FEDERAL COURT OF AUSTRALIA

Malek Fahd Islamic School Limited v Minister for Education and Training [2018] FCAFC 37

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| Appeal from: | *Malek Fahd Islamic School Limited v Minister for Education and Training* [2016] AATA 1087 |
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| File number: |  |
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| Judges: | **PERRAM, MORTIMER & Wigney JJ** |
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| Date of judgment: | 20 March 2018 |
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| Catchwords: | **EDUCATION –** *Australian Education Act 2013* (Cth) (‘the Act’) – Basic requirements for approval – Fit and proper to be an approved authority – Ongoing funding requirements for approved authorities – Variation or revocation of approval on Minister’s own initiative – *Australian Education Regulation 2013* (Cth) (‘the Regulation’) – Not-for-profit requirement**ADMINISTRATIVE LAW** – appeal from Administrative Appeals Tribunal under s 44 of *Administrative Appeals Tribunal Act 1975* (Cth) – where Respondent revoked Applicant’s status as approved authority due to failure to satisfy requirements for Commonwealth funding under Act – whether Tribunal erred in law by making various findings not reasonably open on evidence – whether finding available on evidence that money had been ‘applied’ for purpose of school or ‘distributed’ whether directly or indirectly to any other person within meaning of reg 26 of Regulation – whether Tribunal misconstrued s 81(2) of Act by imposing higher threshold on Applicant for variation of approval than legislation required or did not adequately reveal process of reasoning  |
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| Legislation: | *Constitution* s 96*Administrative Appeals Tribunal Act 1975* (Cth) ss 43(1), 44*Australian Charities and Not-for-profits Commission Act 2012* (Cth)*Australian Education Act 2013* (Cth) Part 6, ss 6, 14, 21, 22, 72, 73, 74, 75, 76, 77, 78, 81, 82, 130*Australian Education Regulation 2013* (Cth) regs 26, 29*Stamp Duties Act 1920* (NSW) |
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| Cases cited: | *Ardmona Fruit Products Co-operative Co Ltd v Federal Commissioner of Taxation* [1952] HCA 40; 86 CLR 530*Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321*Bacon v Salamane* [1965] HCA 22; 112 CLR 85*Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378*Commissioner of Taxation v Bargwanna* [2012] HCA 11; 244 CLR 655*Empire Waste Pty Ltd v District Court of New South Wales* [2013] NSWCA 394; 86 NSWLR 142*Flynn v Commissioner of Stamp Duties* [1975] 1 NSWLR 208*Lennon v Gibson and Howes Ltd* [1919] AC 709; 26 CLR 285*Malek Fahd Islamic School Limited v Minister for Education and Training* [2016] FCA 807*Malek Fahd Islamic School Limited v The Australian Federation of Islamic Councils Inc* [2017] NSWSC 1712*Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24*Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51; 281 ALR 147*Pettitt v Dunkley* [1971] 1 NSWLR 376 *R v Easton* [1994] 1 Qd R 531*Re Lutheran Laypeople’s League of Australia Inc* [2016] SASC 106*Residual Assco Group Ltd v Spalvins* [2000] HCA 33; 202 CLR 629*Robert Bosch (Australia) Pty Ltd v Secretary, Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] FCAFC 117; 206 FCR 92*Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664*Trustees, Executors and Agency Co Ltd v Acting Federal Commissioner of Taxation* [1917] HCA 56; 23 CLR 576 |
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| Date of hearing: | 17 May 2017 |
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| Date of last submissions: | 5 December 2017 (Applicant)7 December 2017 (Respondent) |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 168 |
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ORDERS

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|  | NSD 18 of 2017 |
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| BETWEEN: | MALEK FAHD ISLAMIC SCHOOL LIMITEDApplicant |
| AND: | MINISTER FOR EDUCATION AND TRAININGRespondent |

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| JUDGES: | PERRAM, MORTIMER AND WIGNEY JJ |
| DATE OF ORDER: | 20 march 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Applicant pay the Respondent’s costs as taxed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRAM J:

