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Australian Broadcasting Tribunal v Bond ("Bond Media case") [1990] HCA 33; (1990) 170 CLR 321 (26 July 1990)

HIGH COURT OF AUSTRALIA

AUSTRALIAN BROADCASTING TRIBUNAL v. BOND AND OTHERS [\[1990\] HCA 33](#); [\(1990\) 170 CLR 321](#)
F.C. 90/032

Administrative Law (Cth) - Broadcasting and Television

High Court of Australia

Mason C.J.(1), Brennan(2), Deane(3), Toohey(4) and Gaudron(4) JJ.

CATCHWORDS

Administrative Law (Cth) - Judicial review - Decision of administrative character made under enactment - Conduct engaged in for purpose of making decision - Review of decisions and conduct - Ambit - Grounds - [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth), [ss. 3,5,6](#).

Broadcasting and Television - Commercial broadcasting licences - Australian Broadcasting Tribunal - Power to suspend or revoke licence if satisfied that licensee no longer fit and proper person to hold licence - Controller of licensee not fit and proper person - Whether licensee fit and proper - Conduct before commencement of licence period - Broadcasting Act 1942 (Cth), s. 88.

HEARING

1990, February 27, 28, March 1, July 26. 26:7:1990
APPEAL from the Federal Court of Australia.

DECISION

MASON C.J. This appeal is brought from orders made by the Full Court of the Federal Court by way of judicial review under the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) ("the [ADJR Act](#)") of various decisions, findings and rulings made by the appellant, the Australian Broadcasting Tribunal ("the Tribunal"), in an inquiry which it held under s.17C(1) of the Broadcasting Act 1942 (Cth) ("the Act").

2. The respondents are Mr Alan Bond (the first respondent), Mr David Aspinall (the fifth respondent), Bond Corporation Holdings Limited (the third respondent) ("BCH"), of whose Bond Media Division Mr Aspinall is the Chief Executive, Queensland Television Limited (the sixth respondent) ("QTL"), of which Mr Aspinall was at all material times Executive Director, and five other companies associated with Mr Bond. The relationship which exists between Mr Bond and the companies, including QTL, and between the companies themselves is set out in the reasons for judgment prepared by Toohey and Gaudron JJ. For present purposes it is sufficient to say that, by

reason of his shareholding in Dallhold Investments Pty. Ltd. (the second respondent) ("Dallhold"), Mr Bond is able to determine the composition of the boards of directors of Bond Media Limited (the fourth respondent) ("Bond Media") and the sixth to ninth respondents. They are subsidiaries, at one or more removes, of Bond Media and are the holders of commercial licences under the Act. QTL holds a commercial television licence for station QTQ-9, Brisbane. Consolidated Broadcasting System (W.A.) Pty. Limited (the seventh respondent) is the licensee of radio stations 6AM and 6KG. North West Radio Pty. Ltd. (the eighth respondent) holds the commercial licences for radio stations 6KA and 6NW and Darwin Broadcasters Pty. Limited (the ninth respondent) holds the commercial licence for radio station 8DN.

3. Mr Bond played a prominent, even a dominating, role in the activities of the respondent companies. The inquiry related to his participation in certain transactions involving the companies, in particular QTL. It was alleged that the circumstances of Mr Bond's participation in these transactions reflected adversely on his fitness and consequently upon the fitness of the licensee companies to hold commercial licences under the Act. The Tribunal, having found after a lengthy inquiry that Mr Bond was guilty of improper conduct in various respects, concluded that he would not be found to be a fit and proper person to hold a commercial broadcasting licence under the Act, notwithstanding that he did not hold and, being a natural person, was not eligible to hold such a licence: see s.81AA(1). The Tribunal then went on to find that, by reason of Mr Bond's control of the licensee companies, the sixth to ninth respondents were "no longer fit and proper persons to hold the licences".

4. The respondents commenced two proceedings under the [ADJR Act](#). In the first proceeding, the first to fifth respondents were applicants; in the second, the sixth to ninth respondents were applicants. The respondents sought relief in respect of eighteen decisions, findings or rulings made by the Tribunal, of which eleven were described as "decisions" and seven were described as "conduct". The applications were heard by a Full Court of the Federal Court (Lockhart, Pincus and Gummow JJ.) exercising original jurisdiction. The Federal Court allowed the applications in part and set aside the decisions that Mr Bond would not be found to be a fit and proper person to hold a broadcasting licence and that the licensee companies were no longer fit and proper persons to hold their broadcasting licences. The Court concluded that the factual findings underlying the two decisions which it set aside were erroneous in law or fact but declined to set those findings aside.

5. The lengthy arguments presented in this Court primarily concern the final decisions of the Tribunal, but also raise questions concerning the way in which the decisions, findings and rulings made by the Tribunal were treated by the Federal Court. Moreover, the respondents rely upon additional arguments presented to the Federal Court but which that Court found it unnecessary to consider, and they also seek special leave to cross-appeal on further grounds.

6. Underlying the arguments presented to this Court is a fundamental question as to the limits of the jurisdiction of the Federal Court under the [ADJR Act](#) to review conclusions, including findings of fact, which constitute elements in the chain of reasoning leading to the ultimate administrative decision or order which is the subject of the application for review. If the Federal Court lacked the necessary jurisdiction to review a particular matter before it, then the applications for review should have failed to that extent and the appeal should succeed to the extent of any excess of jurisdiction. Accordingly, it will be necessary to consider the ambit of the Federal Court's jurisdiction to entertain applications for judicial review under the [ADJR Act](#). However, it is convenient to sketch in outline the proceedings before the Tribunal, the decisions which it made, the applications to the Federal Court for review of those decisions and the judgment of the Federal Court. Then the alleged errors of the Tribunal can be identified with a view to determining whether the Federal Court had jurisdiction to review them and, to the extent that the Federal Court had such jurisdiction, whether it erred in the exercise of its jurisdiction.

7. The proceedings before the Tribunal had their genesis in a broadcast on 2 February 1983 on television station QTQ-9, as part of the "Today Tonight" programme, of material alleging abuse of office by Sir Johannes Bjelke-Petersen, then Premier of the State of Queensland. The Premier commenced proceedings for defamation in the Supreme Court of Queensland against QTL as licensee of the station. In January 1985, BCH, of which company Mr Bond was the Executive Chairman, acquired through its subsidiary Bond Media and other subsidiaries the share capital of QTL. Mr Bond became Chairman of the Board of QTL and remained so until 31 March 1987, when he ceased to be a director. On 1 April 1986 the defamation proceedings were settled by the payment of \$400,000 to

the Premier. The payment was made not by QTL but by its parent, BCH.

8. On 31 July and 1 August 1986, the Tribunal conducted a hearing as part of its inquiry into the renewal of the licence for QTQ-9 pursuant to s.86 of the Act, as it then stood. The Australian Labor Party was granted leave to appear as a party at the hearing. On 5 August 1986 the then Leader of the Opposition in the Queensland Parliament made allegations in the Parliament concerning the propriety of the defamation settlement. The Tribunal subsequently heard further evidence, including evidence from Mr Bond and Mr Aspinall. On 29 May 1987 the Tribunal announced its decision to renew the commercial television licence for QTQ-9, holding that QTL was a fit and proper person to hold the licence, that being the substantial issue which had arisen for decision at the inquiry.

9. There the matter would have rested but for an interview of Mr Bond by Ms Jana Wendt on 21 January 1988 on the television programme "A Current Affair". In that interview Mr Bond said:

"(C)ertainly the Premier made it under no doubt that if we were going to continue to do business successfully in Queensland, then he expected that matter to be resolved." under s.17C(1) to which this appeal relates.

10. During the course of the inquiry, other matters came to the attention of the Tribunal, which caused it to give notice from time to time of new issues to be considered. Only two of the issues which fell for consideration before the Tribunal are relevant to this appeal. The first relates to the settlement of the defamation action. The second relates to a telephone conversation between Mr Bond and Mr Leigh Hall, an executive of the AMP Society, on or about 11 May 1988, in which, it was alleged, Mr Bond threatened to use his television staff to gather information about the AMP Society, which was a business competitor of Mr Bond, and to expose the AMP Society by showing the results on television.

11. The notice of the s.17C(1) inquiry was issued pursuant to reg.9 of the Australian Broadcasting Tribunal (Inquiries) Regulations (Cth). The notice stated that the Tribunal had commenced an inquiry into issues relating to certain commercial radio and television licences "owned by companies associated with Mr Alan Bond". The licences were for those stations already mentioned and operated by the sixth to ninth respondents respectively. The notice went on to set out the original issues to be addressed at the inquiry. They included the following questions:

"1. Whether anything connected with the payment of \$400,000 in settlement of a defamation action by Sir Joh Bjelke-Petersen against Queensland Television Limited has any implications as to the suitability of companies associated with Mr Alan Bond to hold the above broadcasting licences. In this context it will be considered whether Mr Bond and companies associated with him are fit and proper persons to hold the above licences.

2. Whether it would be advisable in the public interest for the Tribunal to do any of the following:

- (a) suspend any of the said licences associated with Mr Bond;
- (b) revoke any of the said licences;
- (c) impose or vary conditions on any of the said licences."

Of the issues subsequently notified by the Tribunal, pursuant to reg.12, only two are presently relevant. They are:

"3A. Whether Mr Bond expressly or impliedly asserted to an executive of the AMP Society on or about 11 May 1988 that:-

- (a) staff of a television station or stations with

which Mr Bond was associated were at his direction gathering material on certain share transactions entered into by the AMP Society;

(b) the broadcasting of that material would be contrary to the interests of the AMP Society;

(c) he would cause that material to be broadcast by a television station or stations with which he was associated unless the AMP Society ceased to act contrary to the interests of Mr Bond and of companies with which he was associated in relation to a proposed election for the board of directors of Bell Resources Ltd.

3B. Whether if made, anything connected with the making of these assertions has any implications as to the suitability of companies associated with Mr Alan Bond to hold the above broadcasting licences. In this context it will be considered whether Mr Bond and companies associated with him are fit and proper persons to hold the above licences."

Issues 1 and 3B raised the hypothetical question whether Mr Bond was a fit and proper person to hold a commercial broadcasting licence.

12. Issue 2 reflected the possible exercise by the Tribunal of its powers under ss.85 and 88(2) of the Act. By s.85(1) the Tribunal "may, during the currency of a licence ... vary or revoke any of the conditions of the licence (subject to an immaterial exception) or impose further conditions". Section 88(2) enables the Tribunal to suspend or revoke a commercial licence if it appears advisable in the public interest on any of three specified grounds. One such ground is that the licensee "is no longer a fit and proper person to hold the licence": s.88(2)(b)(i).

13. On 7 April 1989 the Tribunal published what it described as a "Decision on Facts". It contained five findings of fact which were largely subsumed in a summary of findings of fact made by the Tribunal on 26 June 1989. The Tribunal considered these findings to be relevant to the further findings, which it then made, that Mr Bond would not be found to be a fit and proper person to hold a broadcasting licence and that the respondent licensees were no longer fit and proper persons to hold their broadcasting licences. Although the respondents sought review of the findings contained in the "Decision on Facts" published on 7 April, the relevant findings of fact were those repeated in the summary published on 26 June. For present purposes it will be sufficient if I set out the findings of fact as published on the later date. They were:

"1. Mr Bond agreed to pay the Premier of Queensland, Sir Joh Bjelke-Petersen, \$400,000 to settle his defamation claim not believing that that sum was justified by that claim alone, but believing that if he did not settle at that figure the Premier might harm his interests in the State of Queensland.

2. Mr Bond sought to disguise the true amount agreed to be paid in the belief that a sum in excess of \$50,000 could not survive public scrutiny.

3. Mr Bond deliberately gave misleading evidence to the Australian Broadcasting Tribunal in 1986 in relation to the events of January and February, 1986, and in relation to the nature of the meeting with Sir Joh Bjelke-Petersen on 17 February, 1986.

4. Mr Bond deliberately gave false evidence to the Australian Broadcasting Tribunal in this Inquiry in

relation to his motivation for making the offer to Sir Joh Bjelke-Petersen at the meeting of 17 February, 1986 and in relation to the telex of 2 January, 1986 which was relevant to a determination of the date by which agreement had been reached between Mr Bond and Sir Joh Bjelke-Petersen.

5. Mr Bond threatened to use his TV staff to gather information on a business competitor (the AMP Society) and to expose the competitor by showing the results on television."

14. It is necessary to refer to a ruling apparently made by the Tribunal in the course of argument on 8 and 10 February 1989. Counsel assisting the inquiry submitted that the Tribunal should not consider whether the Premier of the State of Queensland had solicited a bribe from Mr Bond, or otherwise acted improperly, and that it would be inappropriate to make any finding at all as to the motives of the Premier or as to the proper inferences to be drawn from the evidence as to what the Premier did. The Tribunal appears to have accepted this submission and the ruling is another decision which the respondents sought to review.

15. Notwithstanding that ruling, the Tribunal found that Mr Bond's conduct in connection with the settlement was improper in that, having the belief mentioned in finding No. 1, his participation "does not exhibit an appreciation of the proper relationship between those with control of media interests and governments".

16. In relation to finding No. 3, the Tribunal said:

"We are clearly of the view that Mr Bond and Mr Aspinall misled the Tribunal in Brisbane as to the events of January/February (1986), and this deception was calculated to create an impression that the agreement (as to the settlement of the defamation proceedings) was finalised in a manner contrary to the reality as it was known to them both."

In the earlier inquiry Mr Bond and Mr Aspinall had given evidence that the agreement for settlement was reached in late March or early April 1986. In 1989 the Tribunal, after hearing evidence from a number of witnesses, including Mr Bond, Mr Aspinall and the Premier, found that the agreement was reached in December 1985 and that, on 2 January 1986, instructions were given by telex to the solicitors for QTL to complete the settlement. The Tribunal also found that, at a meeting on 17 February 1986, Mr Bond attempted to persuade the Premier to agree to a method of payment which would disguise the true amount of the settlement. Mr Bond proposed that \$50,000 be paid to the Premier, the balance of \$350,000 to be paid as a payment overseas related to assets, a loan without obligation to repay or an excessive payment for the sale of property. Neither the giving of the instructions on 2 January 1986 nor the attempt to disguise the amount of the payment was disclosed at the 1986 inquiry.

17. On 1 May 1989, counsel offered to the Tribunal certain undertakings on behalf of Mr Bond, Dallhold, BCH and Bond Media. The undertakings were offered on the footing that they would insulate the licensee companies from interference by, and association with, Mr Bond. The undertakings were offered without prejudice and without admissions, with a view to bringing the inquiry to an end without any adverse findings, orders or conditions. Counsel submitted to the Tribunal that, in the event that it should hold that it lacked power to accept the undertakings, then the Tribunal would have power under s.85 of the Act to impose corresponding conditions upon the relevant licences.

18. On 16 May 1989 the Tribunal decided that it did not have power to consider the proposed undertakings at that stage of the proceedings. The Tribunal also expressed the view that the imposition of conditions was the exercise of a power which was related to the making of a relevant finding under the Act so that the power could not be exercised in prospect. In the result the Tribunal concluded that it lacked power to impose conditions at that stage of

the inquiry.

19. On an application under the [ADJR Act](#) the Federal Court then held that the Tribunal had power at that stage of the inquiry to impose conditions on the licences, even without finding that a licensee was no longer a fit and proper person to hold its licence, and also that the Tribunal had power at that stage of the inquiry to consider the undertakings and could take the undertakings into account in the exercise of its powers under the Act: *Bond Media Limited v. Australian Broadcasting Tribunal* [\(1989\) 4 BR 35](#). On 26 June 1989, in the light of the Federal Court decision, the Tribunal gave consideration to the undertakings but did not accept them. Likewise, it refused to impose conditions. The Tribunal concluded that the Bond Media undertakings did not "address the concerns we have about Mr Bond's behaviour". Although it is by no means clear, it must be inferred that the Tribunal had the same reservations about the undertakings offered by Dallhold and BCH.

20. Of the first undertaking proffered by Mr Bond, the Tribunal said that it had "little confidence ... in the notion that Mr Bond would not ultimately prevail in any significant area where his overall interests were involved". The Tribunal said that the second and third undertakings offered by Mr Bond were not relevant. The Tribunal went on to say:

"Apart from the reasons so far set out, we consider that the scheme proposed does not address the fundamental issues in the findings we made. To highlight this by one example, we have found that Mr Bond deliberately misled this Inquiry. There is nothing in these proposals which addresses the fundamental nature of such a finding in relation to the fitness and propriety of the individual involved. In rejecting this proposal, we do not express any view about the appropriateness or otherwise of the imposition of conditions or acceptance of undertakings at some subsequent stage in the Inquiry."

