body[82]:

> "There is a difference between public and private power but … one may shade into the other. When rights are exercised directly by the government or by some agency or body vested with statutory authority, public power is obviously being exercised, but it may be exercised in ways which are not so obvious. … [A] body … which conducts a public racecourse at which betting is permitted under statutory authority, to which it admits members of the public on payment of a fee, is exercising public power."

112 A similar focus on the nature of the power exercised by a decision-making body, in order to determine whether or not it was subject to judicial review, was adopted by the English Court of Appeal in *R v Panel on Take-overs and Mergers, Ex parte Datafin*[83]. The decision-making body in that case was the Panel of Take-overs and Mergers. The panel was a non-statutory, unincorporated association, without statutory, or common law prerogative powers. However, it regulated an important part of the financial market in the City of London. Despite the fact that the Panel did not owe its existence to a statute, and that its decisions were not required by, or made pursuant to, a power conferred by a statute, the Court of Appeal held that it was amenable to public law review.

113 Lloyd LJ expressed the opinion that where the source of the power was a statute or subordinate legislation, the body was subject to judicial review, but not where the source of the power was contractual. However, between those

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79 (1979) 143 CLR 242 at 264.

80 (1979) 143 CLR 242 at 264.

81 (1979) 143 CLR 242 at 269.

82 (1979) 143 CLR 242 at 275.

83 [1987] QB 815 ("*Datafin*").

extremes, a court would look more closely to the nature of the power that was exercised[84]. For the members of the Court of Appeal there were a number of features of the Panel and its decisions that brought it within the purview of public law. These included the fact that there had been an "implied devolution of power" to the Panel by the government whereby at least some legislation assumed its existence[85]. Its chairman and deputy chairman were appointed by the Governor of the Bank of England[86]. The Panel was used by the government as one of the central features of the regulation of the financial market[87]. Its decisions had a significant effect on a great number of citizens, many of whom had not consented to its exercise of power[88]. Importantly, although the Panel as such was a "private" body, its functions and decisions could have significant consequences through the Council of the Stock Exchange, which was a public body. Such consequences could include the exclusion or suspension of a listed company from the Stock Exchange[89]. Finally, it was also considered relevant that those affected by the Panel's exercise of power had no other private law remedies for scrutiny or control[90].

114 It is useful to have regard to these Australian and English decisions in approaching the first issue presented in this appeal. As I remarked in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[91]:

> "Where a decision is reviewed on grounds that are contained in an enactment, such as the [ADJR Act], … determining the content of those grounds and the availability of relief requires an interpretation of the statutory language and purpose, read against the background of administrative law principles that have developed (and that continue to develop) under the common law."

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84 [1987] QB 815 at 847.

85 [1987] QB 815 at 849.

86 [1987] QB 815 at 849.

87 [1987] QB 815 at 838.

88 [1987] QB 815 at 838.

89 [1987] QB 815 at 838, 851-852.

90 [1987] QB 815 at 839.

91 [2003] HCA 30 at [155].

115 Whether or not the criterion of the exercise of "public power" is sufficiently precise to be accepted as the basis for review of decisions under the common law[92], the observations about the nature of the power identified in cases such as *Forbes* and *Datafin* are helpful in analysing whether particular decisions are of an "administrative character". When applied to the circumstances of the present appeal, all the criteria identified in those cases point towards the conclusion that AWBI's impugned decisions were made pursuant to governmental or statutory authority. Indeed, the position of AWBI with its statutory veto on the decisions of a public authority is a much stronger instance than that presented by a private trotting club or a private industry panel. It is therefore unsurprising that AWBI's decisions should be classified as "administrative" and rendered subject to public law scrutiny.

