REVIEW OF REFUSALS OF EXCLUDED INDIVIDUAL APPLICATIONS

[based on a paper presented at the 2010 BSA conference]

Litigation Lawyers

INTRODUCTION

1. The *Queensland Building and Construction Commission Act* ("the Act") provides a system whereby a licensee who suffers an insolvency event is excluded from holding a licence for five (5) years.

2. If the Commission considers that a person should be excluded, then section 56AF(2) requires the Commission to give a notice regarding that decision.

3. Section 56AF(3) is mandatory in requiring that, unless certain things happen within twenty-eight (28) days, the licence must be cancelled. Whilst the plain wording of the section is clear, previous cases have confirmed this approach:

   (a) *Anderson v QBSA* [2010] QCAT 390 at [74]; and

   (b) *Shaw v QBSA* [2008] CCT152.

4. Accordingly, there are very serious ramifications resulting from the application of these sections.

DECISION TO CATEGORISE AS EXCLUDED INDIVIDUAL

5. Section 56AF of the Act applies where the Commission considers a person is an Excluded Individual for a Relevant Event. It relevantly provides:

> ***"56AF Procedure if licensee is excluded individual***
> *(1) This section applies if the Commission considers that an individual who is a licensee is an excluded individual for a relevant event.*
> *(2) The Commission must give the individual a written notice identifying the relevant event and stating the following--*
> *(a) why the Commission considers the individual is an excluded individual for the relevant event;*
> *(b) the individual may apply to the authority to be categorised as a permitted individual for the relevant event if the individual has not already done so;*
> *(c) the circumstances, stated in subsection (3), in which the Commission must cancel the individual's licence."*

6. Pursuant to section 86(1), a decision, pursuant to section 56AF that a licensee is an Excluded Individual is reviewable:

> ***"86 Reviewable decisions***
> *(1) The tribunal may review the following decisions of the Commission --*
> *(k) a decision under section 56AF or 56AG that--*
> *(i) a person is an excluded individual or excluded company; or*
> *(ii) an individual is still a director or secretary of, or an influential person for, a company;"*

7. It can be seen that the Act does not provide for a review of a decision under section 56AC. Therefore:

   (a) The decision that a person is an excluded individual is made pursuant to section 56AF(2), and not section 56AC;

   (b) The decision pursuant to section 56AF is a reviewable decision (if the person is licensed); and

(c) The definition of "Excluded Individual" is contained in section 56AC.

8. Section 56AC of the Act which provides:

> ***"Excluded individuals and excluded companies***
>
> *(1) This section applies to an individual if--*
> *(a) after the commencement of this section, the individual takes advantage of the laws of bankruptcy or becomes bankrupt (relevant bankruptcy event); and*
> *(b) 5 years have not elapsed since the relevant bankruptcy event happened.*
>
> *(2) This section applies to an individual if-*
> *(a) after the commencement of this section, a company, for the benefit of a creditor:*
> *(i) has a provisional liquidator, liquidator, administrator or controller appointed; or*
> *(ii) Is wound up, or is ordered to be wound up; and*
> *(b) 5 years have not elapsed since the event mentioned in paragraph (a)(i) or (ii) (relevant company event) happened; and*
> *(c) the individual-*
> *(i) was, when the relevant company event happened, a director or secretary of, or an influential person for, the company; or*
> *(ii) was, at any time after the commencement of this section and within the period of 1 year immediately before the relevant company event happened, a director or secretary of, or an influential person for, the company.*
>
> *(3) If this section applies to an individual because of subsection (1), the individual is an excluded individual for the relevant bankruptcy event.*
>
> *(4) If this section applies to an individual because of subsection (2), the individual is an excluded individual for the relevant company event."*
>
> *(5) An excluded individual for a relevant bankruptcy event (the first event) does not also become an excluded individual for another relevant bankruptcy event (the other event) if the first event and the other event are both consequences flowing from what is, in substance, the one set of circumstances applying to the individual.*
>
> *(6) An excluded individual for a relevant company event (the first event) does not also become an excluded individual for another relevant company event (the other event) if the first event and the other event are both consequences flowing from what is, in substance, the one set of circumstances applying to the company.*
>
> *(7) A company is an excluded company if an individual who is a director or secretary of, or an influential person for, the company is an excluded individual for a relevant event."*