The respondents sought review of both the decision to refuse to accept the undertakings and the decision not to impose conditions.

21. The eleven decisions of which the respondents sought review may be summarized as follows:

- (1) The decision made on 26 June 1989 that Mr Bond would not be found to be a fit and proper person to hold a licence.
- (2) The decision made on 26 June 1989 that the licensee companies were no longer fit and proper persons to hold their licences.
- (3) The decision made on 26 June 1989 to refuse to consider at that stage of the inquiry the imposition of conditions on the licences.
- (4) The decision made on 26 June 1989 to refuse to accept the undertakings.
- (5) The decision made on 26 June 1989 that Mr Bond's agreement to pay the Premier \$400,000 was improper.
- (6) The decision made on 8 or 10 February 1989 that the Tribunal was unable to, and did not, make a finding about whether the Premier threatened to harm Mr Bond's interests in the State of Queensland.
- (7) to (11) inclusive The respective decisions on 7 April 1989 to make the

five

findings of fact contained in the summary published on 26 June.

The seven acts of the Tribunal described as "conduct", of which the respondents sought review, are in essence the same matters of which the respondents sought review as "decisions", the seventh "conduct" comprising the making of the five findings of fact in the summary of 26 June.

AMBIT OF JUDICIAL REVIEW UNDER THE [ADJR ACT](#)

22. The [ADJR Act](#) provides, inter alia, for judicial review of "a decision to which this Act applies" (s.5) and "conduct (engaged in) for the purpose of making a decision to which this Act applies" (s.6).

23. The expression "decision to which this Act applies" is defined in s.3(1) to mean "a decision of an administrative character made ... (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1". There is no definition of the central term "decision".

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

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

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

(1) Meaning of "Decision"

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

27. The word has a variety of potential meanings. As Deane J. noted in *Director-General of Social Services v. Chaney* [\[1980\] FCA 87](#); [\(1980\) 47 FLR 80](#), at p 100; [\[1980\] FCA 87](#); [31 ALR 571](#), at p 590, in the context of judicial or administrative proceedings it ordinarily refers to an announced or published ruling or adjudication. In such a context, the word may signify a determination of any question of substance or procedure or, more narrowly, a determination effectively resolving an actual substantive issue. Even if it has that more limited meaning, the word can refer to a determination whether final or intermediate or, more narrowly again, a determination which effectively disposes of the matter in hand: see *Chaney*, at p 100; p 590 of ALR.

28. In the context of judicial proceedings, the Privy Council has accepted that "the natural, obvious and prima-facie meaning of the word 'decision' is decision of the suit by the Court": see *Rajah Tasadduq Rasul Khan v. Manik Chand* (1902) LR 30 Ind App 35, at p 39; *The Commonwealth v. Bank of N.S.W.* [\[1949\] HCA 47](#); [\(1949\) 79 CLR 497](#), at p 625; (1950) AC 235, at p 294. But here the relevant context is not that of a decision reached in curial or

judicial proceedings, so that the meaning must be determined by reference to the text, scope and purpose of the statute itself.

29. The fact that the [ADJR Act](#) is a remedial statute providing for a review of administrative action rather than some form of appeal from final decisions disposing of issues between parties indicates that no narrow view should be taken of the word "decision". In this respect it is significant that [s.5](#) does not speak of "final decision". It is also significant that the jurisdiction of the Federal Court to grant declaratory relief is not confined to granting relief in respect of ultimate decisions. The jurisdiction extends to questions in issue in pending proceedings: cf. *Forster v. Jododex Aust. Pty. Ltd.* [\[1972\] HCA 61](#); [\(1972\) 127 CLR 421](#), per Gibbs J. at p 438. The existence of this jurisdiction, which antedated the [ADJR Act](#), suggests that the concept of a reviewable decision is not limited to a final decision disposing of the controversy between the parties.

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

31. The relevant policy considerations are competing. On the one hand, the purposes of the [ADJR Act](#) are to allow persons aggrieved by the administrative decision-making processes of government a convenient and effective means of redress and to enhance those processes. On the other hand, in so far as the ambit of the concept of "decision" is extended, there is a greater risk that the efficient administration of government will be impaired. Although Bowen C.J. and Lockhart J. appeared to emphasize the first of these considerations in *Australian National University v. Burns* [\[1982\] FCA 191](#); [\(1982\) 64 FLR 166](#), at p 172; [\[1982\] FCA 191](#); [43 ALR 25](#), at p 30, there comes a point when the second must prevail, as their Honours implicitly acknowledged. To interpret "decision" in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process.

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

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

34. If "decision" were to embrace procedural determinations, then there would be little scope for review of "conduct", a concept which appears to be essentially procedural in character. To take an example, the refusal by a

decision-maker of an application for an adjournment in the course of an administrative hearing would not constitute a reviewable decision, being a procedural matter not resolving a substantive issue and lacking the quality of finality. Then it is the "conduct" of the hearing in refusing an adjournment that is the subject of review. To treat the refusal of the adjournment in this way is more consistent with the concept of "conduct" than with the notion of "decision under an enactment".

35. The interpretation of "decision" which I favour is not as broad as that preferred by the Federal Court in *Lamb v. Moss* [1983] FCA 254; (1983) 76 FLR 296; 49 ALR 533. There the Full Court of the Federal Court (Bowen C.J., Sheppard and Fitzgerald JJ.), after reviewing the authorities, which the Court said revealed "some inconsistency", stated (at p 318; p 556 of ALR):

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

My view is more in accord with the tentative opinion expressed earlier by Ellicott J. in *Ross v. Costigan* (1982) 59 FLR 184; 41 ALR 319 when he said (at p 197; p 331 of ALR) that "it may well be that the word 'decision' means an ultimate or operative determination not a mere expression of opinion or a statement which can of itself have no effect on a person". However, I would not wish for myself to place emphasis on the words "of itself" in this statement. To say that a reviewable decision is an ultimate or operative determination does not mean that antecedent conclusions or findings which contribute to the ultimate or operative decision are beyond reach. Review of an ultimate or operative decision on permissible grounds will expose for consideration the reasons which are given for the making of the decision and the processes by which it is made.

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

37. I agree with the Full Court in *Lamb v. Moss* (at p 312; p 550 of ALR) in thinking that the court has a discretion whether to grant or refuse relief by way of judicial review under the *ADJR Act*. The references in s.16 of the *ADJR Act* to "in its discretion" are eloquent on that score. Further, I agree that only in most exceptional circumstances would it be appropriate to grant relief in respect of a decision given by a magistrate in committal proceedings: see at p 326; p 564 of ALR. The delays consequent upon fragmentation of the criminal process are so disadvantageous that they should be avoided unless the grant of relief by way of judicial review can clearly be seen to produce a discernible benefit: *Yates v. Wilson* [1989] HCA 68; (1989) 64 ALJR 140.

(2) Was There a Reviewable Decision?

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

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

39. On the other hand, the Tribunal's conclusion that Mr Bond would not be found to be a fit and proper person to hold a licence was not a determination for which the Act provided and was no more than a step in the Tribunal's reasoning on the way to the finding that the licensees were no longer fit and proper persons to hold their licences.

True it was an essential step in the reasoning by which the Tribunal chose to support its determination concerning the licensees, but this circumstance is not enough to invest the conclusion with the characteristics which would qualify it as a reviewable decision. I would reject the notion accepted in the Federal Court that the finding adverse to Mr Bond was a "decision ... not authorized by" the Act within the meaning of s.5(1)(d). For the reasons already given, the finding was not relevantly a "decision".

(b) The Consequences of Concluding that the Finding
Adverse to the Licensees was a Reviewable Decision

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

41. In passing, before considering the status of the findings of fact, I should state that the Tribunal's rejection of the undertakings and its refusal to impose conditions on the licences may well have constituted independently reviewable decisions falling within [s.3\(2\)\(g\)](#) of the [ADJR Act](#) on the footing that they were "decisions" not to exercise a substantive power, as the Tribunal had power to accept undertakings (Bond Media Limited v. Australian Broadcasting Tribunal) and to impose conditions : s.88(2). On the other hand, it should be noted that the refusal to impose conditions did not relate to specific conditions. However, I propose to review the Tribunal's rejection of the undertakings and its refusal to impose conditions as part of the review of the Tribunal's treatment of s.88(2)(b)(i), itself an element in the review of the adverse finding with respect to the fitness of the licensees, although, strictly speaking, the rejection of the undertakings and the refusal to impose conditions are open to review on the ground contained in [s.5\(2\)\(g\)](#) of the [ADJR Act](#) (upon which the respondents rely) only if they are reviewable decisions. For the sake of argument, I shall assume that they are reviewable decisions.

(c) The Findings of Fact

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

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

44. Powerful considerations support the correctness of this view. The [Administrative Appeals Tribunal Act 1975](#) (Cth) ("the [AAT Act](#)") provides specifically for review on the merits by the Administrative Appeals Tribunal. It is scarcely to be supposed that the Parliament, in so providing, nevertheless intended to invest the Federal Court with a similar jurisdiction under the [ADJR Act](#), for that would be the effect of that Act if it were to confer jurisdiction to review findings of fact generally. Indeed, the concept of judicial review which finds literal expression in the title of the [ADJR Act](#) and in its operative provisions tells against the existence of such a wide jurisdiction. The expression "judicial review", when applied to the traditional review functions of the superior courts in our system of justice,

exercisable by means of the prerogative writs and the grant of declaratory relief and injunction, ordinarily does not extend to findings of fact as such. To expose all findings of fact, or the generality of them, to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government. Amongst other things, such a change would bring in its train difficult questions concerning the extent to which the courts should take account of policy considerations when reviewing the making of findings of fact and the drawing of inferences of fact.

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

(3) Meaning of "Conduct"

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

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

48. So, in *Chan v. Minister for Immigration and Ethnic Affairs* [\[1989\] HCA 62](#); [\(1989\) 63 ALJR 561](#); [87 ALR 412](#), it was possible to review the decision of the delegate for error of law on the basis either that it was a reviewable decision or that the inquiry preceding the making of the decision was reviewable conduct. But it was not precise in that case to describe the decision of the delegate as reviewable conduct, because the decision was not a matter of procedure. Further, in truth it was the decision, not the conduct engaged in for the purpose of making the decision, which was the subject of challenge, and the decision of the delegate can have been reviewable as an improper exercise of power only because the decision itself was reviewable; [s.6\(1\)\(e\)](#) would not permit the review of conduct as an improper exercise of power.

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

50. Some reference must be made to [s.6\(1\)\(f\)](#) which speaks of an error of law being "committed in the course of the conduct". On its face, this provision permits of review of any error of law made, for example, in an inquiry held for the purpose of making a "decision". Such a review of conduct might entail a challenge to a substantive, as

well as a procedural, error of law. However, this ground of review of "conduct" does little to expand the "error of law" ground contained in [s.5\(1\)\(f\)](#) relating to errors of law "involved" in the decision. Ordinarily, if not always, an error of law made in the course of conduct engaged in for the purpose of making a decision would be an error of law involved in the decision itself: see, for example, *Chan v. Minister for Immigration*. This ground of review does not detract, therefore, from the argument that the [ADJR Act](#) maintains a dichotomy between reviewable decisions and reviewable conduct.

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

(4) Was there Reviewable Conduct?

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

53. Of all the matters relied upon by the respondents as reviewable conduct, leaving aside any of those matters reviewable as a decision or attacked as elements in a reviewable decision, only the ruling that the Tribunal was unable to, and did not, make a finding about whether the Premier threatened to harm Mr Bond's interests in Queensland could conceivably give rise to reviewable conduct. It is, however, unnecessary to examine this question independently, as the correctness of the ruling as a matter of law can be considered as an element in the challenge to the decision that the licensees were no longer fit and proper persons to hold their licences.

REVIEW OF THE DECISION THAT THE LICENSEE COMPANIES WERE NO LONGER FIT AND PROPER PERSONS TO HOLD THEIR LICENCES

54. It is convenient, before commencing an examination of the reviewable decision that the licensees were no longer fit and proper persons to hold their licences, to summarize those grounds of challenge raised by the respondents which fall within the scope of the jurisdictional limits of the [ADJR Act](#). First, the respondents contend that the Tribunal misconstrued s.88(2)(b)(i) of the Act. Part of that contention relates to the Tribunal's refusal to accept the undertakings or to impose conditions. Another part concerns the taking into account of alleged irrelevant considerations and the alleged failure to take into account relevant considerations. Secondly, the Tribunal's ruling that it could not make findings as to the Premier's conduct is challenged as an error of law involved in the making of the reviewable decision. Thirdly, the respondents contend that the circumstances surrounding the defamation settlement were irrelevant to the making of the reviewable decision. Fourthly, the findings of fact are challenged as, it is said, errors of law involved in the reviewable decision. The crucial findings in this context are the finding as to Mr Bond's motivation in making the defamation settlement (finding No. 1, attacked through the second challenge mentioned above), the finding that Mr Bond deliberately misled the 1986 inquiry (finding No. 3), and the finding that Mr Bond threatened to use his television staff to gather information and to expose a competitor (finding No. 5). Those are the crucial findings because, unless the challenge to finding No. 1 is sustained, then the challenges to the subsidiary findings relating to the defamation settlement (findings Nos 2 and 4, along with the finding regarding improper conduct described as the fifth "decision") must fail. Unless the challenge to finding No. 3 is sustained, the challenge to finding No. 5 must fail, since finding No. 5 was based largely upon issues of credit relating to finding No. 3.

(1) Construction of s.88(2)(b)(i)

(a) The Decision of the Federal Court so far as it Related to s.88(2)(b)(i)

55. The Federal Court held that the Tribunal's decision "involved" two errors of law and so was subject to review under s.5(1)(f). The Federal Court concluded, first, that "the Tribunal fell into a serious error of law in construing and applying sub-s.88(2) of the Act". As their Honours put it, the Tribunal "went astray by equating the fitness and propriety of Mr Bond (or lack of it) with that of the licensees" and then failing "to look at other material before it

which required consideration if its decision as to the supervening lack of fitness and propriety of the licensees was not to be regarded as perverse". The "other material" was in the form of evidence (a) that the boards of the licensee companies operated in an entirely proper manner and discharged their duties in accordance with their obligations, and (b) that Mr Bond did not interfere with the performance by directors and executives of the licensee companies of their duties and responsibilities. The Tribunal did not refer to this evidence in its reasons.

56. Further, the Court considered that the Tribunal's decision that the undertakings did not address the fundamental issues in the finding as to the fitness and propriety of Mr Bond was misconceived. Their Honours considered that the undertakings went to the fitness of the licensees in that, had the undertakings come into effect, Mr Bond would have distanced himself from the licensees and he would have been distanced from them by the interposition of Dallhold, BCH and Bond Media. The Court also pointed to the Tribunal's failure to consider the past and continuing compliance by the licensee companies with their obligations under the Act.

57. Thus, the Court concluded that the Tribunal took too narrow a view of the relevant considerations to be taken into account in addressing the question for determination under s.88(2). The error of law thus lay "in construing what was involved if, within the meaning of sub-s.88(2) of the Act, (the Tribunal) was to be satisfied that each of the licensees was no longer a fit and proper person to hold its licence or licences".

(b) The Decision of the Tribunal
so far as it Related to s.88(2)(b)(i)

58. Having read and re-read the Tribunal's statement of its reasons for making its findings adverse to Mr Bond and the licensee companies, I have come to the conclusion that the Full Court has misread or misunderstood some critical comments made by the Tribunal. The Tribunal said:

"Mr Bond remains, by virtue of his association with the licensee companies, the only relevant individual in the sense that consideration of his fitness and propriety is relevant to the question of fitness and propriety of the licensees."

This statement follows immediately after a paragraph in which the Tribunal refers specifically to findings made in its Decision on Facts of 7 April 1989 in relation to particular individuals. Such findings were most adverse to Mr Bond and Mr Aspinall. There were also findings in relation to other senior executives of the Bond companies. The paragraph to which I have referred goes on to say in effect that, notwithstanding the findings made against Mr Aspinall, his conduct was not relevant to the Tribunal's consideration of the fitness of the licensee companies.