116 *The decisions were made under an enactment*: In *Australian Broadcasting Tribunal v Bond*, Mason CJ held that the phrase "decision of an administrative character made … under an enactment", read as a whole, indicated that a decision "which a statute requires or authorizes"[93] or "for which provision is made by or under a statute"[94] is reviewable under the ADJR Act. That approach recognises that the elements of "decision", "administrative character" and "under an enactment" in the definition cannot be construed in isolation. They are inter-related. Each informs the meaning and content of the others.

117 The primary judge[95] made reference to the decision in *Glasson v Parkes Rural Distributions Pty Ltd*[96]. In that case this Court held that where a statute was not "the source of the power to appoint the decision-maker, or the source of his power to make the decision, or the source of the decision's legal effect", the decision could not be said to have been made "under an enactment".

118 During argument, reference was also made to Federal Court decisions interpreting the phrase "decision … made … under an enactment". However, most of the cited exegesis related to corporations or authorities created by statute, and decisions of such bodies to enter contracts[97] or decisions pursuant to existing

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92 Craig, "Public Law and Control over Private Power", in Taggart (ed), *The Province of Administrative Law*, (1997) 196 at 198-199.

93 (1990) 170 CLR 321 at 336.

94 (1990) 170 CLR 321 at 337.

95 (2000) 64 ALD 29 at 38-39 [36].

96 (1984) 155 CLR 234 at 241.

97 eg *James Richardson Corporation Pty Ltd v Federal Airports Corporation* (1992) 117 ALR 277; *General Newspapers Pty Ltd v Telstra Corp* (1993) 45 FCR 164.

(Footnote continues on next page)

contracts[98]. As such, they raise different issues. They are not apposite to the circumstances of the present appeal.

119 Approached in the broad way that the composite phrase in the ADJR Act suggests, it follows that the notion of a "decision … made … under an enactment" is not to be construed narrowly. Whether or not the source of the decision-maker's power to act derives from a statute is not the determinative criterion for the purposes of characterising the impugned decision as reviewable under the ADJR Act. However, while cases such as *Forbes* or *Datafin* illustrate that a statutory origin is not essential to invoke the supervisory jurisdiction of a court at common law, for a decision to come within the ADJR Act, it must have some appropriate nexus to a federal enactment, given the specific reference to a decision "made … under an enactment" in s 3(1).

120 In this regard, the fact that AWBI was a private company, incorporated under corporations law, does not have any immediate legal consequence. While it is true that AWBI as an entity does not owe its existence to the Act, focusing on the terms of the Act it is equally clear that AWBI is not just an ordinary private corporation. AWBI is specifically named in the Act (as "nominated company B")[99]. The Act confers on AWBI the privileged position of being the only person who can export wheat from Australia without approval from the regulating Authority[100]. The Authority had to consult AWBI in performing its key regulatory function[101]. Moreover, the Authority could not give consent for an export by another trader without obtaining AWBI's prior approval[102].

121 Through the statutory requirement for the prior approval of "nominated company B", AWBI had conferred upon it the power to exercise a key influence on the regulatory process and the conduct of a public authority. The notion that a private corporation, as such, could, by its decision, control the consent-making processes of the Authority (and thereby effectively control the occasions and terms on which other traders would be allowed to participate in its market) is unthinkable without the support of valid legislation. The only way that AWBI's

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See Allars, "Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises", (1995) 6 *Public Law Review* 44.

98 *Australian National University v Burns* (1982) 43 ALR 25.

99 The Act, ss 3, 57, 84.

100 The Act, ss 57(1) and (1A).

101 The Act, s 57(3A).

102 The Act, s 57(3B).

"decision" could take on a legal character affecting the conduct of the Authority, and the economic rights of NEAT (and its growers) and of other Australian growers who wished to export wheat to the world market, is by force of the Act. And then only if the Act gives such authority in clear and unmistakable terms[103].