## 1. Introduction

1. This is an appeal from the Administrative Appeals Tribunal (‘the Tribunal’) under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (‘the AAT Act’). The Applicant was an ‘approved authority’ under the provisions of the *Australian Education Act 2013* (Cth) (‘the AE Act’). The Applicant’s status as an approved authority entitled it to access financial assistance provided by the Commonwealth for entities which operate schools. The Applicant conducts an independent Islamic combined primary and high school operating principally from premises at Greenacre in Sydney. It also has smaller campuses at Hoxton Park and Beaumont Hills. There are ongoing obligations with which an approved authority must comply to be eligible to remain approved and hence to access Federal funding. One of these, in s 75(3) of the AE Act, is that a school should not be conducted for profit. A delegate of the Minister came to the view that the Applicant was being conducted for profit and revoked its status as an approved authority. That decision was affirmed on internal review by another delegate of the Minister (‘Review Decision’). The effect of the Review Decision was to make the Applicant ineligible for Federal funding. It was not in dispute that, if the Review Decision stands, the school conducted by the Applicant will have to close. The Review Decision has, however, been stayed pending the resolution of these proceedings.
2. The basis on which the delegate concluded in the Review Decision that the Applicant was being conducted for profit concerned, *inter alia*, the lease under which the school occupies its Greenacre campus. The lessor is the Australian Federation of Islamic Councils Inc (‘AFIC’). It was AFIC which had originally set up the Applicant as a company limited by guarantee. Until March 2016, the Applicant was under the control of AFIC. It is not in dispute that AFIC improperly used the Applicant as an object for making profits. This continued until March 2016 when a new independent board for the Applicant was put in place. That board took rapid steps to terminate a number of inappropriate arrangements with which AFIC had saddled the Applicant.
3. One problem the new board could not immediately solve arose from the lease of the Greenacre premises. The difficulties were twofold. First, the rent payable to AFIC under it exceeded a fair market rent. Secondly, the Applicant could not simply terminate the lease, however improperly it had been procured by AFIC, because it continued to need the Greenacre premises to conduct the school.
4. It did the best, therefore, that it could which was to stop paying rent to AFIC. But the lease remained on foot and rent continued to accrue under it although the obligation to pay that rent remained unmet. Responsibly, the continuing accrual of the rental obligation was recorded in some of the Applicant’s accounting records.
5. In the Review Decision, the delegate affirmed the original decision and concluded that the Applicant’s authorisation should be revoked.
6. The Applicant sought a review of the Review Decision in the Tribunal under the AAT Act. At the same time, it launched proceedings against AFIC in the Equity Division of the New South Wales Supreme Court seeking relief in relation to a number of allegations of breach of fiduciary duty by AFIC. Significantly, however, in the initial form of the proceedings no mention was made about future obligations which the Applicant might owe to AFIC in respect of the Greenacre lease. The Summons and Statement filed in the Commercial List did seek equitable damages and other relief for rent paid to AFIC in excess of the market rate at Greenacre in the past, however this did not address the continuing obligation it owed to AFIC to pay inflated rent into the future. Before the Tribunal, testimony was given by one of the Applicant’s new independent board members, Ms Silva, of the very many steps the Applicant was now taking to unravel its relationship with AFIC. In addition, board minutes of the new board recording these efforts were also put in evidence.
7. The Tribunal nevertheless affirmed the Review Decision. So far as it could see, the Applicant was continuing to incur a liability to AFIC to pay above market rate rent. The Applicant seemed to the Tribunal to be conducting its school for the profit of AFIC. The Tribunal accepted that the new board was doing its best to bring AFIC to account by means of the equity proceedings but these did not adequately impugn the Greenacre lease. It was unable to conclude that the rental obligation was likely to cease to exist. In that circumstance, like the delegate, it too thought the school was being conducted for profit.
8. It is from that adverse decision that the Applicant now appeals to this Court.

## 2. The grounds of appeal

1. The grounds of appeal were set out in the Applicant’s Amended Notice of Appeal and were extensive. However, the case was narrowed on the hearing of appeal to just three grounds. These were, first, that the Tribunal had erred in law in its interpretation of the word ‘applied’ in reg 26(c)(i) of the *Australian Education Regulation 2013* (Cth) (‘the AE Regulation’); secondly, that the Tribunal had erred in law in concluding that the School was being conducted for profit when there was no evidence that this was so; and, thirdly, that the Tribunal had erred in law in its interpretation of s 81 of the AE Act because, contrary to the views of the Tribunal, that provision did authorise the imposition of conditions even if the Applicant was in breach of the requirements of the AE Act.