59. Read in this context, the following statement that Mr Bond was "the only relevant individual in the sense that consideration of his fitness and propriety is relevant to the question of fitness and propriety of the licensees" amounts to no more than a conclusion that, if the licensees were to be found unfit by reference to the unfitness of persons associated with the licensees, Mr Bond's unfitness alone was relevant. Unfortunately the Federal Court read the statement as if it were an assertion that the meritorious qualities of persons associated with the licensee companies other than Mr Bond were not relevant to the issue of fitness of those companies. Plainly it was not such an assertion.

60. True it is that the Tribunal did not refer to or expressly take into account the character, reputation and performance of other directors of the respondent companies, especially the licensee companies. Nor did the Tribunal refer to, or expressly take into account, the history of compliance by the licensee companies and their directors with their obligations under the Act. However, it is perfectly clear that the Tribunal was not proceeding on the footing that these matters were irrelevant as a matter of law to the issue of the licensees' fitness. What the Tribunal found was that, by reason of his capacity to control the composition of the boards of directors of the licensee companies and his position as a key executive within the corporate structure, enabling him "to initiate and involve himself in management decisions which affect(ed) the broadcasting activities within the group", Mr Bond's unfitness compelled the conclusion as a matter of fact that each of the licensees was unfit.

61. That this is so emerges from the Tribunal's reasons for refusing to accept the undertakings at that stage of the proceedings. The Tribunal summarized the undertakings offered by Mr Bond in this way:

"Mr Bond undertakes to ensure within a specified time frame that a majority of the directors of Bond Media Ltd, as well as its Chairman, are persons who are not otherwise associated with him, Dallhold Investments Pty Ltd or Bond Corporation Holdings Ltd. He also undertakes not to use for his purposes or for any commercial purpose the staff or any other resources of Bond Media licensees, other than on usual commercial terms. Finally, he undertakes not to interfere or seek to interfere with the selection and/or presentation of any news and current affairs programs of any of the Bond Media licensees or cause Bond Media to breach the Tribunal's Program Standards."

The Tribunal dealt with Mr Bond's undertakings in the following paragraphs:

"The first undertaking does not significantly effect (sic) the control Mr Bond has by virtue of his shareholding. The lack of association with Mr Bond and the two corporations he controls with the proposed restructured board does not avoid the fact that Mr Bond by virtue of his shareholding remains in control of the company. Apart from this we have little confidence in view of the evidence we have heard in this Inquiry in the notion that Mr Bond would not ultimately prevail in any significant area where his overall interests were involved.

In relation to the second undertaking, our findings went only to Mr Bond's threat to take such action ... This undertaking, in terms of addressing that issue, is not relevant.

There being no finding against Mr Bond of interfering in the manner envisaged in the final undertaking, it is likewise not relevant."

62. In the face of these expressed reasons for rejecting the undertakings, it is not to the point to suggest, as the Federal Court did, that the Tribunal was mistaken in treating the undertakings as going only to the fitness of Mr Bond and as having no relevance as a matter of law to the fitness of the licensees. Their Honours seized upon the Tribunal's statement, "These undertakings do not address the concerns we have about Mr Bond's behaviour", as if it evidenced the acceptance and application of an immutable proposition of law that once the key executive was shown to be unfit then the licensee itself must necessarily be unfit. That was not so. I deal with the undertakings and the refusal to impose conditions at greater length below.

(c) The Proper Construction and Application of s.88(2)(b)(i)

63. The Federal Court appears to have interpreted s.88(2)(b)(i) in such a way that the Tribunal can never be justified in finding that a licensee is no longer a fit and proper person to hold its licence by reference alone to a finding that the person who is in a position to control the composition of its board of directors would be unfit to hold the licence. However, for the reasons already given, it is not a proposition on which the Tribunal's finding with respect to the licensees depends.

64. In the light of the contest which has taken place in this case, it is appropriate that I should say something about the width of the discretion given to the Tribunal by s.88(2)(b)(i). First, the Tribunal must approach an inquiry,

which has in contemplation the possible exercise of the power of suspension or revocation of a commercial licence on the ground that the licensee is no longer a fit and proper person to hold the licence, on the footing that the licensee was found to be fit and proper when the licence was granted. Thus, the reference to "no longer" looks generally to some alteration in the perception of the fitness and propriety of the licensee occurring since the licence was granted or to some supervening event or circumstance relating to such fitness and propriety. The interpretation of the expression "no longer" can conveniently be considered in more detail in connection with the relevance of the defamation settlement. Secondly, the statutory concept of "fit and proper person to hold the licence", which is undefined, takes account of qualities and characteristics of the licensee apart from the matters mentioned in s.88(2)(a), (b)(ii) and (c). Thus, the concept comprehends matters other than the financial, technical and management capabilities necessary to provide an adequate and comprehensive service, lack of which is a ground for suspension or revocation under s.88(2)(b)(ii). Thirdly, though fitness and propriety are necessarily related to the holding of the licensee's commercial licence and to the provision of a broadcasting service pursuant to that licence (see *Re New Broadcasting Ltd.* (1987) [12 ALD 1](#), at pp 8-9), the concept should not be narrowly construed or confined. It must extend to any aspect of fitness and propriety that is relevant to the public interest, because the Tribunal's power to suspend or revoke commercial licences is only exercisable "if it appears to the Tribunal that it is advisable in the public interest to do so, having regard only to the ... matters or circumstances" set out in pars (a), (b) and (c) of s.88(2).

65. Some indication of the breadth of the content of the concept may also be gathered from the fact that it is a purpose of the Act to ensure that commercial broadcasting is conducted in the interests of the public: *Reg. v. Australian Broadcasting Tribunal; Ex parte 2HD Pty. Ltd.* [\[1979\] HCA 62](#); [\(1979\) 144 CLR 45](#), at p 53. The provisions of the Act dealing with the grant, renewal, suspension and revocation of licences, the limitations on the ownership of shares, the determination of programme standards and the extensive role given to the Tribunal in connection with these matters are all designed to secure the attainment of that purpose. Commercial broadcasting is a very important medium in the communication of information and ideas. Moreover, a commercial broadcasting licence is a valuable privilege which confers on the licensee the capacity to influence public opinion and public values. For this reason, if for no other, a licensee has a responsibility to exercise the power conferred by the licence with a due regard to proper standards of conduct and a responsibility not to abuse the privilege which it enjoys. Possession of a licence or the exercise of the privilege which it confers has been described "as in the nature of a public trust for the benefit of all members of our society": see the Australian Report of the Royal Commission on Television, (1954), at p 144; Second Reading Speech on the Broadcasting and Television Bill 1956 (Cth) by the Honourable C.W. Davidson, Postmaster-General, House of Representatives Parliamentary Debates (Hansard), 19 April 1956, p 1536.

66. A licensee which is a fit and proper person in the context of s.88(2)(b)(i) must have an appreciation of those responsibilities and must discharge them. Conversely, a licensee which lacks a proper appreciation of those responsibilities or does not discharge them is not, or may be adjudged not to be, a fit and proper person.

67. In this case, the Tribunal was bound to satisfy itself that QTL or one of the other three licensees was no longer a fit and proper person before it could exercise the statutory powers under s.88. The Tribunal arrived at that state of satisfaction by a process of reasoning based on Mr Bond's serious misconduct in various respects which involved one licensee, QTL, in serious misconduct. Mr Bond's relationship with the licensee companies was such that, in the judgment of the Tribunal, they were not insulated from his participation in decision-making and thus from the possible impact of his malign influence.

68. The Federal Court seems to have thought that, no matter how great the capacity for control of a licensee exercisable by a person with relevantly undesirable propensities, s.88(2)(b)(i) does not authorize the making, without regard to the character and performance of the board of directors of the licensee and of those persons who comprise its management, of a finding that the licensee is no longer a fit and proper person to hold its licence. This proposition cannot be sustained either as a matter of law or by way of interpretation of s.88(2). Obviously there is an array of potential fact situations. The degree of an individual's capacity for control may not be so great as to warrant an inference that his character should be identified automatically with that of the licensee; in that event it would be necessary to look to the character and performance of the directors and the management. In another case, where the capacity of the individual for control of the licensee is great, the inference may be justified without

examining the character and performance of the directors and the management of the licensee. Especially is this so when it is established that the person having the capacity to control participates in the decision-making processes of a licensee and procures the making of reprehensible decisions which are designed to enhance and protect his own interests. The present case is just such a case and it has the added and important element that the licensees are part of an important group of companies owning television and radio licences, with a large stake in the Australian communications industry, Mr Bond having the capacity to control them through his capacity to control the composition of the board of directors of each company in the group.

69. The respondents suggested further grounds upon which it was said that the Tribunal had erred. First, it was contended that the Tribunal had applied a wrong test by considering the worthiness of the licensees to hold the privileges and benefits of a licence, rather than their fitness and propriety as licensees. That submission must fail, since, as I have explained, the worthiness of a person to receive the benefits of a particular licence is directly relevant to the concept of fitness and propriety as it relates to the licence in question. The respondents also contended that the presence of provisions elsewhere in the Act expressly requiring consideration of the fitness and propriety of persons other than a licensee is an indication that such a consideration was regarded by the legislature as irrelevant in the context of s.88(2): see ss.92F and 92FAA. But if those sections do provide such an indication, it is not sufficient to displace the general approach to the construction of s.88(2) which I have explained.

70. It follows that the Federal Court was itself in error in two respects. First, it erred in placing an incorrect interpretation on the reasons given by the Tribunal for making its finding that the licensee companies were no longer fit and proper persons to hold their commercial licences. Accordingly, there was no basis for the first error of law which the Federal Court thought that it had detected - the misconstruction and misapplication of s.88(2)(b)(i). Secondly, the Federal Court was in error in construing s.88(2)(b)(i) as it did.

(d) The Rejection of the Undertakings

71. Once it is accepted that the Tribunal held that the undertakings did not address its concerns about Mr Bond's behaviour for the reasons which I explained earlier and, further, that the Tribunal had little confidence that Mr Bond would not prevail "in any significant area where his overall interests were involved", there is no ground for concluding that the rejection of the undertakings involved any error of law or that the Tribunal, in rejecting the undertakings, failed to take a relevant consideration into account ([s.5\(1\)\(e\)](#) and (2)(b) of the [ADJR Act](#)), or that the rejection was "so unreasonable that no reasonable person could have so exercised the (relevant) power": [s.5\(1\)\(e\)](#) and (2)(g).

(e) Refusal to Impose Conditions

72. The Tribunal declined to impose conditions before making its determination under s.88(2)(b)(i); in declining so to do the Tribunal did not have specific conditions under consideration. It was not suggested that the Tribunal was bound to impose conditions before proceeding to a determination under s.88(2)(b)(i), only that the Tribunal had a discretion and that the exercise of this discretion was "so unreasonable that no reasonable person could have so exercised the (relevant) power": see [s.5\(2\)\(g\)](#).

73. It is important to note that the Tribunal may exercise its power to suspend or revoke a licence, if it considers it advisable to do so in the public interest, once it is satisfied of one of the matters mentioned in s.88(2)(a), (b) and (c). Paragraph (c) refers to non-compliance with a condition. It follows that the Tribunal may exercise its powers under the section if it is satisfied that a condition of the licence has been broken, without considering first whether it should impose a further condition on the licence. Correspondingly, the Tribunal may exercise its powers if it is satisfied of any of the matters mentioned in pars (a), (b)(i) and (b)(ii) without considering first whether it will impose conditions.

74. It was for the Tribunal to decide whether it would consider the imposition of conditions before proceeding to a determination of the fitness and propriety issue. As a matter of logic and common sense there is much to be said in favour of the course taken by the Tribunal, that is, deciding, first, the fitness and propriety issue and then, in the light of that decision, deciding whether the public interest called for the imposition of conditions, suspension, revocation or some other action. A determination of what would be appropriate and sufficient conditions could not

sensibly be made in the circumstances of this case until a finding was made as to the fitness and propriety of the licensees.

75. In the result the Tribunal's refusal to impose conditions on the licences at the stage of the proceedings when it was asked to consider doing so was not unreasonable within the meaning of [s.5\(2\)\(g\)](#) of the [ADJR Act](#).

(2) The Decision of the Federal Court so far as
it Related to the Tribunal's Alleged Failure
to Make Findings as to the Premier's Conduct

76. The Federal Court held that the Tribunal sought to determine the nature of the transaction involving the settlement of the defamation action without inquiring into the purpose or motives of the Premier in reaching the settlement and that this was an impermissible approach to the question. Their Honours said:

"It was impossible both in logic and common sense for the Tribunal to determine the nature of the transaction involved in the settlement of the defamation claim without making findings as to what was said and done by each person involved in the settlement negotiations on both sides of the record. By taking the course which it did, the Tribunal necessarily prevented itself from making any finding to the effect that the sum of \$400,000 was extorted or solicited by the Premier."

77. As the decision of the Tribunal does not state the Tribunal's ruling on this matter, let alone give reasons for that ruling, it is necessary to refer to the course of proceedings before the Tribunal. In the course of argument, after evidence had been given by the witnesses including the Premier, Mr Burbidge Q.C., counsel assisting the inquiry, submitted that, as the Premier was not amenable to the jurisdiction of the Tribunal in the sense that it could not pronounce formal findings against him, the Tribunal should not make any finding as to the motives of the Premier or as to the proper inferences to be drawn from what he did. Mr Shand Q.C. responded to this submission by contending that, if the Tribunal were to accept the submission, then it would disable itself from determining the nature of the transaction and make it impossible to establish any foundation for forming a judgment about Mr Bond's conduct. Ultimately the Tribunal, seemingly accepting Mr Burbidge's submission, ruled that while it could "accept the facts of what went on", it could not move "to an adverse finding against" the Premier. The Chairman made various statements about the effect of the ruling which were by no means uniformly consistent. At one stage the Tribunal confirmed that it could make findings only by reference to what Mr Bond thought the transaction was.

78. If the Tribunal approached the matter on the footing that, because the Premier was not amenable to its jurisdiction, it could not make findings as to the nature of the transaction - and it is by no means clear that the Tribunal accepted that limitation upon its function - then the Tribunal was in error and that error was an error of law in that the Tribunal took too narrow a view of its own jurisdiction or powers. On the assumption that there was such an error of law, the question is whether that error vitiated the decision that the licensees were no longer fit and proper persons; did that decision involve an error of law within the meaning of [s.5\(1\)\(f\)](#) of the [ADJR Act](#)?

79. The argument for the respondents, reflecting the view of the Federal Court, is that the error vitiated the findings of fact made in relation to the settlement of the defamation action and, because the findings with respect to Mr Bond's fitness and that of the licensees stemmed in large measure from the findings made in relation to the defamation settlement, the ultimate decision itself involved an error of law. More particularly, the respondents contend that, unless findings were made as to the nature of the transaction and what was said and done, it was impossible to make a judgment about the propriety of Mr Bond's conduct. This, it is urged, resulted in the Tribunal's failure to take into account a relevant consideration ([s.5\(2\)\(b\)](#)) - the nature of the transaction - and a denial of natural justice ([s.5\(1\)\(a\)](#)).

80. A decision does not "involve" an error of law unless the error is material to the decision in the sense that it

contributes to it so that, but for the error, the decision would have been, or might have been, different. The critical question on this aspect of the case is whether, but for the alleged error of law on which the respondents rely, the decision might have been different by reason of the possibility that the Tribunal would not have made the findings of fact relating to the settlement in the terms in which they were made.

81. The respondents submitted by way of illustration that, had the Tribunal found that the true nature of the transaction was that the Premier threatened Mr Bond's interests in Queensland and solicited or extorted a bribe, that finding would have put a different complexion on the matter in that a less serious view might have been taken of Mr Bond's conduct. The submission is misconceived. Neither Mr Burbidge nor counsel for the respondents contended that the Tribunal should make a finding that the Premier sought a bribe from Mr Bond. It was not in the interests of the respondents to seek such a finding because the testimony of the Premier and Mr Bond, who were the only persons present at their conversations, was to the effect that their discussions were limited to the negotiation of what each person considered to be a proper settlement of the action. They each denied that there had been any importuning by the Premier. In the absence of any submission that the Tribunal should reject that evidence and find on other evidence that the Premier solicited a bribe or made a threat, it would not have been proper for the Tribunal to have made a finding of the kind suggested. In these circumstances, there is no foundation for the contention that, but for the alleged error of law, there was a possibility that the Tribunal might not have made the critical findings of fact.