122 The submission that AWBI was under no duty to make a decision as envisaged by s 57(3B) of the Act, should also be rejected[104]. AWBI was an identified repository of a power conferred upon it by an Act of the Parliament. As the primary judge found, without a decision by AWBI "a large part of the scheme created under s 57 would become unworkable"[105]. In the Full Court, Gyles J, who otherwise would have withheld relief, expressed a view accepting that s 57(3B) may impose "an enforceable duty upon [AWBI] to give an answer when requested"[106]. I regard it as unthinkable that AWBI could simply ignore, or unduly delay, a consultation that the Authority was obliged by the Act to conduct with it upon receiving an application for consent to the export of wheat. In the result, AWBI did not do either of those things. In each case it acted with a speed made possible by its inflexible and publicly stated approach to all such applications.

123 It follows that it is the Act that provides for, requires, and gives legal force to, AWBI's "decisions" relevant to NEAT's applications. It is the role performed for the purposes of the Act, and not the corporate structure of AWBI, that determines the character of the "decisions" in question in this appeal. Other decisions made by AWBI may indeed have the character of decisions by a private corporation operating within the private sphere. But, at least in so far as its decisions have the consequences provided for in s 57(3B) of the Act, they are decisions outside the private curtain. They are subject to public scrutiny. They are decisions of an administrative character made under an enactment, as that expression is used in the ADJR Act.

124 Two further provisions in s 57 of the Act reinforce this conclusion. The first, in s 57(6), is the immunity provided from the operation of another public regulatory law, namely the TPA, for AWBI's decisions "under and for the purposes of" s 57 of the Act[107]. The second is the provision in s 57(7) obliging

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103 cf *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 471, 476; *Suatu Holdings Pty Ltd v Australian Postal Corporation* (1989) 86 ALR 532 at 541 per Gummow J.

104 cf joint reasons at [58].

105 (2000) 64 ALD 29 at 40 [42].

106 (2001) 114 FCR 1 at 13 [53].

107 cf *Richardson v McKnight* 521 US 399 at 412 (1997).

the Authority, by the end of 2004, to conduct a review and report to the Minister on the conduct of AWBI, including in relation to "the granting or withholding of approvals for the purposes" of s 57(3B).

125 If all that AWBI were doing, in providing and withholding approval under s 57(3B), were the severable conduct of a private corporation acting under corporations law (and amenable only to corporate disciplines) the last two sub-sections of s 57 would not appear. Those provisions confirm that the "decisions" made by AWBI, as contemplated by s 57(3B), are decisions that assume special public law characteristics.

126 In light of the foregoing analysis, the conclusion of the primary judge that AWBI's export approval decisions were "expressly or impliedly authorised" by the Act and that s 57(3B) gave legal "force or effect" to such decisions[108], was correct. This appeal does not present some of the more difficult problems that can arise at the intersection of regulation and commerce, and the exercise of public and private power[109].

127 *The errors of the Full Court*: The judges in the Full Court adopted a different approach. Heerey J concluded that, in making its decisions to refuse approval to the Authority's consent to NEAT's applications, "AWBI was outside the province of administrative law"[110]. His Honour reached this view on the basis of the suggested legislative intention that AWBI should be "a vigorous, monopolistic participant in the Australian wheat export market"[111].

128 Mansfield J[112] and Gyles J did not find it necessary to express a concluded view on this point. However, in his reasons, Gyles J expressed the opinion that, in acting as it did in pursuit of its "commercial interests", AWBI was outside the ambit of s 5(2)(f) of the ADJR Act or the common law principle reflected in that provision[113]. In his view, the "reach of administrative law" could extend to decisions made by AWBI for the purposes of s 57(3B) in some circumstances, including where it could be shown that the decision was "not bona fide"[114]. But,

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108 (2000) 64 ALD 29 at 40 [42].

109 cf *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739.

110 (2001) 114 FCR 1 at 8 [26].

111 (2001) 114 FCR 1 at 9 [31].

112 (2001) 114 FCR 1 at 10 [38].

113 (2001) 114 FCR 1 at 12-13 [52].