## 3. The proper construction of reg 26(c)(i) of the AE Regulation

1. The Tribunal’s view was that whilst the lease from AFIC remained in place with a rent set above a market rate, the Applicant was, in effect, paying a profit component to AFIC.
2. This was so even though the Tribunal accepted that the Applicant had stopped paying AFIC the rent due under the lease some time before. That was beside the point where, so the Tribunal reasoned, the Applicant continued to record the rent falling due under the lease as an accrued liability. It also observed that the proceedings which the Applicant had commenced against AFIC in the Equity Division of the Supreme Court of New South Wales did not sufficiently address the Greenacre lease (in the sense I have explained above at [6]).
3. The provision the Minister’s delegate had initially moved under in the Review Decision to revoke the Applicant’s approval as an approved authority was s 81(1)(a) of the AE Act. It was this same power that the Tribunal, then standing in the Minister’s shoes, proceeded to exercise: AAT Act s 43(1). The Tribunal reasoned that the language of s 81(1)(a) required it, *inter alia*, to be satisfied that the Applicant complied with s 75. Attention in this appeal was confined to s 75(3) which required the Applicant not to conduct for profit any school. Although s 75(3) was not itself couched in language which required the Minister to form a state of satisfaction as to that matter, that is how s 75(3) operated when picked up by s 81(1)(a), since s 81(1)(a) expressly contemplated that a decision would be made that had the effect of bringing into play s 130(2)(b) which permitted the regulations to prescribe in such cases the ‘matters that the decision-maker may or must (as prescribed by the regulations) have regard to in making the decision’.
4. Subregulation 26(c) of the AE Regulation was such a regulation and was expressed, relevantly, to have been made for the purposes of s 75(3), that is to say, for the purpose of the requirement that the Applicant not conduct a school for profit. Subregulation 26(c) did not prescribe any mandatory considerations that had to be taken into account but it did set out considerations which could, as a matter of discretion, be taken into account in assessing whether an approved authority was conducting a school for profit. Relevantly, reg 26(c) provided:

‘**Division 1—Basic requirements for authorities and bodies**

**26 Not‑for‑profit requirement**

For paragraph 130(2)(b) of the Act, the matters that the Minister may have regard to for the purposes of determining whether a person satisfies the requirement in subsection 75(3), 84(3) or 92(3) of the Act are:

…

(c) whether money derived from or relating to a school in relation to which the person has applied to be the approved authority, block grant authority or non‑government representative body:

(i) has been applied for the purposes of the school or for the purposes of the functions of the authority or body; or

(ii) has been distributed (whether directly or indirectly) to an owner of the authority or body, or any other person; and

…’

1. These were not the only matters, however, which the Minister, and thereafter the Tribunal, could take into account under the AE Act. Section 75 itself provided that for the purpose of determining whether an approved authority satisfied s 75(3) (the non-profit requirement) the Minister ‘may have regard to:… any other matters the Minister considers relevant’ (s 75(6)(d)).
2. Before the Tribunal, and again in this Court, the Applicant contended that the mere fact that rent fell due under the lease and was being recorded in some of the Applicant’s accounting records as a liability which continued to accrue meant, in terms of reg 26(c)(i), that the Applicant could not be said to be ‘applying’ money relating to the school for a non-school purpose. This was because it was not paying the rent and no funds were changing hands. For a largely similar reason, it submitted that it was not ‘distributing’ money in terms of reg 26(c)(ii) either.
3. The Tribunal did not accept this construction of reg 26(c)(i) holding instead that the money was being applied because the obligation to pay rent remained on foot: [50]. Importantly, it also reasoned that even if that was not the proper construction of the word ‘applied’ in reg 26(c)(i) and the Applicant was right that no funds were being ‘applied’ within its meaning, the fact that rent was continuing to accrue under the lease was a matter which it could take into account under the catchall provision in s 75(6)(d) (‘any other matters the Minister considers relevant’).
4. I am unable to discern any error in that approach. Regardless of what the word ‘applied’ means in reg 26(c)(i), I can see no basis on which the Tribunal may be held to have erred in considering the continuing accrual of rent as a matter considered relevant under s 75(6)(d). The only possible answer to that would be an argument that such a matter was a mandatory irrelevant consideration within the meaning of *Minister for Aboriginal Affairs v Peko Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40. But there is nothing in the subject-matter, scope or purpose of the AE Act from which such an implication may be drawn. If reg 26(c)(i) were perhaps to be couched in negative terms such that particular matters could not be taken into account then some occasion might arise to consider whether it was necessary to read down s 75(6)(d) of the AE Act. Such an argument would be on the assumption that the AE Act and AE Regulation are a scheme so that it is legitimate to construe the former in light of the latter: see *Empire Waste Pty Ltd v District Court of New South Wales* [2013] NSWCA 394; 86 NSWLR 142. But even making that assumption, I am unable to extract from the proposition that ‘X’ may be taken into account, the proposition that ‘Y’ may not be. Accordingly, I discern no error.
5. I would reject the first argument.