9. It should be noted that:

(a) The wording of section 56AC is not limited to licensee. Hence a decision could be made that a non-licensee is an excluded individual;

(b) A non-licensee does not appear to have a right of review by virtue of the wording of section 86(1)(k); and

(c) There is no time limit as to when the decision could be made.

APPROACH TO THESE SECTIONS IN THIS PAPER

10. In this paper it is proposed to deal with:

(a) Firstly, scenarios for Relevant Bankruptcy Event;

(b) Secondly Relevant Company Event;

(c) Some miscellaneous points; and

(d) Discussion regarding some CCT cases.

RELEVANT BANKRUPTCY EVENT

11. The wording of section 56AC makes it clear that, in the bankruptcy context, there are two (2) situations in which the section applies, namely:

(a) Where an individual "*takes advantage of the laws of bankruptcy*"; and the second

(b) Where an individual "*becomes bankrupt*".

"takes advantage of the laws of bankruptcy"

12. There is no definition in the Act for the expression "takes advantage of the laws of bankruptcy".

13. Although this expression has been used in a number of other Acts in Queensland, there appears to have been no judicial (ie court) consideration of its meaning. This was considered at length in the Appeal Tribunal decision of *QBSA v Meredith* [2010] QCATA 50. In that decision Justice Wilson stated:

> *"[15] Whatever the proper meaning of the expression "takes advantage of the laws of bankruptcy", it was plainly intended to have a different meaning from "becomes bankrupt".*
>
> *[16] The phrase "take advantage of" is, in its ordinary meaning, synonymous with "use". Here, Mr Meredith entered into bankruptcy but then, as is uncontentious, his creditors voted in favour of accepting a composition under s 73 of the BA, leading to annulment. In the context of s 56AC, then, applying the ordinary meaning of the phrase can lead to results that are unreasonable: for example, that a person might find themselves categorised as an excluded individual if they use the laws of bankruptcy to have their bankruptcy annulled.*
>
> *[17] The Acts Interpretation Act 1954 permits consideration of extrinsic material capable of assisting interpretation if the ordinary meaning of words leads to a result that is unreasonable."*

14. Accordingly, His Honour Justice Wilson quoted the Explanatory Note and the Second Reading Speech, when the sections were first introduced in the Act by amendments made in 1999. The explanatory memorandum to the Bill relevantly provided:

> *"Clause 27 inserts a new Part 3A – Excluded and Permitted Individuals and Permitted Companies. A major deficiency with the existing regulatory structure has been the ability of defaulting contractors to restructure their corporate structure to re-emerge as a 'phoenix' company following cancellation of a licence.* ***This new part is designed to remove individuals who have demonstrated their incapacity to manage finances from the building industry for a 5-year period****.(emphasis added)"*

15. The following was said by the Honourable JC Spence in the Second Reading speech:

> *"…the Bill contains provisions to prevent bankrupts and persons associated with bankruptcy from holding or being associated with a building contractor's licence for a period of 5 years ... The scheme introduced by the Bill provides for `excluded individuals' who may not hold a licence. These are bankrupts or* ***individuals who take advantage of the laws of bankruptcy such as through entering into a `part X arrangement' with creditors*** *or who are associated with a failed company. They will be "excluded individuals" for five years from the relevant event. (emphasis added)"*