114 (2001) 114 FCR 1 at 13 [53].

on his Honour's approach, the present was not such a case. This seems to suggest that Gyles J considered that the decision could be "administrative" in character and subject to review for some purposes, but not for others. With respect, this is an approach difficult to reconcile with the terms of the ADJR Act.

129 The approaches adopted by the Full Court are vitiated by a number of errors. First, as I have pointed out, it is the "decision" that needs to be characterised in order to determine if it falls within the scope of the ADJR Act, not its maker. For the purposes of characterising the decision, it is erroneous to focus on the formal character of AWBI as a private corporation, to the exclusion of all the other considerations.

130 It is also inappropriate to fix upon the "commercial" nature of the approval decisions, without recognising the exceptional character of those decisions and the role that they played in the regulatory scheme. Ordinarily, a private corporation cannot make decisions that have an effective power of veto over the entitlement of competitors, or potential competitors, to participate in a given market. No provision of corporations law gave AWBI such a power. The only source of such power was s 57(3B) of the Act.

131 To say that an approval decision by AWBI is made in the exercise of its general powers and pursuant to its corporate constitution does not advance the analysis. It frames the question in a way that makes it simpler to answer, but it strips the problem of its inherent complexity[115]. For the board of a private corporation to adopt a resolution restricting the right of a competitor to participate in its market would be a meaningless exercise. Without s 57(3A) of the Act and particularly s 57(3B), any such "decision" by AWBI would be legally impotent. Even if a corporation were able to give force or effect to a resolution to exclude a competitor from its market by wielding its sheer economic power, any such action would be likely to run afoul of the TPA.

132 Commercial considerations may indeed have guided the decision of AWBI as to whether to give or refuse approval to the Authority's consent to the bulk export of wheat by NEAT. They could properly do so. So much was never denied by NEAT. However, the reason that the Act required such a "decision" on the part of AWBI was for the purposes of the administration of a statutory scheme for a form of export marketing monopoly as enacted by the Federal Parliament. That was also why the Act provided immunity from the application of statutory regimes (such as the TPA) that would otherwise apply to "commercial decisions" of a private corporation.

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115 cf *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 197 ALR 153 at 179 [96].

133 In so far as private corporations are entrusted under a statute with public functions affecting others, they are thereby rendered liable to administrative law remedies and, depending upon the terms of the legislation, quite possibly to the writs provided by the Constitution[116]. The mere fact that such a decision may be affected, or guided, by considerations of a commercial nature will not take it outside the ambit of such judicial review.

134 It may be that the statutory conferral of monopoly status on AWBI as a private corporation, in itself (particularly when viewed with the added fact that it was formed from what was once a public body) could impose obligations to observe the norms and values of public law, adapted by analogy, in particular instances of its decision-making[117]. In such circumstances, quite apart from administrative law, it has sometimes been viewed as appropriate to impose duties to the community upon such corporations out of recognition of the particular powers they enjoy[118]. In light of my conclusions about the special statutory position of AWBI, and the fact that the impugned decisions were both required and made effective by the Act, elements sufficient to make them fall within the scope of the ADJR Act, it is unnecessary for me to rely on any broader principle.

The exercise of power: principles

135 *The blanket approach*: The determination of the character of the "decision" made by AWBI logically comes first. If AWBI's "decision" is not characterised as falling within the ambit of the ADJR Act, NEAT's endeavour to attack the validity of the "decision" in accordance with that Act would fail at the threshold. No question would then arise as to whether the impugned "decisions" involved an improper exercise of power, and if so, what are the consequences. That was the approach of Heerey J in the Full Court[119]. That approach has now been adopted in the joint reasons in this Court.

136 But once it is decided, as I think it should, that the "decision" of AWBI to grant, or withhold, approval in accordance with s 57(3B) of the Act is administrative in character and made under the Act, it is my view that the

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116 Constitution, ss 75(iii) and 75(v).