82. It follows that the Tribunal did not fail to take into account a relevant consideration. Nor did it deny natural justice to the respondents by depriving them of the opportunity of calling evidence or making submissions. There was an element of obscurity arising from a want of uniformity in the Tribunal's statements as to the effect of its ruling but I am left with the strong impression that counsel for the respondents understood what was decided, namely, that Mr Bond's conduct would be assessed by reference to what he thought the transaction was and that is how the Tribunal dealt with the matter. Accordingly, the Federal Court was wrong in concluding that the Tribunal's finding that the payment of \$400,000 was improper was vitiated by error.

(3) The Relevance of the Defamation Settlement

83. The respondents contend that the settlement was an irrelevant consideration ([s.5\(2\)\(a\)](#) of the [ADJR Act](#)) to the Tribunal's determination of the fitness and propriety issue and that, accordingly, the decision on that issue was vitiated. The argument is that, because the Tribunal had inquired into the defamation settlement in 1986 and had declined to draw any inference adverse to Mr Bond or the licensee QTL, the Tribunal was not entitled to reopen that decision. The argument rests substantially on the proposition that in the context of suspension or revocation of a current licence the concept "is no longer a fit and proper person" signifies a licensee which, though fit and proper at the time of grant or renewal, as the case may be, of the licence, has ceased to be fit and proper by reason of supervening circumstances or events. The argument finds textual support in the relationship of the words "no longer" with the expression "fit and proper person"; "no longer" does not govern the word "satisfied". Even so, the consequences which would follow from the adoption of this interpretation are so startling that it should not be accepted. It would mean that the Tribunal could not exercise its powers under the section in the case of a licensee which is not fit and proper or lacks the capabilities mentioned in s.88(2)(b)(ii) where that lack of fitness or capability existed at the beginning of the licence period and was not known at that time because the licensee had taken steps to conceal or disguise it. It cannot be supposed that Parliament intended that the Tribunal's powers should be restricted in this way. The preferable interpretation is that par.(b)(i) and (ii) may be satisfied even if the Tribunal finds that the licensee lacks the relevant fitness or capabilities during the currency of the licence by reason only of conduct or circumstances existing before the commencement of the licence period.

84. Of course, the Tribunal should not reopen a previous decision unless there is justification for reopening in the form of new and material information coming to the attention of the Tribunal. Stability in the industry and the standing of the Tribunal itself require that it should respect its own decisions. On the other hand, the interests of the public require that the Tribunal should be at liberty to consider the reopening of an issue examined and determined in an earlier decision when new and material information comes to light which suggests that the decision was erroneous or made in ignorance of relevant facts. The comments made by Mr Bond on the television programme "A Current Affair" certainly provided a justification for such a reopening.

85. Accordingly, the settlement of the defamation action was not an irrelevant consideration.

(4) Review of the Findings of Fact

(a) Grounds of Review

86. As I have explained, findings of fact and inferences of fact are not reviewable under the [ADJR Act](#) unless jurisdiction is enlivened by the review of a "decision" or "conduct". Findings of fact, including inferences, may be reviewed under the [ADJR Act](#) for error of law ([s.5\(1\)\(f\)](#)) and on the ground "that there was no evidence or other material to justify the making of the decision" ([s.5\(1\)\(h\)](#)). It is not necessary to consider the content of the ground in [s.5\(1\)\(j\)](#), "that the decision was otherwise contrary to law".

87. The question whether there is any evidence of a particular fact is a question of law: *McPhee v. S. Bennett Ltd.* ([1934](#)) [52 WN\(N.S.W.\) 8](#), at p 9; *The Australian Gas Light Co. v. The Valuer-General* ([1940](#)) [40 SR\(NSW\) 126](#), at pp 137-138. Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law: *Australian Gas Light*, at pp 137-138; *Hope v. Bathurst City Council* [[1980](#)] [HCA 16](#); ([1980](#)) [144 CLR 1](#), at pp 8-9. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: *Federal Commissioner of Taxation v. Broken Hill South Ltd.* [[1941](#)] [HCA 33](#); [[1941](#)] [HCA 33](#); ([1941](#)) [65 CLR 150](#), at pp 155, 157, 160. So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v. Maryborough Mining Warden* [[1975](#)] [HCA 17](#); ([1975](#)) [132 CLR 473](#), at pp 481, 483.

88. But it is said that "(t)here is no error of law simply in making a wrong finding of fact": *Waterford v. The Commonwealth* [[1987](#)] [HCA 25](#); ([1987](#)) [163 CLR 54](#), per Brennan J. at p 77. Similarly, Menzies J. observed in *Reg. v. The District Court; Ex parte White* [[1966](#)] [HCA 69](#); ([1966](#)) [116 CLR 644](#), at p 654:

"Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law."

89. Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.

90. On the other hand, there are statements in the English cases which support a "no sufficient evidence" test in the context of judicial review of findings of fact: see, for example, *Reg. v. Governor of Brixton Prison; Ex parte Armah* ([1968](#)) [AC 192](#), at pp 235, 257; but cf. pp 241, 263. It remains to be seen whether these statements convey any more than a "no probative evidence" test. So far no occasion has arisen to determine whether this is the case and, if so, whether the statements are to be seen as expressing what is or should be the law of Australia on the topic. There are also statements in the English cases which suggest that findings and inferences are reviewable for error of law on the ground that they could not be reasonably made on the evidence or reasonably drawn from the primary facts: *Edwards (Inspector of Taxes) v. Bairstow* [[1955](#)] [UKHL 3](#); ([1956](#)) [AC 14](#), at p 36; *Cooper v. Stubbs* (1925) 2 KB 753, at p 772; *British Launderers' Research Association v. Borough of Hendon Rating Authority* (1949) 1 KB 462, at pp 471-472; *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* (1965) 1 WLR 1320, at p 1326; (1965) 3 All ER 371, at p 374. Further, in *Mahon v. Air New Zealand* [[1983](#)] [UKPC 29](#); ([1984](#)) [AC 808](#), the Judicial Committee stated (at p 821) that natural justice requires that "the decision to make (a) finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory". These statements may be traced back to the observations of Diplock L.J. in *Reg. v. Deputy Industrial Injuries Commissioner; Ex parte Moore* (1965) 1 QB 456, at p 488; see also *Minister for Immigration and Ethnic Affairs v. Pochi* [[1980](#)] [FCA 85](#); ([1980](#)) [44 FLR 41](#), per Deane J. at pp 67-68; [[1980](#)] [FCA 85](#); [31 ALR 666](#), at pp 689-690 (an appeal from a decision of the Administrative Appeals Tribunal under the [AAT Act](#)). The approach adopted in

these cases has not so far been accepted by this Court.

91. The foregoing brief summary of the authorities relating to review for error of law is by no means decisive of the interpretation of the grounds of review in the [ADJR Act](#). It does, however, provide part of the context by reference to which one must determine the scope of the relevant grounds of review contained in that Act. Moreover, the content of the "error of law" ground of review in s.5(1)(f) is necessarily influenced by the scope and purpose of the [ADJR Act](#) as an element in the statutory scheme of review constituted by that Act and the [AAT Act](#). Two elements of that scheme are significant for present purposes. The first is that the [AAT Act](#) alone provides for review on the merits; the second is that the two Acts draw a sharp distinction between errors of fact and errors of law. These two elements provide strong support for the view that, in general, the concept of "error of law" in [s.5\(1\)\(f\)](#) is intended to reflect the content of that expression as it was understood at common law in this country before 1977. Of course, unlike the antecedent common law, [s.5\(1\)\(f\)](#) does not require that the error of law appear on the face of the record.

92. The ground of review in [s.5\(1\)\(h\)](#),

"that there was no evidence or other material to justify the making of the decision",

must be read with [s.5\(3\)](#). That sub-section provides:

"The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or
(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

93. The effect of [s.5\(3\)](#) is to limit severely the area of operation of the ground of review in [s.5\(1\)\(h\)](#). If we put to one side the situation to which par.(b) is directed (proof of the non-existence of a fact critical to the making of the decision), the opening part of par.(a) restricts the "no evidence" ground to decisions in respect of which the decision-maker was required by law to reach that decision only if a particular matter was established. In such a case the ground of review is that there was "no evidence or other material ... from which he could reasonably be satisfied that the matter was established".

94. As the respondents do not seek to bring this case within [s.5\(3\)\(a\)](#) or (b), the ground of review in [s.5\(1\)\(h\)](#) has no direct application here. But the presence of [s.5\(3\)](#) tells against an expansive interpretation of [s.5\(1\)\(f\)](#). Indeed, it might be argued from the presence of [s.5\(1\)\(h\)](#) and (3) that they constitute a definitive and exhaustive statement of the "no evidence" ground of review for the purpose of [s.5](#), thereby excluding such a ground from the concept of "error of law" in [s.5\(1\)\(f\)](#). However, such a result would verge upon the extreme and would pay scant attention to the traditional common law principle that an absence of evidence to sustain a finding or inference of fact gives rise to an error of law. The better view, one which seeks to harmonize the two grounds of review, is to treat "error of law" in [s.5\(1\)\(f\)](#) as embracing the "no evidence" ground as it was accepted and applied in Australia before the enactment of the [ADJR Act](#) and to treat the "no evidence" ground in [s.5\(1\)\(h\)](#), as elucidated in [s.5\(3\)](#), as expanding that ground of review in the applications for which pars (a) and (b) of [s.5\(3\)](#) make provision. Within the area of operation of par.(a) it is enough to show an absence of evidence or material from which the decision-maker could reasonably be satisfied that the particular matter was established, that being a lesser burden than that of showing an absence of evidence (or material) to support the decision. This interpretation of the two grounds of review enables

one to say that [s.5\(1\)\(h\)](#) and (3)(a) have the effect of overcoming to a limited extent and in a limited area the restrictions on the traditional "no evidence" ground considered by Barwick C.J. and Gibbs J. in *Sinclair v. Maryborough Mining Warden*, at pp 481, 483.

95. The Federal Court has expressed its agreement with statements made by the House of Lords to the effect that courts exercising judicial review should leave the finding of facts to the public body appointed for that purpose by the legislature except where the public body acts "perversely": see *Reg. v. Hillingdon London Borough Council*; *Ex parte Puhlhofer* [\[1986\] UKHL 1](#); [\(1986\) AC 484](#), at pp 510, 518; see, for example, *Broadbridge v. Stammers* [\(1987\) 16 FCR 296](#), at pp 300-301; *Apthorpe v. Repatriation Commission* [\(1987\) 77 ALR 42](#), at pp 53-54. In this context, "perversely" signifies acting without any probative evidence: see *Television Capricornia Pty. Ltd. v. Australian Broadcasting Tribunal* (1986) [13 FCR 511](#); *Smith v. General Motor Cab Company Limited* [\(1911\) AC 188](#), at p 190. Thus, it has been held that the [ADJR Act](#) does not permit general review of findings of fact, in the absence of error of law: *Borkovic v. Minister for Immigration* [\(1981\) 39 ALR 186](#), at p 189. In particular, in *Western Television Ltd. v. Australian Broadcasting Tribunal* [\(1986\) 12 FCR 414](#), Pincus J. held (at p 429) that the presence of [s.5\(1\)\(h\)](#) and (3) meant that an error of law within the meaning of [s.5\(1\)\(f\)](#) could not include a mere lack of evidence, as distinct from a complete absence of evidence.

96. However, in several decisions it has been suggested that findings of fact which are unreasonable or arbitrary may be reviewed under [s.5\(1\)\(e\)](#) and (2)(a) and (b): see *Singh v. Minister for Immigration and Ethnic Affairs* [\(1987\) 15 FCR 4](#), at p 10; *Independent F.M. Radio Pty. Limited v. Australian Broadcasting Tribunal* (unreported, Federal Court, 21 April 1989); *Minister for Immigration, Local Government and Ethnic Affairs v. Pashmforoosh* (unreported, Federal Court, 28 June 1989). In the last-mentioned case, Davies, Burchett and Lee JJ. said (at p 11):

"Thus, decisions may be set aside because, being insufficiently supported by reason, they appear to be an improper exercise of the power conferred or arbitrary or because there was no evidence or other material sufficient to justify the making of the decision or the decision was so unreasonable that no reasonable person could have so exercised the power. The making of, or failure to make, a particular finding of fact in the course of the reasoning process may equally be attacked on any such ground. The taking into account of a fact found unreasonably or the failure to take into account a fact that a reasonable decision-maker would have found and taken into account provides a ground of review under [ss.5\(1\)\(e\)](#) and [5\(2\)\(a\)](#) and (b) of the [ADJR Act](#)." (emphasis added)

97. This statement is unobjectionable to the extent that a finding of fact constitutes a "decision" such that it can be reviewed for unreasonableness and on other appropriate grounds. But if the finding does not constitute a "decision", it is beyond review independently of such a "decision". In accordance with what I have already said, a finding of fact will then be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts, which amounts to the same thing.

(b) The Findings of Fact

98. My conclusion that the defamation settlement was not an irrelevant consideration and that there was no basis for setting aside the finding of fact that Mr Bond agreed to pay \$400,000 to the Premier in settlement of his claim, not believing that the sum was justified by that claim alone but believing that, if he did not settle, the Premier might harm his interests in Queensland, means that the Federal Court was not justified in setting aside the further findings of fact which depended on that finding. The challenge to the findings about improper conduct (the finding described as the fifth "decision"), attempting to disguise the amount of the settlement (finding No. 2), and giving misleading evidence and deliberately giving false evidence (findings Nos 3 and 4) were all related to the primary

finding of fact (finding No. 1) concerning Mr Bond's motivation in agreeing to settle the claim. And the Federal Court interfered with the consequential findings because it set aside the primary finding. Once the attack upon finding No. 1 fails, so too do the attacks upon findings Nos 2 and 4 and the fifth "decision"; Mr Bond's evidence (which was rejected) was clearly inconsistent with finding No. 1.

(i) The Finding that Mr Bond Deliberately Gave
Misleading Evidence to the 1986 Inquiry

99. However, the respondents also challenged the finding that Mr Bond deliberately gave misleading evidence to the 1986 inquiry (finding No. 3) on the ground that the information then supplied was limited to a response to matters then raised by the Tribunal.

100. The finding made on 7 April 1989 that Mr Bond deliberately gave misleading evidence to the 1986 inquiry in relation to the events of January and February 1986 and in relation to the nature of the meeting with the Premier on 17 February 1986 related to an issue which was formulated by the Tribunal in these terms:

"ISSUE 2

The level of candour by the licensee at this Inquiry
and during the QTQ Inquiry."

The history of the events leading to the formulation of this issue in the 1989 inquiry began on 5 August 1986 when Mr Warburton, the then Leader of the Opposition in Queensland, made allegations concerning the propriety of the defamation settlement and suggested that it involved the payment of a bribe to the Premier. The Tribunal, by letter dated 29 August 1986, wrote to the solicitors for Mr Bond and QTL in these terms:

"The Tribunal therefore asks that your client provide a
comprehensive response dealing with all matters relevant to
the settlement, in April 1986, of the defamation action
brought by the Premier of Queensland against QTQ."

On 9 October 1986 the Tribunal, in the course of holding an inquiry into the renewal of the QTQ licence, stated:

"The purpose of the hearing will be to deal with
matters left outstanding between the Australian Labor Party
and the licensee."

101. In his statement to the 1986 inquiry Mr Bond said that he saw the Premier on 17 February 1986 and endeavoured to negotiate a reduction of the figure of \$400,000 without success and told the Premier that that settlement was subject to ratification by the board of BCH. The evidence given at that inquiry was that the agreement to pay \$400,000 to the Premier was only finally determined in late March or early April 1986. Mr Aspinall gave evidence to the 1986 inquiry that the deed of settlement was prepared in March. Moreover, Mr Lodge, the solicitor for the Bond interests, in evidence at that inquiry stated that in his opinion the damages for the defamation action would be between \$100,000 and \$300,000.

102. The effect of this evidence led the Tribunal in 1986 to find the settlement to be commercially justifiable in point of amount, that it was made in March or April 1986 and that it did not involve any improper payment to the Premier.

103. At the 1989 inquiry it emerged that on 17 October 1985 a discussion took place between the Premier and Mr Bond in which the sum of \$400,000 was mentioned as a settlement figure. At a further meeting on 18 December 1985, according to the Premier, the two of them "shook hands" on the figure of \$400,000. On 2 January 1986 Mr Aspinall sent a telex to the solicitors for QTL's insurers instructing them to prepare, in conjunction with the Premier's solicitors, an agreement for the settlement of the action for that amount, on terms that there should be no disclosure. The instruction stated:

"(T)he non-disclosure of settlement, is most vital".