16. Further His Honour Justice Wilson said:

> *"[23] Even without the assistance of the extrinsic material it is tolerably clear from the provision itself that it is intended to be a broad catch-all for persons who, by whatever means, relieve themselves of the whole or part of their debts by going into bankruptcy; and that, by the phrase, the legislature intended that any use of the laws of bankruptcy to that end would be caught, and lead to the licensee becoming an excluded individual.*
>
> *[28] The learned member fell into error, with respect, in deciding the question whether or not Mr Meredith had taken advantage of the laws of bankruptcy when, for the reasons given here, that was apt to describe what had occurred and sufficient to warrant the QBSA to consider, under s 56AF, that he was an excluded individual by reason of what had occurred (the relevant bankruptcy event)."*

17. Clearly therefore, a person takes advantage of the laws of bankruptcy:

    (a) If they enter a Part IX or Part X arrangement;

    (b) Lodge a debtor's petition;

    (c) If they achieve an annulment by putting forward a composition which is accepted by his or her creditors in accordance with either section 74 or 153A of the *Bankruptcy Act*.

18. Note it is possible to annul a bankruptcy pursuant to section 153B *Bankruptcy Act* if the bankruptcy order ought not to have been made. Such an annulment is probably not "taking advantage of" the laws of bankruptcy.

"becomes bankrupt"

19. The term "becomes bankrupt" is interpreted in the context of licensing legislation to refer to the fact that a person did, in fact, become bankrupt. Bankruptcy law in respect of annulment is to the effect that, upon annulment, the bankruptcy is retrospectively removed. That however is irrelevant legal fictions do not change what occurred.

20. In *QBSA v Meredith* (cited above) Justice Wilson indicated that:

> *"[24] … Mr Meredith is in any event caught by the phrase "becomes bankrupt". An annulment has the effect of putting the bankrupt back in the position they would have been in if the bankruptcy had never occurred but, as Hill J observed in Oates v Commissioner of Taxation [1990] FCA 510, the fact that legislation uses the words "becomes bankrupt" does not mean that the phrase has the same meaning as it does in the BA. The meaning of the phrase must be discovered in the context of the legislation in which it appears, and the purpose of that legislation.*
>
> *[25] The question becomes, then, whether the expression as it is used in s 56AC is properly understood to mean "becomes bankrupt and the bankruptcy has not subsequently been annulled" or whether the words are to be construed as applying whether or not an annulment has occurred.*
>
> *[26] The phrase falls to be considered in the context of legislation focussing upon the qualities to be exhibited by a person who ought properly be licensed under it. The focus is upon the act itself, not its legal effects; the only question to be asked under the subsection is whether or not the individual has "become" bankrupt.*
>
> *[27] Again, the focus of the legislation is upon the contractor's suitability to hold a licence, by reference to his or her capacity for financial management and, in particular, demonstrated ability to remain liquid. It is this financial ability upon which the subsection focuses. Once that is appreciated, the phrase "becomes bankrupt" in this discrete legislation refers not to the provisions of the BA, or the consequences of annulment under it but, rather, to the fact of bankruptcy.*
>
> *[28] The learned member fell into error, with respect, …. In addition, because the alternative phrase "becomes bankrupt" also applies the Authority was entitled, too, to form the conclusion that he was again an excluded individual."*

21. There is also a careful analysis of the issues, consideration of the cases and conclusion of Giles JA in *Union Club v Lord Battenberg* (2006) 66 NSWLR 1 as set out in paragraphs 21 to 81 of his decision as to the effect at law of the annulment of a bankruptcy.