117 cf *Gay Law Students Association v Pacific Telephone And Telegraph Company* 595 P 2d 592 at 597-602 (1979). See also *West v Atkins* 487 US 42 at 54-57 (1988).

118 See Whincop and Keyes, "Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law", (1997) 25 *Federal Law Review* 51.

119 (2001) 114 FCR 1 at 9 [30]; cf at 12-13 [52].

successive decisions to refuse approval to NEAT's applications made pursuant to the policy of blanket refusal were invalid.

137 *Discretionary decisions and policy*: It is not unlawful for a repository of statutory power to adopt a general policy for the purposes of dealing with numerous cases or applications, to ensure that the power is consistently exercised by reference to relevant considerations[120]. A policy that structures the discretion and provides guidance for its exercise will usually be lawful and can often be desirable. Additionally, a decision-maker upon whom is reposed a discretion, such as that reposed in AWBI, would also be entitled to adapt and change the policy from time to time[121], so long as it remains within the strictures of the relevant enactment.

138 However, adopting any method for making a discretionary decision, including the use of a legally permissible policy, does not relieve the decision-maker of the need to consider the individual circumstances of each application that comes before it. The reasons that lie behind this requirement of individual decision-making are clear. If the Parliament had intended a common rule to apply, it would have said so to the extent that that would be constitutionally valid. By reposing a discretionary power, and duty, upon a decision-maker to make individual assessments, the legislature contemplated the possibility that those affected might make representations concerning decisions potentially having important consequences for them. It recognised (as common experience also teaches) that exceptional cases can arise so as to warrant special or particular treatment. Unthinking, inflexible administration can be an instrument of oppression and abuse of power, taking the decision-maker outside the purpose for which the power was granted[122]. The essence of lawful public administration in the exercise of a discretion (as of good decision-making generally) is to keep an open mind concerning the justice, reasonableness and lawfulness in the

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120 eg *Green v Daniels* (1977) 51 ALJR 463 at 467; 13 ALR 1 at 8-9; *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 at 503-504; *Carroll v Sydney City Council* (1989) 15 NSWLR 541 at 550; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 625; *R v Secretary of State for the Home Department, Ex parte Venables* [1998] AC 407 at 496-497; cf *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 418.

121 *Peninsula Anglican Boys' School v Ryan* (1985) 7 FCR 415.

122 cf *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189-190.

particular case, even if this sometimes involves a departure from a general policy[123].

139 *AWBI's policy and the Act*: AWBI's policy was not one that sought to structure the discretion conferred under the Act, so as to indicate the criteria that would be taken into account, or the circumstances in which it was likely to grant or withhold approval. Rather, it was a policy to refuse all applications for approval. A number of elements in s 57 indicate that the Parliament contemplated that AWBI would engage in individualised rather than "blanket" decision-making for the purposes of giving or withholding its approval.

140 The Act requires the consent of the Authority for each proposed export of wheat by a trader other than AWBI. It obliges the Authority to consult AWBI. If there were no point in doing so, the Parliament would not have so enacted. It should not be imputed that it set about enshrining in the Act a charade, having the appearance of consultation but no substance because the decision of AWBI was already cut and dried. Similarly, the fact that the approval of AWBI is required in each case of an application to the Authority, as a precondition to the Authority's own consent power, signifies that a decision is contemplated case by case. As well, the obligation to accompany the application with a fee[124], payable to the Authority, is another indication that the Parliament envisaged a real process having a true utility to the applicant; not a futility doomed from the outset to fail. It would be truly malign to design a statutory scheme whereby an applicant would have to pay a fee in order to receive a predetermined, unvarying rejection of the application. That may happen in Kafka's works but not, at least so far, in Australian public administration.