The Tribunal refused to accept evidence given by Mr Bond, acquiesced in by Mr Aspinall, that Mr Aspinall had misconceived his instruction from Mr Bond. The Tribunal held that the telex reflected a concluded agreement which had been made on 18 December 1985.

104. At the 1989 inquiry further evidence was given of a third and final meeting on 17 February between the Premier and Mr Bond in which Mr Bond proposed to pay \$50,000 in cash and \$350,000 by way of non-repayable loan or by a payment overseas or a property transaction involving an excessive price payment of \$350,000. The Premier rejected this proposal in a letter dated 19 February 1986 in which he referred to the settlement as having been negotiated in November and confirmed in mid-December, followed by the delivery on 10 January of a draft release and letter of apology. In this letter the Premier called for finalization of the settlement without delay. On 26 February a Mr Pearce replied on behalf of Mr Bond, stating:

"Please be assured that Mr Bond is as anxious as you to resolve the position however is not prepared to put both parties in a position where they will be exposed to allegations of improper conduct.

He assumed that it would be understood that any agreed settlement would be subject to a satisfactory legal position. The advice we have received expresses grave concern and indicates that the proposed method of payment is fraught with danger."

There was also evidence before the 1989 inquiry that Mr Lodge considered that \$50,000 was the maximum sum that could be attributed to the defamation settlement. In this respect, the Tribunal said:

"In finding that the Tribunal was misled by the earlier figure, while we think this may have been on the balance of probabilities, intentional, we consider that a higher degree of proof would be required for such a finding to be made in this case."

105. By way of answer to the suggestion that Mr Bond deliberately misled the 1986 inquiry in two respects, the respondents submit that all Mr Bond and Mr Aspinall did was to respond to the Tribunal's request for relevant information relating to the allegation made by Mr Warburton, namely, that the settlement involved a bribe. The respondents further submit that neither Mr Bond nor QTL had a duty to make full disclosure in 1986 of other information. The two respects in which it was claimed that the 1986 inquiry was misled were:

- (1) the giving of misleading evidence concerning the date of the agreement for settlement; and
- (2) the non-disclosure of the attempts by Mr Bond to disguise the amount of the settlement.

106. The Tribunal found that Mr Aspinall's evidence in 1986 about the drafting of the deed in March was misleading and also found that his assertions in 1989 that he did not mention the January deed because it did not proceed were untrue. In the result the Tribunal found that Mr Bond and Mr Aspinall misled the Tribunal with a view to creating the impression that the agreement was finalized in a manner contrary to the true facts.

107. In this respect, the Tribunal said:

"Bond's counsel submitted that the licensee had approached the Brisbane Inquiry on the strict basis that information which it supplied was limited to a response to only those matters raised by the Queensland ALP.

If this submission were accepted, then the licensee would be justified in claiming that it had no duty to make a full disclosure of other relevant information.

It is our view, after examining transcript of the QTQ hearing on this matter and the Report that followed the hearing, that none of the parties (was) acting under this assumption. In the rather lengthy discussion which took place at the beginning of the hearing on 17 November 1986, several submissions were made dealing with the relevance of particular material. None of these referred to that particular construction of the letter of 29 August 1986.

If, in fact, particular witnesses had been giving evidence in Brisbane under such a limitation, it would be expected that in evidence before us they would have adverted to such a restriction, and none did in those particular terms. We also note that no witness from the Bond group at this Inquiry made mention of any such conception regarding their evidence, nor was such a proposition led from any witness. While such a construction could be argued in a strict legal sense, we find the submission not sustainable and do not accept it."

108. The Tribunal did not refer to evidence given by Mr Aspinall to the 1989 inquiry in which he stated that he was in charge of collating the material to be produced to the Tribunal in 1986 in response to the letter of 29 August. The following exchange took place between Mr Aspinall and counsel assisting the inquiry:

"And you accept, do you, that the material which was produced to the inquiry was produced consequent upon the request and in accordance with the terms of this letter of 29 August 1986?---Yes, and I believe that it complied with that request.

I think the key question is to be found in the second paragraph in these terms:

The tribunal therefore asks you that your client provide a comprehensive response dealing with all matters relevant to a settlement - et cetera?---That is correct, yes.

Yes?---As per Mr Warburton's accusation in Parliament, yes.

Yes. And it was in endeavouring to satisfy that request in those terms that the material was created and presented?---That is correct."

The effect of Mr Aspinall's evidence is not altogether clear, but it is certainly capable of being understood as a statement that he read the letter of 29 August as a request only for material relevant to the bribery allegation. It is surprising that the Tribunal failed to advert to this evidence and to correspondence passing between QTL's solicitors and the Tribunal in October and November 1986 which provides some support for the view that QTL was proceeding on the footing that the subject-matter of the inquiry was the bribery allegation. Perhaps the Tribunal overlooked Mr Aspinall's evidence. The other possibility is that the Tribunal rejected his evidence on this point, a possibility that is reinforced by the Tribunal's adverse comments on other aspects of his testimony. Even so, one would have expected some reference to that part of Mr Aspinall's evidence which I have set out, more particularly as the Tribunal was embarking upon a finding that Mr Bond "deliberately gave misleading evidence" to the 1986 inquiry. The Tribunal should have taken more care in expressing its reasons for making such an adverse finding.

109. However, the short answer to the respondents' case on this point is that, even if Mr Aspinall read the letter as calling for a comprehensive response dealing with all matters relevant to the allegation made by Mr Warburton, the letter nonetheless called for the production of all material relating to the proposals put on 17 February 1986 by Mr Bond to the Premier and material concerning the maximum amount that could be attributed to the settlement of the defamation action. Whether the evidence called for a finding that Mr Bond deliberately misled the 1986 inquiry was for the Tribunal to decide provided that there was evidence to support the finding and that it involved no error of law. Despite the failure of the Tribunal to refer to that part of Mr Aspinall's evidence mentioned earlier and the sketchy and disjointed discussion of the issue by the Tribunal, there is not enough to demonstrate an error of law on the part of the Tribunal. It does not emerge that the Tribunal misapprehended the scope of the 1986 inquiry or what was involved in the particular issue it was purporting to decide in 1986. Nor does it appear that there was no probative evidence to support the finding, or that an inference that Mr Bond deliberately misled the 1986 inquiry was not open on the evidence.

(ii) The Finding that Mr Bond Threatened to Use
his Television Staff to Gather Information
and to Expose a Competitor

110. There was a challenge to this finding (finding No. 5), but only by reference to an adverse assessment made by the Tribunal of Mr Bond's credibility on the basis of other findings. As the challenge to the other findings fails, so does this one.

CONCLUSION

111. In the result I conclude that the Federal Court erred in setting aside the Tribunal's decision that the licensee companies were no longer fit and proper persons to hold their licences. Moreover, the respondents' further grounds in support of the result reached by the Federal Court have not been made out. There remains the question what orders should be made.

112. When this Court granted special leave to appeal, it specifically referred to the possibility that, on the appeal, closer examination of the facts and issues might result in the rescission of the order granting special leave. The hearing of the appeal has confirmed in my mind the Court's earlier decision to grant leave. The case involves important questions affecting the Federal Court's jurisdiction to review "decisions" and "conduct" under the [ADJR Act](#), as well as important questions concerning the limits and grounds of review under [ss.5](#) and [6](#) of that Act and the interpretation of s.88(2) of the Act. Accordingly, I would refuse to rescind the grant of special leave.

113. The other question relates to the respondents' applications for special leave to cross-appeal. The questions which the respondents seek to argue in their cross-appeals relate primarily to the relief which the Federal Court granted. At all events, the grounds argued depend upon the respondents first succeeding in resisting the appeal. I would therefore refuse special leave to cross-appeal.

114. I agree with the orders proposed by Toohey and Gaudron JJ.

BRENNAN J. I agree with the Chief Justice.

DEANE J. There was a time when it was customary to refer to the duty of a non-curial statutory decision-maker to observe common law requirements of fairness and detachment in certain circumstances as a "duty to act judicially" (see, e.g., *Testro Bros. Pty. Ltd. v. Tait* [\[1963\] HCA 29](#); [\(1963\) 109 CLR 353](#), at pp 365, 369, 370; *Board of Education v. Rice* [\(1911\) AC 179](#), at p 182; *R. v. Electricity Commissioners* (1924) 1 KB 171, at p 205; *Local Government Board v. Arlidge* [\(1915\) AC 120](#), at p 132). There were, however, disadvantages in that phraseology. For one thing, as Lord Diplock pointed out in *O'Reilly v. Mackman* [\[1983\] UKHL 1](#); (1983) 2 AC 237, at p 279, it tended to give rise to, and preserve, subtle and often confusing distinctions between decisions that were "quasi-judicial" and those that were "merely" administrative. For another, particularly in this country where there is a constitutional barrier against the conferral of any part of the judicial power of the Commonwealth upon an administrative decision-maker, it involved the potential for confusion between an obligation to act judicially and the well-settled notion of exercising judicial power. In time, the common law obligation of a statutory decision-maker to act judicially in certain circumstances came to be ordinarily referred to as the obligation to act in

accordance with the requirements of "natural justice". Here again, however, there was a potential for confusion: between the relevant common law requirements of fairness and detachment and the jurisprudence of wider theological and civilian perceptions of natural law. These days, it is customary and convenient in this country to avoid references to "acting judicially" or "natural justice" and to speak of the "requirements of procedural fairness" when referring to the fairness and detachment required of a person entrusted with statutory power or authority to make an administrative decision which may adversely and directly affect the rights, interest, status or legitimate expectations of another in his, her or its individual capacity. That evolution of terminology should not, however, be permitted to constrict the content of such an obligation to a mere requirement to observe some surface formalities. A duty to act judicially (or to accord procedural fairness or natural justice) extends to the actual decision-making procedure or process, that is to say, to the manner in which and the steps by which the decision is made. As I pointed out in *Minister for Immigration and Ethnic Affairs v. Pochi* [\[1980\] FCA 85](#); [\(1980\) 44 FLR 41](#), at p 67; [\[1980\] FCA 85](#); [31 ALR 666](#), at p 689, it would be both surprising and illogical if such a duty involved mere surface formalities and left the decision-maker free to make a completely arbitrary decision. If the actual decision could be based on considerations which were irrelevant or irrational or on findings or inferences of fact which were not supported by some probative material or logical grounds, the common law's insistence upon the observance of such a duty would represent a guarantee of little more than a potentially futile and misleading facade. If the decision were determined by the toss of a coin or some other arbitrary procedure, the "right" to a hearing would be illusory. If the decision could be based on unreasoned prejudice, the audi alteram partem rule would be pointless.

2. As has been often said, the precise content of the obligation of a statutory tribunal to act judicially or to observe the requirements of natural justice or procedural fairness may vary according to the statutory framework of the particular proceedings and the circumstances of the individual case: "the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth" (per Tucker L.J., *Russell v. Duke of Norfolk* (1949) 1 All ER 109, at p 118). That being so, the content of the obligation is not susceptible of precise definition otherwise than in the particular circumstances of a given case. The most that one can do is identify its ordinary incidents. Obviously enough, those incidents include the absence of the actuality or the appearance of disqualifying bias and the according of an appropriate opportunity of being heard. In the following paragraph, I identify what I see as the other more important incidents of the obligation. In so doing, I have treated what are sometimes referred to as "Wednesbury principles" (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [\[1947\] EWCA Civ 1](#); (1948) 1 KB 223, at pp 229-233) as encompassed by the obligation to act judicially in cases where that obligation exists (but cf., for a contrary approach, *Council of Civil Service Unions v. Minister for the Civil Service* [\[1983\] UKHL 6](#); [\(1985\) AC 374](#), at pp 410-411, 414-415).

3. If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on preconceived prejudice or suspicion. Arguably, it requires a minimum degree of "proportionality" (cf. the C.C.S.U. Case, at p 410). When the process of decision-making need not be and is not disclosed, there will be a discernible breach of such a duty if a decision of fact is unsupported by probative material. When the process of decision-making is disclosed, there will be a discernible breach of the duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact. Breach of a duty to act judicially constitutes an error of law which will vitiate the decision.

4. There is nothing in either the provisions of the Broadcasting Act 1942 (Cth) or the particular circumstances which had the effect of excluding or modifying any of the above incidents of the Tribunal's duty to act judicially in the present case. That being so, it was necessary that any findings of fact made by the Tribunal, upon which a reviewable "decision" was based, were supported by some probative material which was properly before the Tribunal. If a finding of fact was not so supported, a "decision" which was based upon it was invalid. In that regard, it would matter not that the decision could be supported by some other finding of fact which was open to the Tribunal but which the Tribunal had not made. The point can be illustrated by reference to a hypothetical case where a decision could be supported by either a finding of fact A or a finding of fact B and where there was probative material to support a finding of A but no probative material at all to support a finding of B. If, in such a

case, the Tribunal stated that it made no finding about, and placed no reliance upon, A but based a reviewable "decision" on a positive finding of B, the Tribunal would have failed to discharge its duty to act judicially. Its decision would be based on a finding of fact which, being unsupported by any probative material, was, as a matter of law, not open. It would simply be irrelevant to say that there was probative evidence upon which the Tribunal had not relied which would have supported a finding of A which the Tribunal had neither made nor relied upon. Therein, to my mind, lies the compelling force of the approach adopted in English cases, such as *Reg. v. Deputy Industrial Injuries Commissioner*; *Ex parte Moore* (1965) 1 QB 456, at p 488, which are referred to in the judgment of the Chief Justice and which accord to the common law requirements of natural justice or procedural fairness a concern with substance as well as form by recognizing that a decision made in compliance with those requirements must be "based" upon probative and relevant material (see, also, *Mahon v. Air New Zealand* [1983] UKPC 29; (1984) AC 808, at pp 820-821).

5. At one stage in the course of argument in the present case, it appeared to me that the Tribunal's "decision" that each of the licensee companies was no longer a fit and proper person to hold its licence was relevantly based on a finding of fact that Mr. Bond and Mr. Aspinall had deliberately misled the Tribunal in the earlier Brisbane Inquiry and that that finding of fact was, in turn, based upon a finding that, as a matter of fact, no witness from the Bond group at the Brisbane Inquiry suggested that there had been any "conception" that the information which the Bond company was required to supply was strictly limited to a response to specific matters which had been raised by the Queensland Branch of the Australian Labor Party. That last-mentioned finding of fact was plainly and demonstrably wrong. It was not, in the circumstances, supported by probative material before the Tribunal. Careful consideration of the reasons of the Tribunal has, however, led me to conclude that the Tribunal's conclusion that Mr. Bond and Mr. Aspinall had deliberately misled the Tribunal in the earlier Brisbane Inquiry was not based on that mistaken finding of fact. Consequently, the decision about the lack of fitness and propriety of the licensee companies was not affected by it.

6. Subject to the foregoing, I agree with the judgment of the Chief Justice.

TOOHEY AND GAUDRON JJ. This is an appeal from the Full Court of the Federal Court of Australia exercising original jurisdiction under the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) ("the [ADJR Act](#)"). The Full Court had before it applications for orders of review by Alan Bond, Dallhold Investments Pty. Ltd., Bond Corporation Holdings Limited, Bond Media Limited and David Roy Aspinall (the first to fifth respondents to the present appeal) and by Queensland Television Limited, Consolidated Broadcasting System (W.A.) Pty. Limited, North West Radio Pty. Ltd. and Darwin Broadcasters Pty. Limited (the sixth to ninth respondents to the present appeal) in respect of an inquiry conducted by the Australian Broadcasting Tribunal ("the Tribunal"). The Tribunal now appeals from the decision and orders of the Full Court.

Background to the Appeal

2. The sixth to ninth respondents each hold at least one commercial licence under the Broadcasting Act 1942 (Cth) ("the Broadcasting Act"). Queensland Television Limited (the sixth respondent) holds a commercial television licence. The seventh and eighth respondents each hold two commercial radio licences. The ninth respondent holds one commercial radio licence. Each of the sixth to ninth respondents is a subsidiary company, at one or more removes, of Bond Media Limited (the fourth respondent). The shareholding in Bond Media Limited is held or controlled as to 53% (mostly through subsidiaries) by Bond Corporation Holdings Limited (the third respondent) and as to 12% by Dallhold Investments Pty. Ltd. (the second respondent). Dallhold Investments Pty. Ltd. also holds 58% of the shares in Bond Corporation Holdings Limited. Mr Bond (the first respondent), by virtue of his shareholding in Dallhold Investments Pty. Ltd., is able to determine the composition of the Boards of Directors of Bond Media Limited and the sixth to ninth respondents.