22. As Hill J did in *Oates* (cited above), the question may be tested by example:

    (a) Where an individual who has been the subject of a sequestration order subsequently successfully appeals that order, the conclusion to be reached is that the person should never have become bankrupt in the first place. Such a situation may arise where there was a mistake made as to the identity of the person or for some reason inconsistent with the person having demonstrated their incapacity to manage their finances. Should the expression "becomes bankrupt" be construed as applying whether or not an annulment of the bankruptcy has occurred this would result in an unintended consequence, namely that a person who had not demonstrated their incapacity to manage their finances being an excluded person;

    (b) The alternative case to be considered is that such as the present where an individual is made bankrupt but obtains an annulment in circumstances where a composition was accepted by that person's creditors. In such a situation the person has demonstrated their incapacity to manage their finances. If the construction of the expression "becomes bankrupt" is understood to mean "becomes bankrupt and the bankruptcy has not subsequently been annulled" this would have the effect that the person was not an excluded individual by reason of the fact of becoming bankrupt. However, the person would nevertheless be an excluded individual because the alternate condition that the person had "take[n] advantage of the laws of bankruptcy" would have been satisfied.

23. Therefore:

    (a) "Becomes bankrupt" has its ordinary meaning;

    (b) Annulment by payment of creditors does not change the fact that a person was bankrupted;

(c) Annulment or overturning of a sequestration order where it should not have occurred in the first place does not fall within "becomes bankrupt". Note this last point is not tested by any decision.

RELEVANT COMPANY EVENT

24. In relation to a Relevant Company Event, an individual is an Excluded Individual if:

    (a) A company is wound up, or appoints an administrator, or has a controller appointed;

    (b) The winding up or administration was "for the benefit of a creditor".

    (c) The person was a director or influential person at the time or within the previous twelve (12) months of that company;

"Provisional liquidator, liquidator, administrator or controller appointed"

25. The various types of insolvency events is not discussed or defined in the Act. Clearly therefore, the terms should be understood in their context in the law generally – which means in accordance with the Corporations Act.

26. A liquidator or provisional liquidator appointed in any winding up.

27. An administrator is appointed by the directors of the company pursuant to section 436A of the Corporations Act:

> ***"Company may appoint administrator if board thinks it is or will become insolvent***
> *(1) A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that:*
> *(a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and*
> *(b) an administrator of the company should be appointed."*

28. A controller is defined by section 9 of the Corporations Act to be:

> ***""****controller"* *, in relation to property of a corporation, means:*
> *(a) a receiver, or receiver and manager, of that property; or*
> *(b) anyone else who (whether or not as agent for the corporation) is in possession, or has control, of that property for the purpose of enforcing a charge;*
> *and has a meaning affected by paragraph 434F(b) (which deals with 2 or more persons appointed as controllers)."*

29. Accordingly "a controller" means a Receiver or a Controller. Note that a Receiver could be appointed either by a court or by a secured creditor pursuant to a security document.

"For the benefit of a creditor"

30. Whilst these words appear simple, in practice they raise a number of complicated issues. Eg what if there were no assets and it was not intended that any creditor benefit from the winding up?

31. There is no clear indication in cases as to what this phrase means. In both *Gallagher* and *Corcoran* an example of when this applies was given, but no general principle was enunciated.

32. For that reason, I have attempted to work out a general principle as to when the section is triggered. Previously, I have submitted that whether or not an insolvency event is "for the *benefit of a creditor*" depends upon the purpose or likely effect of that event (ie either might trigger the section), and not proof that an amount of money has been received.

33. I have come to the conclusion recently that this is not the most correct approach. There is High Court authority for the proposition that the words of a statute should interpreted based upon their meaning and not be substituted for a test based on other words. On that basis, my proposed test must be wrong.

34. What can be said is that, whether or not an insolvency of a company is "for the benefit of a creditor" :

(a) The words do not state that the insolvency must be instigated by a creditor (which is confirmed in *Corcoran*, unreported QCAT QR-027-09 on 21 December 2010 at para 15.