141 This conclusion is still further reinforced by the statutory obligation of the Authority to issue guidelines about the matters that it would take into account in granting consent. If the Authority's consent is subject to an individualised decision, in accordance with its guidelines, it is hard to imagine that AWBI, having the power of effective veto on such decisions, could act on the basis of a blanket prohibition of granting approval, whatever the circumstances of the individual application, thereby rendering the Authority's consent process superfluous. The requirement of a review and report to the Minister on the conduct of AWBI[125] is yet a further indication that individualised conduct was expected by the Parliament. Had it been intended to condone an unyielding monopoly in favour of AWBI, irrespective of particular circumstances, ordinary

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123 cf *Evans v Donaldson* (1909) 9 CLR 140 at 152-153.

124 The Act, s 57(3D).

125 The Act, s 57(7).

principles of construction would require that this be spelt out in the legislation in plain terms[126]. It is not.

142 The foregoing reasoning explains my conclusion that it was not permissible for AWBI to adopt a blanket policy of refusing approval in exercising its function under s 57(3B) of the Act. The Act sought to establish a "single desk" for the marketing of export wheat, whereby one company, namely AWBI, would hold the right to export wheat from Australia. However, the Parliament left open the possibility of individual traders being allowed to export outside of AWBI's pools. It did not consider that such an approach would undermine the "single desk". That approach simply continued the arrangements that had been in place before the restructure of the Board. It involved a particular accommodation of the "public" and "private" interests involved in exporting wheat from Australia, in turn reflecting the realities of the international markets for that cereal.

143 The single-desk selling arrangement has been maintained for the export of wheat because of the interventionist policies of the United States of America and the European Union that "can substantially reduce international wheat prices" through "varying forms of domestic support and export subsidy programs"[127]. The Parliament recognised that Australian wheat growers were unable to set or control such international prices. The statutory purpose was to "maximise the net returns to growers", through avoiding situations where Australian wheat traders were competing with other Australian wheat traders[128]. This explains why AWBI was given such a key role in the regulation of exports by other traders (who were otherwise its competitors). That role extended beyond consultation, to a power of effective veto. But the price of such veto power was that AWBI would assess the impact of any proposed export upon its own commercial interests, before such export could be allowed to go ahead.

144 The blanket policy of refusal adopted by AWBI amounted, in effect, to the rewriting of the legislation by the decision of a private company. One of the options canvassed in the Explanatory Memorandum prepared for the amendment of the Act was to grant the monopoly for all wheat exports to the grower company. However, that option was eventually not chosen[129]. Nor did the Parliament decide to simply legislate the monopoly for all bulk exports to the

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126 cf *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 578 [4], 587-588 [33]-[34], 594-595 [59].

127 Explanatory Memorandum at [19].

128 Explanatory Memorandum at [20].

129 Joint reasons at [42].

grower company. If it be needed, that is yet a further indication that the stance taken by AWBI is quite contrary to the purpose of the Parliament.

145 The provision in the Act for a case by case consideration of applications for proposed bulk export illustrates why it is incorrect to say, as officers of AWB and AWBI asserted on many occasions, that the grant of approvals by AWBI, that may result in bulk export consent from the Authority, would undermine the single-desk selling arrangements. The grant of approval by AWBI in a particular case and its fact-specific circumstances did not establish any precedent for the grant of future approvals – either for the same trader or type of wheat, or for the same destination. The legislation did not provide for approvals that would cover particular growers or traders, periods of time, or export destinations. In fact, AWBI was free, and was required, to reassess the impact of each application on its own activities individually. In a real sense, the general principle would be reinforced by occasional and particular exceptions permitted on their special individual merits as the Act envisaged. It is an old adage that the exception proves the rule.

146 Where a decision is subject to judicial review, the grounds of review that would be available and appropriate will depend upon the statutory and decision-making context. It follows from the foregoing analysis that the ground of review contained in s 5(2)(f) of the ADJR Act, invoked by NEAT, was applicable to the "decision" of AWBI to grant or withhold approval by reference to the legislative language and purpose[130].