3. In 1986 the Tribunal held an inquiry as to the renewal of the commercial television licence of the sixth respondent. One of the issues at that inquiry was whether, by reason of the settlement of a defamation action between the sixth respondent and Sir Joh Bjelke-Petersen, the then Premier of Queensland, it was no longer a fit and proper person to hold its commercial television licence. That issue was determined in favour of the sixth respondent.

4. In 1988 the Tribunal was conducting an inquiry concerning the licences held by the sixth to ninth respondents. It was an "ordinary inquiry" pursuant to s.17C(1) of the Broadcasting Act, initiated by the Tribunal after it was made aware of a statement made by Mr Bond relating to the settlement of the defamation action between the sixth respondent and Sir Joh Bjelke-Petersen. Other matters came to the attention of the Tribunal during the course of its inquiry, as a result of which it gave notice, from time to time, of new issues to be considered in that inquiry. The last of those notices, which was given on 21 October 1988, contains the issues with which the Tribunal and in turn the Full Court were concerned. Only two of those issues are relevant to the present appeal. The first (and the one to which most of the argument in this Court was directed) relates to the settlement of the defamation action. The second concerns a telephone conversation between Mr Bond and an executive of the AMP Society on or about 11 May 1988. The notice raised the question "(w)hether it would be advisable in the public interest for the Tribunal to do any of the following:

- (a) Suspend any of the said licences ...
- (b) Revoke any of the said licences.
- (c) Impose or vary conditions on any of the said licences."

In formulating this question the Tribunal plainly had in mind its powers under ss.85 and 88(2) of the Broadcasting Act.

5. By s.85(1) of the Broadcasting Act the Tribunal "may, during the currency of a licence ... vary or revoke any of the conditions of the licence (other than conditions applicable by virtue of section 129) or impose further conditions". Section 88(2) of the Broadcasting Act enables the Tribunal to suspend or revoke a commercial licence, if it appears advisable in the public interest, on a number of specified grounds, including that the licensee "is no longer a fit and proper person to hold the licence".

6. After an extensive and hard-fought hearing, the Tribunal made factual findings in respect of the issues identified in its notice of new issues. A further hearing was held to determine whether the sixth to ninth respondents were no longer fit and proper persons to hold their licences. In answering that question, the Tribunal set out a summary of relevant factual findings as follows:

"1. Mr Bond agreed to pay the Premier of Queensland, Sir Joh Bjelke-Petersen, \$400,000 to settle his defamation claim not believing that that sum was justified by that claim alone, but believing that if he did not settle at that figure the Premier might harm his interests in the State of Queensland.

2. Mr Bond sought to disguise the true amount agreed to be paid in the belief that a sum in excess of \$50,000 could not survive public scrutiny.

3. Mr Bond deliberately gave misleading evidence to the Australian Broadcasting Tribunal in 1986 in relation to the events of January and February, 1986, and in relation to the nature of the meeting with Sir Joh Bjelke-Petersen on 17 February, 1986.

4. Mr Bond deliberately gave false evidence to the Australian Broadcasting Tribunal in this Inquiry in relation to his motivation for making the offer to Sir Joh Bjelke-Petersen at the meeting of 17 February, 1986 and in relation to the telex of 2 January, 1986 which was relevant to a determination of the date by which agreement had been reached between Mr Bond and Sir Joh Bjelke-Petersen.

5. Mr Bond threatened to use his TV staff to gather

information on a business competitor (the AMP Society) and to expose the competitor by showing the results on television."

7. It is necessary to provide some background to findings numbered 1, 2, 3 and 4. Much of the contest at the hearing before the Tribunal was directed to whether the defamation settlement was a vehicle for the improper payment of moneys to Sir Joh Bjelke-Petersen. On this issue the Tribunal took the view, either as a matter of law or as a matter of fairness, that it should make no finding adverse to Sir Joh. However, the Tribunal characterized the actions of Mr Bond in relation to that settlement as improper on the basis that his involvement, attended with the belief set out in the Tribunal's findings, "does not exhibit an appreciation of the proper relationship between those with control of media interests and governments".

8. Findings 2, 3 and 4 derived from factual findings made by the Tribunal as to when agreement was reached concerning the settlement. In the 1986 inquiry the evidence given was that agreement was reached in late March or early April 1986. After hearing evidence at the 1988 inquiry, the Tribunal found that agreement was reached in December 1985 and that, on 2 January 1986, instructions were given by telex to the solicitors for the sixth respondent to take the necessary steps to have the agreed settlement finalized. The Tribunal further found that thereafter, at a meeting on 17 February 1986 between Mr Bond and Sir Joh Bjelke-Petersen, Mr Bond attempted to secure Sir Joh's agreement to a method of payment by which the true amount of the settlement would be disguised. In particular, Mr Bond wanted to pay Sir Joh \$50,000 in cash, with a further \$350,000 being paid as a loan without obligation to repay, or as consideration for the sale of an asset "off-shore", or as an excessive payment for the sale of property. These matters were not disclosed in the 1986 inquiry.

9. One other matter relating to the Tribunal's inquiry should be mentioned. The Tribunal was invited by those representing Mr Bond and his associated companies, including those companies whose licences were the subject of inquiry, to refrain from making any finding whether the licensee companies were no longer fit and proper persons within the terms of s.88(2)(b)(i) of the Broadcasting Act. It was argued that any problem disclosed by the evidence could, without any finding being made under s.88(2)(b)(i) of the Act, be resolved by the imposition or variation of conditions attaching to the licences or by the acceptance of undertakings which had been proffered. Initially, the Tribunal doubted that it had the power either to accept undertakings or to impose conditions on a licence at that stage of the inquiry. However, on review by the Federal Court it was held that the Tribunal had legal power, at that stage of the inquiry, to impose conditions on licences the subject of the inquiry, even without finding that a particular licensee is no longer a fit and proper person to hold its licence. It was also held that the Tribunal had legal power to consider undertakings of the kind proffered to it and could take the making of those undertakings into account in the exercise of its powers under the Broadcasting Act and regulations thereto: *Bond Media Limited v. Australian Broadcasting Tribunal* (1989) 4 BR 35. The Tribunal then gave consideration to the undertakings, but at that stage declined to accept them or to attach conditions to a licence or licences. Instead, by reference to the factual findings earlier set out, the Tribunal expressed the view that Mr Bond "would not be found to be a fit and proper person to hold a broadcasting licence" and held that, by reason of his control over the sixth to ninth respondents, those respondents were "no longer fit and proper persons within the terms of s.88(2)(b)(i) of the Broadcasting Act".

10. The respondents filed applications in the Federal Court for orders of review under the [ADJR Act](#). There were two sets of proceedings, No.G349 of 1989, in which the first to fifth respondents were applicants, and No.G513 of 1989, in which the sixth to ninth respondents were applicants. The proceedings were heard together but with separate representation for each set of applicants. Each of the applications sought review of eleven matters characterized as "decisions" and a further seven matters characterized as "conduct". The applications were allowed in part. It was ordered that the decision of the Tribunal that the sixth to ninth respondents were no longer fit and proper persons within the terms of s.88(2)(b)(i) of the Broadcasting Act be set aside. Additionally, the Full Court characterized the Tribunal's conclusion that Mr Bond "would not be found to be a fit and proper person to hold a broadcasting licence" as a decision and ordered that it also be set aside. In the course of its judgment the Full Court stated that the factual findings underlying the Tribunal's decision (other than the finding as to the conversation between Mr Bond and the AMP executive) were vitiated by error. However, the Full Court declined to make orders, as sought by the respondents, setting those findings aside. The Full Court had no need to consider

specifically the refusal of the Tribunal to impose conditions or to accept the offered undertakings. The applications for orders of review characterized those refusals as decisions and sought orders setting them aside. Those orders were not made.

11. In this Court it was argued on behalf of the Tribunal that no reviewable error attends its decision that the sixth to ninth respondents are no longer fit and proper persons within the terms of s.88(2)(b)(i) of the Broadcasting Act or any other decision, if there be any, relating to that issue. This argument largely involved a consideration of the factual matters underlying the Tribunal's decision. On behalf of the respondents it was submitted that the argument thus made involved no consideration of any matter of general importance and that the grant of special leave to appeal should be revoked. Alternatively, it was submitted that the decision of the Full Court was correct, that it was, in any event, sustainable on grounds other than those upon which the Full Court relied and that the respondents should be granted special leave to cross-appeal from the decision of the Full Court in so far as the relief granted fell short of the relief sought.

The [ADJR Act](#): Decisions under [s.5](#) and Conduct Engaged in for the Purpose of Making a Decision under [s.6](#)

12. The [ADJR Act](#) permits of judicial review of a decision to which the Act applies (s.5), conduct engaged in for the purpose of making such a decision (s.6) and the failure to make a decision where there is a duty to make a decision (s.7). An act or omission which is neither a decision, nor conduct engaged in for the purpose of making a decision, nor a failure to make a decision within the terms of the [ADJR Act](#) is not susceptible of review under that Act. Subject to certain exceptions not presently relevant, the [ADJR Act](#) is expressed in [s.3\(1\)](#) to apply to a "decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment". An enactment is defined in [s.3\(1\)](#) in such a way as to include the Broadcasting Act.

13. The available grounds of review under the [ADJR Act](#) vary depending upon whether the subject matter of review is a decision, conduct engaged in for the purpose of making a decision, or a failure to make a decision. See [ss.5, 6 and 7](#). In particular, although there is a certain correspondence in terminology, the grounds applicable to a decision focus on the decision itself ([s.5](#)), whereas the grounds applicable to conduct look either to the conduct ([s.6\(1\)\(a\)](#), (b), (f) and (g)) or to the proposed decision ([s.6\(1\)\(c\)](#), (d), (e), (f), (h) and (j)).

14. It was conceded on behalf of the Tribunal that the finding that the sixth to ninth respondents are no longer fit and proper persons within the terms of s.88(2)(b)(i) of the Broadcasting Act is a decision to which [s.5](#) of the [ADJR Act](#) applies. No such concession was made as to the Tribunal's conclusions that Mr Bond's involvement in the defamation settlement was improper and that he would not be found to be a fit and proper person to hold a commercial broadcasting licence. Nor was any such concession made as to the factual findings upon which those conclusions were based. The argument made on behalf of the Tribunal did not specifically address the question whether the refusal to impose conditions or to accept undertakings constitutes a decision which is reviewable under [s.5](#) of the [ADJR Act](#). In the Federal Court the respondents sought the separate review of each of those conclusions, findings and failures on the basis that they constitute decisions to which [s.5](#) of the [ADJR Act](#) applies. In this Court it was submitted on behalf of the respondents that, if they do not constitute decisions, they are nonetheless separately reviewable as conduct under [s.6](#) of that Act.

15. In *Director-General of Social Services v. Chaney* [1980] FCA 87; (1980) 47 FLR 80, at p 100; [1980] FCA 87; 31 ALR 571, at p 590, Deane J. noted that "(t)he word 'decision' is a word of indeterminate meaning" which might refer to "the mental process of making up one's mind", or "the determination of any question of substance or procedure" or "a determination ... resolving an actual substantive issue". His Honour further noted that the third meaning might refer to "any such determination whether final or intermediate" or might be limited to "a determination which effectively disposes of the matter in hand". His Honour then observed (at p 101; p 591 of ALR) that the activities defined as constituting "a decision" in [s.3\(3\)](#) of the [Administrative Appeals Tribunal Act 1975](#) (Cth) (which provision corresponds to, and is virtually identical with, [s.3\(2\)](#) of the [ADJR Act](#)) "provide some indication that a reference to 'decision' in the Act is, prima facie, a reference to the ultimate or operative determination rather than a reference to an adjudication or determination of issues arising in the course of making such an ultimate or operative determination". His Honour added that that indication was, however, slight.

16. Later, in *Lamb v. Moss* [\[1983\] FCA 254](#); [\(1983\) 76 FLR 296](#); [49 ALR 533](#), it was held by the Full Court of the Federal Court (at p 318; p 556 of ALR), speaking in the context of the [ADJR Act](#), that "there is no limitation, implied or otherwise, which restricts the class of decision which may be reviewed to decisions which finally determine rights or obligations or which may be said to have an ultimate and operative effect".

17. [Section 3\(2\)](#) of the [ADJR Act](#) provides as follows:

"In this Act, a reference to the making of a decision includes a reference to -

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article;

or

(g) doing or refusing to do any other act or thing;

and a reference to a failure to make a decision shall be construed accordingly."

18. Apart from par.(g), [s.3\(2\)](#) of the [ADJR Act](#) speaks exclusively to the exercise of or refusal to exercise a substantive power. The words of par.(g), "doing or refusing to do any other act or thing", also encompass the exercise of or refusal to exercise a substantive power. The Tribunal clearly had power to impose conditions (s.85(1) of the Broadcasting Act) and it is not in issue that it had power to accept undertakings. See *Bond Media Limited v. Australian Broadcasting Tribunal*. Thus, in so far as there was a refusal to exercise either of these powers, there is a decision to which [s.5](#) of the [ADJR Act](#) applies.

19. Generally, the exercise of or the refusal to exercise a substantive power will constitute a decision which, in the terms used in *Lamb v. Moss*, has "an ultimate and operative effect". However, this will not always be so. It is not difficult to envisage situations in which the exercise of, for example, a power to make an order (as referred to in [s.3\(2\)\(a\)](#)) is conditioned upon an earlier declaration (as referred to in [s.3\(2\)\(e\)](#)). In that situation there would be no decision with "ultimate and operative effect" until a decision had been made with respect to the exercise of both powers. Yet, clearly enough, the making of the declaration would, by force of [s.3\(2\)\(e\)](#), constitute the making of a decision.

20. The question raised by [s.3\(2\)](#) of the [ADJR Act](#) is not whether an act (whether positive or negative) should have "ultimate and operative effect" to be characterized as a decision but, rather, whether the terms of par.(g) extend to encompass acts which do not involve the exercise of or refusal to exercise a substantive power.

21. The principles of construction embodied in the Latin expressions *eiusdem generis* and *noscitur a sociis* favour the construction of general words by reference to more particular matters dealt with in the same provision. On this approach, [s.3\(2\)\(g\)](#) of the [ADJR Act](#) might well be construed as confined to the exercise of or refusal to exercise a substantive power. On the other hand, if it had been the intention of the legislature to so limit the decisions which are reviewable under s.5 of the Act, that could have been simply stated.

22. In so far as [s.16\(1\)\(b\)](#) of the [ADJR Act](#) enables the Federal Court, without quashing or setting aside a decision, to make an order "referring the matter to which the decision relates to the person who made the decision for further consideration", that paragraph suggests that the words "doing or refusing to do any other act or thing", as used in [s.3\(2\)\(g\)](#), are not confined to acts involving the exercise of or refusal to exercise a substantive power.

23. Another indication that [s.3\(2\)\(g\)](#) of the [ADJR Act](#) is not confined to the exercise of or refusal to exercise a

substantive power is to be found in Scheds 1 and 2 to that Act which respectively exclude certain classes of decisions from the operation of the Act and the operation of s.13 of the Act. By par.(e) of Sched.1 there are excluded from the Act "decisions ... forming part of the process of making, or leading up to the making of, assessments or calculations of tax or duty" under specified tax Acts. Again, by par.(a) of Sched.2 there are excluded from s.13 of the Act "decisions in connection with, or made in the course of, redress of grievances, or redress of wrongs, with respect to members of the Defence Force".

24. The terms of [s.16\(1\)\(b\)](#) of the [ADJR Act](#) and the implied acknowledgment in Scheds 1 and 2 that the Act applies to decisions forming part of the process or made in the course of other decisions involving the exercise of a substantive power indicate that s.3(2)(g) is not, and, consequently, the acts reviewable as decisions under [s.5](#) of the [ADJR Act](#) are not confined to acts involving the exercise of or refusal to exercise a substantive power.