(b) The nature of the benefit to creditor *might* be monetary, but it might also be the comfort of knowing that an independent administrator or liquidator has been appointed to manage the company in the interests of creditors. This point was discussed in *Gallagher v QBSA* [2010] QCAT 383 at paragraphs 60 to 62 and in *Corcoran* at [23]. Per Rick Oliver in Gallagher at [61]:

> *"Creditors can benefit in many ways as a consequence of the appointment of liquidators. It is obviously a benefit to creditors just to have liquidators investigate the company's accounts to ascertain if there are any assets available to creditors, preference payments or debtors. In my view the very appointment of a liquidator can be said to be a benefit to creditors."*

(c) Consistent with this, it can be observed that the words do not require that a benefit has actually been received. Hypothetically, this must be correct, as if it was the case that the Authority must wait until a liquidator declares to dividend to enable the Authority to identify a monetary benefit, then it would impossible to determine if a corporate insolvency was for the benefit of a creditor until many, many months after the event. That would be absurd.

(d) A creditor who was considering chasing payment of a debt will receive the benefit of knowing the financial position – namely that the debt is no longer payable. Hence another benefit that a creditor might receive is the ability to write off a debt as irrecoverable for tax purposes – or even to trigger the right to claim pursuant to debt insurance.

(e) Upon liquation, the ATO no longer has to monitor the debt of a delinquent company and to expend resources assessing interest and penalties. Hence when the ATO is a creditor, it receives a benefit of closure, whether or not a dividend is received.

35. It is helpful to consider the effect of the words "*for the benefit of a creditor*" in relation to different types of corporate insolvency events:

(a) Winding up in insolvency by the Court upon application filed by a creditor: Clearly such a winding up is at the request of a creditor. There is no need to embark upon an enquiry to see if the liquidator recovers funds and pays a dividend.

(b) Administration of a Company: By section 436A(1) of the *Corporations Act*, for the directors of a company to appoint an administrator, the director must consider that the company is insolvent or likely to become insolvent at some time in the future – therefore there must be creditors. One of the objectives of an administration of a company, as defined in section 435A, is to administer the affairs of the company in a way that results in a better return to creditors. Consequently, the appointment of an administrator must be for the benefit of a creditor.

(c) Appointment of Receiver by a secured creditor: Clearly, this would be for the benefit of a creditor.

(d) Appointment of Receiver by a court: The Supreme Court has inherent jurisdiction to appoint a receiver where it appears to the Court to be just or convenient to do so. This is usually done on an interim basis to secure assets pending the outcome of litigation. Unless there are no creditors therefore, it can be seen that this has the purpose, and the effect, of securing assets – hence benefitting creditors who can thereby be paid.

(e) Creditors' Voluntary Liquidation: In a creditors' voluntary liquidation, the company must be insolvent, by application of the *Corporations Act*.

(f) Members' Voluntary Liquidation: A members' voluntary wind up is not be for the benefit of a creditor. That is, it is a statutory pre-requisite of a members' voluntary winding up that there is a declaration of solvency and all creditors are paid. Hence the winding up is not for the benefit of a creditor;

(g) Winding up due to oppression or deadlock: Where a company is wound up due to deadlock between directors or perhaps oppression of a minority shareholder, the winding

> up may not be for the benefit of a creditor. However, where deadlock or oppression has prevented or delayed payments to creditors, then the winding up would be for the benefit of a creditor. Hence again, it does not matter that a benefit has or has not been received by a creditor. The purpose or effect of this type of winding up might benefit a creditor;

36. The simple analogies above regarding the above situations show that it is absurd to suggest that for a creditor to receive a benefit a monetary receipt must first be identified to have been received.

37. It cannot possibly be the parliamentary intent that the Authority wait see if a dividend is paid, or whether a liquidator pursues preferences or insolvent trading, or event to consult each creditor to ascertain if they have received a tax benefit or a debt insurance payment.

38. In this case, the liquidation was a Creditors' Voluntary Liquidation and there were in fact creditors. Hence, the administration of the company in this matter was for the benefit of a creditor.

"Director or secretary or influential person for the Company within the 12 months prior to the Relevant Event"

39. The term "director" is not defined by the Act. A person appointed as a director of a company is, of course, a director.