The exercise of power: unlawful inflexibility

147 The primary judge found that "AWBI had a policy against approving the bulk export of wheat"[131]; that it was "this policy, and this policy alone, which dictated the rejection of each of NEAT's applications"[132]; and that AWBI's "decisions in this case were clearly made in the inflexible application of its policy against bulk export permits"[133]. In the light of that finding, and the proper application of the Act and of the ADJR Act, it is my opinion that the primary judge, and the Full Court, erred in failing to provide relief to NEAT.

148 The primary judge justified withholding relief on the basis that AWBI's policy and its adherence to that policy were consistent with its constitutional

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130 cf *Shergold v Tanner* (2002) 209 CLR 126 at 135 [27], 136-137 [34]-[35].

131 (2000) 64 ALD 29 at 56 [119].

132 (2000) 64 ALD 29 at 56 [121].

133 (2000) 64 ALD 29 at 63 [157].

charter and that NEAT did not provide any information or reasons for AWBI to depart from that policy. Her Honour explained[134]:

> "No material was put before AWBI which challenged the legitimacy of those considerations, or which provided any argument to the effect that the bulk export permits which were sought could be granted in a manner that was consistent with AWBI's constitutional mandate. In other words, no material was put before AWBI which could be expected to persuade it to deviate from its policy."

In the Full Court, Mansfield J adopted a similar approach[135]. With respect, these considerations did not afford a ground for denying relief.

149 The departure by AWBI from the Act was not, as the primary judge thought, excused or permitted because of the general character of AWBI as a private corporation; the terms of its corporate constitution; its general commercial purposes; or the adoption of a general policy in favour of the single-desk sale of overseas wheat. The fact that the blanket refusal of approval may have been consistent with the constitutional charter of AWBI and AWB is to a large extent irrelevant. Where the Federal Parliament has validly spoken in the terms that it did in the Act, no instrument or action under the Corporations Law of Victoria could give any foundation for a departure from the obligations imposed by the federal legislation.

150 Repositories of statutory functions and powers must keep their minds open for the exceptional case[136]. They must not disable themselves from exercising their discretion by adopting a rule "not to hear any application of a particular character by whomsoever made"[137]. At least they must not do so without clear authority of law permitting that course. There was no such clear authority in the present case. The postulated excuses connected with AWBI's general corporate character did not relieve that body of its duty under the Act to consider a request for its approval as the Act contemplated: judging each of NEAT's applications by reference to its peculiar features as they were put before it and by the way each affected (or did not affect) its own commercial interests.

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134 (2000) 64 ALD 29 at 63 [157].

135 (2001) 114 FCR 1 at 12 [46].

136 *R v Port of London Authority; Ex parte Kynoch Ltd* [1919] 1 KB 176 at 184; *Green v Daniels* (1977) 51 ALJR 463 at 467; 13 ALR 1 at 9; *Kioa v West* (1985) 159 CLR 550 at 632-633; *Howells v Nagrad Nominees Pty Ltd* (1982) 43 ALR 283 at 306-307; *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292.

137 *R v Port of London Authority; Ex parte Kynoch Ltd* [1919] 1 KB 176 at 184.

151 Nor, with respect, was it correct to say that NEAT did not make out a case for relief. The objective and largely uncontested documentary evidence denies that conclusion. For example, in an e-mail sent by NEAT to the Authority in support of its first two applications, involving the export of ADR3 to Italy and Morocco, it was noted that the Italian buyers were "being offered low quality durum from the USA" and that at that point AWB was "not quoting a price for ADR3 to Australian farmers". A number of communications were sent in support of the fifth application for export, also to Italy. The documentation referred to ADR Feed for use by a particular Italian importer for human consumption as pasta. It was pointed out that NEAT's buyer wanted to conclude the deal quickly and did not wish "to buy commingled stocks". Apart from offers from US sellers, in an e-mail to AWBI, NEAT pointed out that while it was waiting for consent, the buyer purchased "two cargoes of low quality Turkish durum" and "another Turkish tender" was due in the following week. The wheat was otherwise exposed to the risk of rotting in Australia unless it was quickly sold. If it were not sold it would be of little or no value to anyone. Clearly what was advanced was a highly fact-specific case. Conscious of AWB and AWBI's interests, NEAT went on to point out that it was simply holding a specific bid, and "has not made any offers to Italy".