25. It does not follow that, because [s.5](#) is not confined to acts involving the exercise of or a refusal to exercise a substantive power, the acts which constitute a decision reviewable under [s.5](#) of the [ADJR Act](#) are at large. They are confined by the requirement in [s.3\(1\)](#) that they be made "under an enactment". A decision under an enactment is one required by, or authorized by, an enactment. Cf. *Australian National University v. Burns* [\[1982\] FCA 191](#); [\(1982\) 64 FLR 166](#); [43 ALR 25](#). The decision may be expressly or impliedly required or authorized. See *Minister for Immigration and Ethnic Affairs v. Mayer* [\[1985\] HCA 70](#); [\(1985\) 157 CLR 290](#), at pp 302-303; *Chan v. Minister for Immigration and Ethnic Affairs* [\[1989\] HCA 62](#); [\(1989\) 63 ALJ 561](#), at p 571; [\[1989\] HCA 62](#); [87 ALR 412](#), at p 429. If an enactment requires that a particular finding be made as a condition precedent to the exercise of or refusal to exercise a substantive power, a finding to that effect is readily characterized as a decision "under an enactment". However, it is otherwise with respect to findings which are not themselves required by an enactment but merely bear upon some issue for determination or some issue relevant to the exercise of a discretion. Findings of that nature are not themselves "decisions under an enactment"; they are merely findings on the way to a decision under an enactment.

26. The finding by the Tribunal that the sixth to ninth respondents were no longer fit and proper persons within the terms of s.88(2)(b)(i) of the Broadcasting Act is, as conceded on behalf of the Tribunal, a decision under an enactment. It was, in the circumstance with which the Tribunal was concerned, a finding which was required before the Tribunal could exercise its power under that section to suspend or revoke the licences.

27. The conclusion that Mr Bond would not be found to be a fit and proper person to hold a commercial licence is in a different category. It is not a conclusion which itself is required to be made before the Tribunal may exercise or refuse to exercise the powers conferred by s.85(1) or s.88(2) of the Broadcasting Act. Nor in truth is it a conclusion authorized by that Act. Rather, it is merely a step in the process by which the Tribunal reached its decision concerning the sixth to ninth respondents. It is not itself a decision under the Broadcasting Act. The same is true of the conclusion concerning Mr Bond's involvement in the defamation settlement and the factual findings upon which the Tribunal's decision concerning the sixth to ninth respondents was based.

28. In the Full Court the conclusion that Mr Bond would not be found to be a fit and proper person to hold a commercial licence was seemingly characterized, in passing and in terms of [s.5\(1\)\(d\)](#) of the [ADJR Act](#), as a "decision ... not authorized by (the Broadcasting Act)". Certainly it was so characterized in the applications for orders of review and in submissions made on behalf of the respondents to this Court.

29. The expression "not authorized" in [s.5\(1\)\(d\)](#) of the [ADJR Act](#), when considered in the context of the exercise of administrative powers conferred by an enactment, signifies a decision that is expressly or impliedly forbidden. The expression does not refer to findings or conclusions which, although not required, bear upon or may bear upon some issue for determination under an enactment. Nor is the expression concerned with the more fundamental question whether a decision has been made under an enactment. It assumes that a decision has been made under the relevant enactment.

30. The decision made by the Tribunal concerning the sixth to ninth respondents was founded on its factual findings and its conclusions concerning Mr Bond. That being so, any error attending those conclusions or findings is necessarily involved in the Tribunal's decision. Accordingly, the conclusions and the factual findings must be

analyzed to see whether they or any of them were attended by some error which renders the decision reviewable under [s.5](#) of the [ADJR Act](#).

31. Because any error attending the conclusions concerning Mr Bond and the Tribunal's factual findings is necessarily involved in the Tribunal's decision concerning the sixth to ninth respondents, it is unnecessary to consider whether, a decision having been made, those conclusions and findings are separately reviewable as conduct under [s.6](#) of the [ADJR Act](#). However, it may be observed that, once a decision has been made, no useful purpose is served by dissecting the steps which have led to that decision and subjecting them to review as conduct unless that review is directed to the identification of some reviewable error attending the decision itself. If the decision is to stand because it is not attended by a reviewable error, review of the conclusions and findings leading to that decision to see if they were attended by some error which, ex hypothesi, was not carried into the decision so as to render it reviewable is a futile exercise. That such is not permitted by the [ADJR Act](#) is clear from the grounds upon which conduct may be reviewed, those grounds being limited to a defect in procedure or in the conduct engaged in for the purpose of making a decision ([s.6\(1\)\(a\)](#), (b), (f) and (g)) and to error infecting or likely to infect "the proposed decision" ([s.6\(1\)\(c\)](#), (d), (e), (f), (h) and (j)). Clearly it is not the intention of the [ADJR Act](#) that conduct is subsumed in decision. The legislation makes independent provision for a review of each. The distinction cannot be explained simply by reference to procedure on the one hand and substance on the other. The language of the [ADJR Act](#), including the grounds upon which each may be reviewed, does not permit such a distinction to be readily drawn.

The Decision of the Full Court

32. The Full Court held that the Tribunal erred in two respects. First, it held that the Tribunal erred "in construing what was involved if, within the meaning of sub-s.88(2) of (the Broadcasting Act), it was to be satisfied that each of the licensees was no longer a fit and proper person to hold its licence or licences". It held that that error was manifest from the failure of the Tribunal to have regard to evidence which suggested that "the boards of the licensee companies operated in an entirely proper manner and discharged their duties in accordance with ... company law", that the directors and executives had not been subject to "interference by Mr Bond", and that, by undertakings offered, Mr Bond "would have distanced himself" from the licensee companies and that the licensees had complied and continued to comply "with their obligations under (the Broadcasting Act)".

33. The second error discerned by the Full Court was an error of law in the Tribunal's holding that "the Premier was not 'amenable' to its jurisdiction and therefore (precluding) itself from making findings as to what the Premier did or said (in relation to the defamation settlement)". The Full Court held that that error tainted all factual findings (other than that relating to the telephone conversation between Mr Bond and an executive of the AMP Society) and the Tribunal's conclusions concerning Mr Bond.

Review of the Decision that the Licensees are no longer Fit and Proper - Section 88(2) of the Broadcasting Act

34. The Full Court construed s.88(2)(b)(i) of the Broadcasting Act so that something more than an adverse finding as to the conduct or character of a person in a position to control the composition of the Board of Directors of a licensee is necessary to ground a finding that the licensee is no longer fit and proper to hold a commercial licence. The matters which the Full Court considered should have been taken into account would seem to indicate that the view was taken that s.88(2)(b)(i) required that regard be had to whether that control had been exercised in some way bearing upon the discharge of the licensee's obligations or was likely to be so exercised.

35. The question raised by s.88(2)(b)(i) of the Broadcasting Act is whether the Tribunal is satisfied that "the licensee is no longer a fit and proper person to hold (a commercial) licence". Two matters may be noted by reference to that question. First, the licensee is, by s.81AA(1) of the Broadcasting Act, necessarily a company that is formed within the limits of the Commonwealth or a Territory and has a share capital. Secondly, the words "no longer" reflect the fact that the licensee will already have been found to be fit and proper when the licence was granted. Moreover, the question of its fitness and propriety will have been a matter open to consideration on each occasion that the licence was renewed. The words "no longer" thus import a requirement that there should have been some change in the circumstances of the licensee or revelation of some event bearing upon its fitness and propriety since that issue was last considered. However, the nature of the required change or supervening event can only be determined by reference to the content of the expression "fit and proper".

36. The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.

37. Whether the fitness and propriety of a licensee to hold a commercial licence are sufficiently ascertained by reference to its character or reputation, or must be ascertained by reference to the conduct of its affairs and activities, is a question the answer to which must be found by implication from the provisions of the Broadcasting Act dealing with the grant, renewal and revocation or suspension of a commercial licence and from the activities to be undertaken pursuant to the licence.

38. Section 88(2) of the Broadcasting Act, although directed to revocation or suspension of a commercial licence, repeats the substance of the considerations relevant under ss.83A(4) and 86AA(4) to the refusal to grant or the refusal to renew a commercial licence. Section 88(2) provides:

"The Tribunal may suspend or revoke a commercial licence if it appears to the Tribunal that it is advisable in the public interest to do so, having regard only to the following matters or circumstances:

(a) the Tribunal is satisfied that the licensee has failed to comply with the undertaking given under subsection 83(1) or 86(4), as the case may be, in relation to the licence;

(b) the Tribunal is satisfied that the licensee (i) is no longer a fit and proper person to hold the licence; or

(ii) no longer has the financial, technical and management capabilities necessary to provide an adequate and comprehensive service pursuant to the licence; or

(c) the Tribunal is satisfied that a condition of the licence has not been complied with."

39. Section 83(1) of the Broadcasting Act requires an applicant for the grant of a licence, not being a limited licence, to give an undertaking that it will, if granted the licence:

"(a) comply with the conditions of the licence;

(b) provide an adequate and comprehensive service pursuant to the licence;

(c) encourage the provision of programs wholly or substantially produced in Australia; and

(d) use, and encourage the use of, Australian creative resources in connection with the provision of programs."

Section 86(4) requires that a fresh undertaking in the terms required by s.83(1) be given before a licence is renewed.

40. It is clear from s.88(2), and from ss.83A(4) and 86AA(4), that the question whether a company is fit and proper to hold a commercial licence extends beyond that which is involved in the provision of broadcasting services and

compliance with the conditions and the undertakings under s.83(1) or s.86(4) which attach to the licence. See *Western Television Ltd. v. Australian Broadcasting Tribunal* (1986) 12 FCR 414, at p 421. Nevertheless, the question is directed to the fitness and propriety of the licensee to hold a commercial licence and to undertake broadcasting activities pursuant to that licence. See *Re New Broadcasting Ltd* (1987) 12 ALD 1, at p 8. Even so, the nature of commercial broadcasting and the grant of power in ss.83A(4), 86AA(4) and 88(2) of the Broadcasting Act on the basis that "it appears ... that it is advisable in the public interest" indicate that the considerations which may be taken into account in determining whether a licensee is not or is no longer fit and proper are not closely confined.

41. Commercial broadcasting plays a significant role in the dissemination of information and ideas. That dissemination is vital to the maintenance of a free and democratic society. See *Attorney-General for New South Wales v. John Fairfax and Sons Ltd. and Bacon* (1985) 6 NSWLR 695, per McHugh J.A. at p 714. See also *Hinch v. Attorney-General (Vict.)* [1987] HCA 56; (1987) 164 CLR 15, at p 83; *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] HCA 31; (1982) 152 CLR 25, at p 98; *Attorney-General v. Times Newspapers Ltd.* (1974) AC 273, at p 315. A commercial broadcasting licence thus carries with it an obligation to the community. It also carries with it the potential for powerful influence. The community is entitled to confidently expect that a licensee will discharge its obligation and, in particular, that the potential for influence will not be abused. Within this context it is necessarily sufficient to ground a finding that a licensee is not a fit and proper person to hold a commercial licence that the community could not or would not have confidence that the licensee would discharge that obligation. Equally it is sufficient to ground a finding that the licensee is no longer fit and proper that the community could or would no longer have that confidence. Those questions are apt to be answered by reference to the character and reputation of the licensee.

42. When the question is whether, having regard to its character or reputation, a company is fit and proper, the answer may be given by reference to the conduct, character or reputation of the persons by and through whom it acts or who are otherwise relevantly associated with it. The identity of the persons relevant to the character and reputation of a company will necessarily vary according to the circumstances of the company under consideration. At one extreme, if a person regularly exercises control in all important matters affecting the company's activities, then, ordinarily, the question will be sufficiently answered by reference to that person. At the other extreme, if no person is in a position of control or if one person, although in a position to exercise control, regularly delegates that control to others, then it will ordinarily be necessary to have regard to the persons who manage the company's affairs and activities. The question whether it is sufficient to have regard to one person or necessary to have regard to others when determining whether a company is fit and proper is one that depends on the circumstances of the company and not on any legal requirement imported by the expression "fit and proper". It follows that, in appropriate circumstances, the question of the fitness and propriety of a company to hold a commercial licence under the Broadcasting Act may be determined by reference to the conduct, character or reputation of a single person associated with it.

43. Because the question of a licensee's fitness and propriety may be determined by reference to its character or reputation, which in turn may be assessed by reference to the conduct, character or reputation of some person or persons associated with it, it follows that the change or supervening event postulated by the words "no longer" may consist of revelations touching the conduct, character or reputation of the person or persons concerned.

44. Section 88(2) of the Broadcasting Act does not, as a matter of construction, preclude the possibility that a finding that the Tribunal is satisfied that a licensee is no longer a fit and proper person may be grounded on the conduct, character or reputation of some person or persons associated with the licensee, which conduct, character or reputation has been revealed since that issue was last considered. The Full Court erred in construing it otherwise. That is not to exclude the possibility that the circumstances of the licensee may be such that failure to have regard to other persons associated with the licensee or to the manner in which the affairs of the licensee have been conducted will constitute a failure to take a relevant consideration into account and, hence, an improper exercise of power under s.5(1)(e) of the ADJR Act. But that is an entirely different issue from that which the Full Court considered was directed by s.88(2) of the Broadcasting Act.

The Tribunal's Approach to the Defamation Settlement

45. As earlier indicated, the Full Court held that the Tribunal erred in law in holding that "the Premier was not 'amenable' to its jurisdiction and (thus precluding) itself from making findings as to what the Premier did or said (in relation to the defamation settlement)". The relevant ruling made by the Tribunal was that it could "accept the facts of what went on", but that it could not move from there "to an adverse finding against Sir Joh Bjelke-Petersen". Precisely what, if any, limits on the Tribunal's findings flowed from that ruling are not clear. However, it is convenient to approach the matter on the hypothesis that, by reason of an error of law, the Tribunal precluded itself from making findings as to what Sir Joh said and did and from characterizing the transaction, if the findings so permitted, as involving extortion, solicitation of a bribe or other impropriety.

46. For an error of law to constitute a ground of review under [s.5\(1\)](#) of the [ADJR Act](#) it is necessary that "the decision (involve) an error of law": [s.5\(1\)\(f\)](#). For an error of law to be involved in a decision something more than the mere occurrence of error is necessary. The error must have contributed to the decision in some way or, at the very least, it must be impossible to say that it did not so contribute. Conversely, an error is not involved in a decision if it did not contribute to the decision or if the decision must have been the same regardless of the error. Thus, to show that an error of law is involved in a decision it is necessary, at the very least, to show that the decision may have been different if the error had not occurred. This approach may be compared with the operation of the rules of natural justice where an allegation is made to which a person has no opportunity to respond. See *Kioa v. West* [\[1985\] HCA 81](#); [\(1985\) 159 CLR 550](#), at p 603.

47. The decision that the sixth to ninth respondents were no longer fit and proper persons to hold their commercial licences was substantially founded on the finding that "Mr Bond agreed to pay the Premier of Queensland ... \$400,000 to settle his defamation claim not believing that that sum was justified by that claim alone, but believing that if he did not settle at that figure the Premier might harm his interests in the State of Queensland." A different finding on that matter may well have resulted in different findings on other factual issues arising out of the settlement, the conclusions concerning Mr Bond and the decision concerning the sixth to ninth respondents.

48. It is not suggested that there was no evidence to support the Tribunal's finding as to Mr Bond's state of mind when he agreed to the defamation settlement. See, in this respect, [s.5\(1\)\(h\)](#) and (3) of the [ADJR Act](#). Nor is it suggested that the Tribunal's approach involved any widening or narrowing of the evidence to which it might properly have regard on that issue. Rather, the Full Court held that an error of law was involved because "(it) was impossible both in logic and common sense for the Tribunal to determine the nature of the transaction involved in the settlement ... without making findings as to what was said and done by each person involved in the settlement negotiations". The same idea was expressed in the argument made on behalf of the respondents that the Tribunal precluded itself from taking into account a relevant consideration, namely, the nature of the settlement transaction. The Full Court held that the failure to make findings as to what was said and done had two consequences. The first consequence was that "the Tribunal ... prevented itself from making any finding to the effect that the sum of \$400,000 was extorted or solicited by the Premier", which finding "might well have gone to lessen the culpability attributed to Mr Bond". The second consequence was that Mr Bond was denied his entitlement "as a matter of natural justice to have both sides of the transaction looked at, if it was to be looked at at all".

49. It is convenient to consider first whether there was a denial of natural justice. There can be no doubt that, as a matter of procedural fairness, the respondents were entitled to call evidence as to what Sir Joh Bjelke-Petersen said and did in relation to the defamation settlement. However, that evidence was called and it is not suggested that any evidence relevant to that issue was shut out by the Tribunal. Thus, the only question of natural justice or procedural fairness is whether the respondents were given a reasonable opportunity to meet the case which would arise if the Tribunal were to proceed solely by reference to a finding as to Mr Bond's belief concerning the settlement. The Tribunal announced its intention to proceed in that manner and allowed an adjournment so that submissions could be made accordingly. There can be no suggestion that there was a denial of natural justice or procedural fairness in the course adopted.