40. In the *Corporations Act* the definition of director is extended:

> **""director"** of a company or other body means:
> (a) a person who:
> (i) is appointed to the position of a director; or
> (ii) is appointed to the position of an alternate director and is acting in that capacity; regardless of the name that is given to their position; and
> (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
> (i) they act in the position of a director; or
> (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes."

41. In view of the inclusion of an influential person in the Act, it is not necessary to consider whether the meaning of director is wide or narrow – though it might on occasion be useful to consider this point.

42. A company search will show if someone is a secretary.

43. The dictionary to the Act includes a definition of "influential person":

> "*influential person, for a company, means an individual, other than a director or secretary of the company, who is in a position to control or substantially influence the conduct of the company's affairs, including, for example, a shareholder with a significant shareholding, a financier or a senior employee*."

44. That definition clearly refers to a person who is in a position to exercise control and is not governed by proof that a person actually did exercise control. This was accepted by Peta Stilgoe in *McClintock*, though that matter has proceeded to a hearing and a decision should be given soon.

45. This accords with common sense, as Part 3A of the Act is aimed at making persons who are influential in a company being accountable to show they took all reasonable steps to avoid the coming into existence of a Relevant Event.

46. The definition includes a substantial shareholder. As to what degree of shareholding is required is open for debate. Note that s. 9 of the Corporations Act defines a "substantial holding" as 5% or more of voting shares in a company - though I anticipate that is used in relation to public companies.

MISCELLANEOUS POINTS

TERMINATION OF A WINDING UP

47. Pursuant to section 482 of the Corporations Act, a Court can terminate a winding up. What is the effect of a termination upon whether a "Relevant Company event" has occurred?

48. Similar to the bankruptcy situation, a winding up could be terminated if:

    (a) The order was made wrongly. The law appears to be that a court will not terminate a winding up, even where there is irregularity, unless it is satisfied as to the company's solvency (there are a number of cases cited on this point in the CCH Corporations Reporter at 148-000). However where there is a *fundamental* irregularity, some cases allow that the winding up be terminated without proof of solvency; or

    (b) All creditors have been paid. This also might occur if the liquidator appoints an administrator and a Deed of Company Arrangement is entered resulting in payment in full.

49. There does not appear to be any QCAT case on this. However consistent with *Meredith*, it is suggested that:

    (a) If a winding up occurred as a result of solvency and payment to creditors in full, then termination of the winding up does not affect the fact that a winding up did occur;

    (b) If a winding up was terminated due to fundamental irregularity and the order should never have been made, then that probably is not a winding up probably does not trigger the exclusion process.

WAIVER/ESTOPPEL

50. What if, after a Relevant Event, in the course of renewing a licence the Applicant discloses that a relevant event occurred, but notwithstanding this, the Commission renewed the licence. Can the Applicant claim estoppel? Can the Commission waive compliance with a statute?

51. Estoppel will not operate in conflict with a statute or to negative the operation of a statute.

52. The doctrine of estoppel was not enforced in previous cases where it was taken to be in conflict with a statutory requirement. See:

    (a) *Considine v Citicorp Australia Ltd* [1981] 1 NSWLR 657

    (b) *Beesly v Hallwood Estates Ltd* [1960] 1 WLR 549

53. A right or duty conferred by legislation does not cease to exist because of a delay in exercising that right or duty. See *R v Ruddick* (1928) 62 OLR 24.

54. Also, rights existing by virtue of a statute cannot be waived where the benefit is one of public policy. The Act gives powers and obligations to an agency which operates for the benefit of the community. Therefore, the Commission's power to classify the Applicant as an Excluded Individual given under statute cannot be waived.

55. In any event, the concept of estoppel requires reliance to detriment upon a representation eg see *Commonwealth v Verwayen* (1990) 170 CLR 394 at 409; 95 ALR 321; 64 ALJR 540.