152 In a passage cited earlier in these reasons, the primary judge found that given AWBI's approach to its functions, NEAT's "applications were bound to be rejected in any event" given the unyielding nature of AWBI's policy. Any other individual considerations or arguments were not taken into account. It is apparent that at least some of NEAT's applications were rejected by AWBI without regard to the evidence of their individual merits (including the possible effects on AWBI's commercial interests). Once that conclusion is reached, it is not the role of a supervising court to form its own view about the way in which a repository of power would have assessed the merits of the case put before it, if it had considered the application properly. At least on the face of things, some of the applications did not appear to affect AWB and AWBI's commercial interests. Whether or not AWBI would have reached that conclusion, we cannot know. What we do know is that AWBI was not even prepared to listen.

153 The assessment of each individual application and the supporting documentation enlivened a role that AWBI was obliged by law to perform. True, its own commercial interests and the returns to the growers who were shareholders of AWB were accorded primacy under the regulatory scheme. But by law, AWBI still had to turn its mind and genuinely consider the effect on those interests of each application that was put before it. It could not shut its ears. To adopt such an approach to making the decisions required, before the Authority could give its own consent, was a small price to be paid for the extensive powers conferred by the Act on AWBI. AWBI refused to pay that price. The primary judge and the Full Court therefore erred in withholding the

relief to which the reasoning correctly adopted by the primary judge otherwise inexorably pointed.

The provision of relief was not futile

154 It was not futile for NEAT to seek relief under the ADJR Act. Had its original application to the Federal Court succeeded promptly, as that Act envisages, AWBI would not have been required to grant the approval. In proceedings under the ADJR Act, the Federal Court does not give a decision on the merits. AWBI would simply have been required to consider the sought-for "approval" on the individual merits of each application rather than pursuant to the blanket refusal that it had adopted.

155 In the Full Court, and in this Court, NEAT acknowledged that such a course was no longer feasible given the passage of time. However, the application under the ADJR Act remained relevant to NEAT's contention that AWBI's purported conduct was not done "under" s 57(3B) of the Act or "for the purposes" of that section[138]. The determination of the point against AWBI would leave it exposed to proceedings by NEAT pursuant to the TPA, deprived of immunity under that Act. It was therefore relevant to those proceedings. Those proceedings should continue. NEAT is entitled to have its consequential rights under the TPA determined according to law.

Orders

156 No separate submissions were received about the form of the orders suggested by NEAT in the event that it succeeded in this Court. This Court should make orders in that form.

157 The appeal should be allowed with costs. The judgment of the Full Court of the Federal Court of Australia should be set aside. In lieu thereof, it should be ordered that the appeal to that Court be allowed; the judgment of the primary judge should be set aside so far as it related to the appellant's claims against AWB and AWBI. In place thereof, this Court should:

(1) *Declare* that the decisions of AWBI refusing to give approval to the bulk export of wheat the subject of the applications referred to in par 8 of the amended statement of claim:

(a) involved the application without regard to the merits of the individual case of a policy against the approval of the export of wheat in bulk; and

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138 The Act, s 57(6).

(b) for that reason, were not done under s 57 of the *Wheat Marketing Act* 1989 (Cth) or for the purposes of that section within the meaning of s 57(6) of that Act;

(2) *Declare* that each of the purported decisions was unlawful and void;

(3) *Order* that each of the purported decisions be set aside;

(4) *Order* that the proceedings be returned to the Federal Court for the determination of outstanding issues; and

(5) *Order* that AWB and AWBI pay the appellant's costs in the Federal Court.