50. It is necessary to give some account of the evidence as to the settlement negotiations to ascertain whether the decision of the Tribunal may have been different if it had not, as hypothesized, precluded itself from making findings as to what Sir Joh Bjelke-Petersen said and did, and, if the findings so permitted, from characterizing the settlement transaction.

51. The defamation settlement was negotiated between Mr Bond and Sir Joh. No other person was present during the negotiations. They and only they could give evidence as to what was said and done. Each gave evidence. Each asserted his belief that the sum involved was an appropriate settlement sum, having regard to the content of the matter upon which the defamation action was brought. Each denied that anything was said or done which was other than by way of a genuine attempt to negotiate an appropriate settlement of the action.

52. The Tribunal could make findings as to what was said and done by Sir Joh Bjelke-Petersen only by reference to his and Mr Bond's evidence. It could proceed to characterize the settlement transaction only by reference to the findings thus made. If his and Mr Bond's evidence was rejected as untruthful (as it might have been), although that would permit the drawing of adverse inferences, it would also destroy the sole evidentiary basis for the making of findings as to what was said and done. If, or to the extent that, that evidence was accepted, it could not support a finding that Sir Joh said or did anything which amounted to impropriety on his part, for the evidence was all to the contrary. If, or to the extent that, that evidence was accepted, it could only support findings which either tended towards a lack of impropriety in relation to the settlement transaction or threw no light on that issue.

53. Even if the Tribunal erred in law and thereby precluded itself from making findings as to what was said and done by Sir Joh Bjelke-Petersen, the available evidence would only have permitted limited findings amounting in practical terms to no more than a statement of what, if any, evidence was accepted. Although such a statement could have been made, it is clear that the evidence, to the extent, if any, that it was accepted, did not persuade the Tribunal either that Mr Bond believed that \$400,000 was an appropriate settlement sum for the defamation action or that he did not believe that his interests would be harmed if he did not settle in that amount. That being so and given the limited nature of the only findings open, it is impossible to say that a statement indicating what, if any, evidence was accepted, and articulating findings or characterizing the settlement transaction by reference to the accepted evidence, may have resulted in a different finding as to Mr Bond's state of mind when he agreed to the settlement.

54. On the hypothesis that the Tribunal erred in law in the manner indicated by the Full Court, it cannot be said that any of the findings or conclusions, or the decision relating to the sixth to ninth respondents might have been different if the error had not occurred.

The Grant of Special Leave to Appeal

55. Although the correctness of the decision of the Full Court turns, to some considerable extent, on an analysis of the evidence before the Tribunal, it also raises questions as to the construction of s.88(2) of the Broadcasting Act, the meaning of "a decision ... under an enactment" as that expression is used in the [ADJR Act](#), the scope of review under the [ADJR Act](#) once a decision has been made, and whether, in terms of [s.5\(1\)\(f\)](#) of the [ADJR Act](#), "the decision involved an error of law". In these circumstances special leave to appeal should not be revoked. Unless the decision and orders of the Full Court are sustainable on other grounds the appeal must be allowed.

The Respondents' Submissions on other Grounds Raised in the Applications for Orders of Review, in their Submissions to this Court and in the Applications for Special Leave to Cross-Appeal

56. There is some difficulty in proceeding to a consideration of these matters by reference to the grounds assigned in the applications for orders of review or the applications for special leave to cross-appeal. The applications characterized a number of findings and conclusions as decisions, which findings and conclusions, for the reasons earlier given, are not themselves decisions under an enactment but merely steps on the way to the decision reached by the Tribunal. Moreover, as earlier indicated, in so far as it was submitted that those matters were reviewable as conduct, along with other matters characterized as conduct in the applications, review of those matters can result in the grant of useful relief only if they disclose a reviewable error attending the decision concerning the sixth to ninth respondents. It is thus convenient to consider those matters by reference to the particular issues raised in the course of argument in this Court.

The Factual Findings

57. Although, for the reasons already given, the factual findings are not reviewable either as decisions or as conduct, it is appropriate that we state our general agreement with the observations of Mason C.J. as to the grounds upon which factual findings may be reviewed.

58. The attack on the finding as to Mr Bond's state of mind in relation to the defamation settlement was made by reference to the failure of the Tribunal to make findings concerning Sir Joh Bjelke-Petersen and to characterize the defamation settlement. That attack has failed. To the extent that the attack on the finding as to Mr Bond's state of mind was the basis of attack on other factual findings, that attack also fails. In particular, the findings as to the attempt to disguise the settlement amount and the giving of false evidence in the 1988 inquiry must stand. Those findings were attacked only on the basis that they were dependent on the finding as to Mr Bond's state of mind when he agreed to the settlement.

59. The finding that Mr Bond gave misleading evidence to the 1986 inquiry was attacked on the basis that in that inquiry the "information supplied was limited to a response to the matters raised". That attack must fail. As earlier indicated, the evidence in the 1986 inquiry was that settlement was reached in late March or early April 1986. In the 1988 inquiry the Tribunal found that agreement had been reached in December 1985.

60. An attack was also made on the finding relating to the conversation between Mr Bond and an executive of the A.M.P. Society on the basis that it depended on adverse findings as to Mr Bond's credibility involved in the other factual findings. The failure of the attack on those other factual findings necessarily entails the failure of this attack.

The Conduct of and the Conclusions Concerning Mr Bond and the Question of the Fitness and Propriety of the Sixth to Ninth Respondents

61. As has been said already in these reasons, the character and reputation of a licensee company may be assessed by reference to the conduct, character or reputation of some person or persons associated with it. The identity of the person or persons by reference to whom it may be assessed depends upon the circumstances of the company under consideration.

62. It was argued on behalf of the respondents that, by equating Mr Bond's fitness and propriety with that of the sixth to ninth respondents, the Tribunal took an irrelevant consideration into account and that, in consequence, its decision concerning the sixth to ninth respondents is reviewable as "an improper exercise of ... power". See [s.5\(1\)\(e\)](#) and (2)(a) of the [ADJR Act](#). Alternatively, it was argued that, by failing to have regard to evidence as to the way in which the affairs of the licensee companies had been conducted and to offered undertakings as to the future conduct of those affairs, the Tribunal failed to take relevant considerations into account. See [s.5\(1\)\(e\)](#) and (2)(b) of the [ADJR Act](#).

63. The question whether a person is fit and proper is one of value judgment. In that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker. So too is the weight, if any, to be given to matters favouring the person whose fitness and propriety are under consideration.

64. The Tribunal regarded the circumstances attending the defamation settlement as involving serious impropriety, holding that Mr Bond's actions in negotiating the settlement did "not exhibit an appreciation of the proper relationship between those with control of media interests and governments". The Tribunal further held that the attempt to disguise the settlement involved "improper behaviour of a more fundamental and damaging nature". It was clearly open to the Tribunal to so evaluate the actions of Mr Bond. It was also open to the Tribunal to assess the character of Mr Bond in the terms that it did, namely, that "he would not be found to be a fit and proper person to hold a broadcasting licence" and by reference to its having "little confidence in view of the evidence ... heard in this Inquiry in the notion that Mr Bond would not ultimately prevail in any significant area where his overall interests were involved".

65. A fair reading of the Tribunal's reasons for decision shows that it equated the fitness and propriety of Mr Bond with that of the sixth to ninth respondents only in the sense that, by reason of his power to control the composition of the Boards of Directors of the licensee companies and in light of his past conduct and his character as assessed by the Tribunal, it had little confidence that Mr Bond would not again engage in conduct having the effect of compromising the integrity, as broadcasters, of licensee companies under his control. That evaluation was one which was well within the scope of the decision-making powers conferred by s.88(2)(b)(i) of the Broadcasting Act. It was an evaluation made by reference to the conduct and character of Mr Bond. But it was also an evaluation of

the character of the sixth to ninth respondents.

66. The weight, if any, to be given to evidence as to the manner in which the affairs of the licensee companies had been conducted was a matter for evaluation by the Tribunal. The Tribunal came to the conclusion that the evidence gave it little confidence that Mr Bond would not "prevail ... where his overall interests were involved". That was a view open to the Tribunal and, once it had come to that view, evidence as to the past conduct of the affairs of the sixth to ninth respondents could not bear any further relevance on the question whether they were no longer fit and proper persons to hold their licences.

67. Again, the significance, if any, to be attached to the undertakings offered as to the future conduct of the affairs of the licensee companies was a matter for evaluation by the Tribunal. The undertakings were so evaluated, the Tribunal holding that they did "not address the concerns (it held) about Mr Bond's behaviour". In the light of that conclusion and the Tribunal's conclusion that it had little confidence that Mr Bond would not prevail "in any significant area where his overall interests were involved", the offered undertakings became irrelevant.

68. The decision of the Tribunal is not susceptible of review on the ground that it was an improper exercise of power by reason either that it had regard to an irrelevant consideration or that it failed to have regard to relevant considerations when it determined that the sixth to ninth respondents were no longer fit and proper to hold their licences by reference to its findings as to the conduct and character of Mr Bond.

Undertakings and Conditions

69. In their applications for orders of review the respondents sought orders setting aside decisions by which, it was said, the Tribunal refused to consider the imposition of conditions and refused to accept the undertakings offered by the respondents. In this Court it was submitted that the decision and orders of the Full Court are sustainable by reference to those refusals, and that special leave to cross-appeal should be granted to enable those decisions to be set aside.

70. Once it is accepted that the offered undertakings became irrelevant in the process involved in the evaluation of the fitness and propriety of the sixth to ninth respondents, it is impossible to say that any error was involved in the Tribunal's refusal to accept them.

71. There are considerable difficulties in the notion that the Tribunal made a decision if it refused to consider the imposition of conditions. Specific conditions dealing with the matters raised by the evidence were not proposed. A refusal to impose specific conditions is readily characterized as a decision. However, once it is said, as was said in the submissions made on behalf of the respondents in this Court, that the Tribunal refused or failed to consider the imposition of conditions or to consult as to suitable undertakings "before or contemporaneously with making a finding under s.88(2)(b)(i) (of the Broadcasting Act)", it is apparent that what is complained of is a refusal or failure to make a decision, rather than the making of a decision susceptible of review under [s.5](#) of the [ADJR Act](#). That refusal or failure, it was argued, amounted to an error of law or, alternatively, constituted unreasonableness.

72. The first question raised by the argument is whether there was any requirement on the part of the Tribunal to consider the imposition of conditions or the acceptance of suitable undertakings. On the basis that there was such a requirement, the respondents argued that the decision concerning the sixth to ninth respondents must be set aside as one involving an error of law ([s.5\(1\)\(f\)](#) of the [ADJR Act](#)) or as one in connection with which procedures that were required by law were not observed ([s.5\(1\)\(b\)](#) of the [ADJR Act](#)). It may be doubted whether, assuming such a requirement, a failure to consider the imposition of conditions or the acceptance of suitable undertakings is properly described as a failure to observe procedures required by law within the terms of [s.5\(1\)\(b\)](#), although, clearly, it would constitute an error of law. If there was no such requirement, the decision must stand unless it can be said that the refusal or failure to consider conditions or to consult as to undertakings rendered the decision unreasonable, that being the only other challenge made by reference to that refusal or failure. See, in this regard, [s.5\(2\)\(g\)](#) of the [ADJR Act](#) which renders a decision reviewable as an improper exercise of power if the exercise of power "is so unreasonable that no reasonable person could have so exercised the power".

73. It was not suggested that there was any express requirement that the Tribunal consider conditions or consult as to suitable undertakings before proceeding to a finding under s.88(2)(b)(i) of the Broadcasting Act. Rather, it was

argued that the requirement flowed from the fact that the inquiry was one into "the proposed exercise of two substantive powers". That is so, but the power under s.88(2) of the Broadcasting Act arises only when the Tribunal is satisfied that one or other of the grounds specified in that sub-section has been made out. Thus, in the present matter, the power under s.88(2) arose only when a finding was made that the sixth to ninth respondents were no longer fit and proper to hold their licences. However, the power may also be activated by a finding that the licensee no longer has one or other of the required capabilities to provide an adequate and comprehensive service or that a condition of the licence has not been complied with. There is no basis for distinguishing these findings from a finding, under s.88(2)(b)(i), that the licensee is no longer fit and proper to hold its licence. Section 88(2) contemplates that any one of these matters may warrant the suspension or revocation of a licence.

74. There is a certain want of logic in the notion that, if the Tribunal is conducting an inquiry to ascertain whether it should exercise its power to impose conditions under s.85(1) or its powers of revocation or suspension under s.88(2), it is required to consider, before or contemporaneously with making a finding under s.88(2)(c), that a condition has not been complied with, whether that non-compliance can be remedied by the imposition of a further condition or the acceptance of an undertaking. Indeed, it might be expected that in that situation and in a number of other situations the Tribunal would not be able to give adequate consideration to the content of appropriate undertakings or conditions until it had made precise findings. There is thus no basis for the implication of a requirement that the Tribunal consider the imposition of conditions or consult as to suitable undertakings before proceeding to a finding under s.88(2) of the Broadcasting Act.

75. Given the nature of the Tribunal's factual findings and its evaluation of the conduct the subject of those findings, it is impossible to say that it was unreasonable for the Tribunal not to do that which it was not required to do, namely, consider the imposition of conditions or consult as to suitable undertakings before or contemporaneously with making a finding under s.88(2)(b)(i) of the Broadcasting Act.

The Relevance of the Defamation Settlement

76. The final argument raised in support of the decision of the Full Court was that the decision concerning the sixth to ninth respondents was an improper exercise of power by reason that the Tribunal had regard to an irrelevant matter, namely, the defamation settlement. The settlement was irrelevant, it was argued, because it had been the subject of the 1986 inquiry, and, having been then investigated, the Tribunal was thereafter precluded from a re-investigation of that matter.

77. The subject matter of the 1986 inquiry was not the defamation settlement. It was whether the licence of the sixth respondent should or should not be renewed having regard, inter alia, to whether it was then a fit and proper person to hold its licence. See s.86AA(4)(b)(i) of the Broadcasting Act. Clearly, once the licence was renewed, it was no longer open to the Tribunal to inquire whether the sixth respondent was not, at the time when its licence was renewed in 1986, a fit and proper person to hold its licence. The 1988 inquiry was directed not to that question, but to the question whether the sixth to ninth respondents were then fit and proper persons to hold their licences.

78. Had there been nothing to raise an issue as to the character or reputation of the sixth to ninth respondents by reference to the defamation settlement, a decision to re-inquire into that matter might have been susceptible of challenge under [s.5](#) of the [ADJR Act](#) on a number of grounds, including, under [s.5\(1\)\(h\)](#), that "there was no evidence or other material to justify the making of the decision". But that issue was raised again in 1988 when Mr Bond, during a television broadcast, stated, in relation to the settlement, that "the Premier made it under no doubt that if we were going to continue to do business successfully in Queensland, then he expected that matter to be resolved". That statement was apt to bring into issue the conduct of the sixth respondent, both as to the defamation settlement and as to the frankness exhibited in the 1986 inquiry. It was also apt to bring into issue the character and reputation of the seventh, eighth and ninth respondents as licensee companies associated with Mr Bond. Those matters having been brought into issue by a statement concerning the defamation settlement, it could not be said that the defamation settlement was irrelevant to the question of whether the sixth to ninth respondents were no longer fit and proper persons to hold their licences. Thus, it cannot be said that a finding as to the fitness and propriety of the sixth to ninth respondents made by reference to the conduct of Mr Bond in relation to the defamation settlement was an improper exercise of power.

Conclusion

79. The orders of the Full Court cannot be sustained on the grounds advanced in this Court on behalf of the respondents. Those grounds encompassed the grounds on which the respondents sought special leave to cross-appeal. The applications for special leave to cross-appeal must be refused with costs and the appeal must be allowed. The orders of the Full Court should be set aside and in lieu thereof it should be ordered that the applications for orders of review be dismissed with costs.

ORDER

Appeal allowed with costs.

Set aside the orders of the Full Court of the Federal Court and in lieu thereof order that the applications for orders of review be dismissed with costs.

Applications for special leave to cross-appeal refused with costs.

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