56. By licence renewal, QBCC does not represent to the Applicant that the Applicant is not an Excluded Individual. Also, there cannot be any action taken by the Applicant to his detriment in reliance on an assumption that he was not an excluded individual.

57. Therefore, both by operation of law, plus also consideration of the alleged estoppel, there cannot be waiver of the statutory obligation to categorise a person as an Excluded Individual.

COMMENTS REGARDING SOME CCT CASES

58. A number of cases were approached wrongly by the CCT. As they were favourable to Applicants, continually you will see reliance upon these cases.

59. In relation to the decision in *Nation v. QBSA* [2006] QCCTB114:

    (a) That decision was a review of a permitted individual decision. By virtue of the wording of 56AD(1) such application must proceed on the basis that, for the purposes of that review, the applicant is an excluded individual. Whether or not somebody is an excluded individual is a separate decision and not the decision under review when considering whether or not somebody should be classified as a permitted individual. Therefore, on the face of the decision, the *Nation* decision was wrongly decided – but particularly it was not within the jurisdiction of the CCT in that case to review whether or not that Applicant was an excluded individual.

    (b) In any event, in *Nation*, consideration as to whether or not that applicant was an influential person (paragraphs 60 to 68) does not consider the definition of "influential person" contained in the dictionary in Schedule 2 of the Act. Rather, the statutory definition was ignored and reference made to the Macquarie Concise dictionary. Clearly, before any reference to the dictionary could occur, the decision must consider the statutory definition contained in the dictionary contained in the Act.

    (c) The definition contained in the dictionary to the Act is different from the definition quoted from the Macquarie dictionary. Clearly therefore, the words in schedule 2 must be applied.

60. In *Thompson v QBSA* [2008] QCCTB 260 at [3]:

    (a) Whilst the matter was review of costs relating to a permitted individual review, that issue was considered based upon whether or not he was influential. Hence this is tainted by the same point as raised above in relation to Nation.

    (b) Also, there was discussion about onus of proof. The Authority should not carry any onus of proof in this type of review.

61. In relation to the decision in *Weldon v. QBSA* [2008] QCCTB:

    (a) *Weldon* is now superseded by Meredith. Note also, it did not cite, nor consider, the *Union Club* decision.

    (b) The first sentence of the case is inconsistent in that it indicates it is review of an Excluded Individual decision, whereas it was actually review of a Permitted Individual decision. Hence the first sentence of the decision does not make sense:

        "This is an application for review of a decision by the QBSA …. whereby it refused to categorise the applicant as a excluded individual pursuant to section 56AD…"

    (c) The actual decision under review, as quoted in the reasons, was a refusal to categorise as a Permitted Individual. The Tribunal therefore did not have the jurisdiction to consider whether or not the Applicant was an Excluded Individual. It is a pre-requisite, and therefore a mandatory premise, of an application under section 56AD(1) for the Applicant to be an Excluded Individual pursuant to section 56AC. Hence the status as an Excluded Individual is admitted by virtue of the application and is not open to challenge. Notwithstanding this, the Tribunal considered factors relevant to the Excluded Individual decision and in effect reviewed that decision, even though that decision was not the subject of review. By, in effect, reviewing the Excluded Individual decision, it is respectfully submitted, the Tribunal acted its beyond jurisdiction.

    (d) Even though the Member stated that he thought that annulment meant in retrospect there was no Relevant Event, the decision was to categorise as a Permitted Individual – ie consistent with the fact that there had been a Relevant Event and that reasonable steps had been taken to prevent that event. Accordingly, there is a lack of consistency within the decision. It is respectfully submitted that, a decision that someone has taken

all reasonable steps to prevent the coming into existence of the circumstances that resulted in a Relevant Event cannot possibly be based upon a suggestion that the Relevant Event did not occur at all.

62. The type of thinking that permeates the above cases is significant. A strict demarcation exists between a decision that a person is an Excluded Person, as apart from a decision that they should be permitted.

Malcolm Robinson