## 4. The No Evidence Ground

1. The Applicant’s no evidence grounds fell into two categories: first, a collection of factual findings related to the Tribunal’s view that obligations were continuing to accrue under the Greenacre lease; secondly, a collection of factual findings that the Applicant was applying funds for non-school purposes. It is convenient to deal with these separately although they are, to an extent, interrelated.

### (a) Continuing obligation to pay rent

1. The precise findings challenged were set out at paragraph 1(a)-(f) of the Further Amended Notice of Appeal. However, the Applicant’s argument in relation to all of them is essentially the same. The debate can be resolved by reference, therefore, to just one of them. The most convenient is the finding relied upon in Ground 1(d). This concerned the Tribunal’s finding at [62]:

‘The ongoing commitment to the Greenacre lease confirms MFISL will remain unable to comply with ss 78(2)(c) and 78(3).’

1. The Applicant submitted that evidence adduced during the hearing ‘precluded’ such a finding. The evidence in question consisted of testimony given by Ms Silva on 29 September 2016 together with the board resolution of 28 September 2016. There is no need to set this evidence out. It shows clearly that the Applicant was aware of the situation with the Greenacre lease and was very active in its efforts to solve the problem which the lease presented.
2. But accepting that to be so, the fact remains that the Greenacre lease was on foot and, at the time, was not being challenged in the Supreme Court proceedings on the issue of future amounts owing under it. In light of that fact, it is not possible to say that there was *no* evidence that the Applicant would remain liable under the lease. There was at least the evidence of the lease itself and the absence of any relevant allegation in the Supreme Court proceedings seeking to impugn that lease. A different view could have been taken, of course, as to whether the Applicant would remain liable into the future. The Tribunal could well have decided that the enthusiasm of the Applicant was so great and the breaches of fiduciary duty by AFIC so very clear, that the Applicant’s continuing liability could not be expected to last long. But that is not an argument that there was no evidence upon which the Tribunal could act in reaching the contrary conclusion. It is an argument about what evidence should be preferred: cf. *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 356.
3. Here there was plainly evidence which supported the Tribunal’s conclusion. Accordingly, I would reject each of Grounds 1(a)-(f).

### (b) Application of funds

1. Grounds 1(g)-(i) turned on the idea that funds could not be applied in circumstances where there was merely an incurring of a liability which was not discharged. If the Applicant were correct in its interpretation of the word ‘applied’ in reg 26(c)(i) then I would accept that there was no evidence before the Tribunal that the Applicant had applied funds for a non-school purpose in that sense. But such an error would, at best, feed back into the argument that the Tribunal had erred by concluding that the Applicant was conducting a school for profit on the basis set out in reg 26(c)(i). However, the Tribunal also expressly reached the same conclusion under s 75(6)(d) on the express basis that ‘applied’ meant what the Applicant submitted; that is to say, an actual payment.
2. The difficulty for the argument then is that if there was no evidence for the finding that funds were ‘applied’ under reg 26(c)(i) this was because the lease was generating only an accrued but undischarged liability. But if that was the case, it could be, and was in fact, taken into account under s 75(6)(d). Either way, the Applicant loses and the argument is not material.
3. I would reject the Grounds 1(g)-(i).

## 5. Conditional Approval where non-compliant?

1. The Applicant submitted that once the Tribunal concluded that it was non-compliant with the AE Act it should have considered imposing conditions on its approval rather than proceeding to cancel the approval. Instead, the Tribunal arguably concluded that it had no power to impose conditions whilst the Applicant was non-compliant. I say ‘arguably’ because the Tribunal’s reasons are susceptible to an interpretation that it was disinclined to exercise its discretion where the Applicant continued to be non-compliant. However, I will assume that its reasons are to be construed as being about power. For completeness, I do not regard this ambiguity as having the effect that the Tribunal’s reasons are not adequate in an administrative law sense: *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 382, 384 and 388.
2. At [64] the Tribunal concluded that the Applicant was non-compliant:

‘64. I have concluded MFISL was not compliant with s 75 in the past because it was, prior to March 2016, being conducted for profit. I have also concluded it was not a fit and proper person prior to that point, and that the organisation was not compliant with its obligations under s 78. It follows the discretion in s 81 to revoke or vary the approval has been enlivened.’

1. On the topic of conditions it then reasoned this way at [68]:

‘68. While I have the power to vary an approval and make it subject to conditions under s 81(2), **I do not think that power extends far enough to permit me to effectively waive significant ongoing non-compliance.** That would be inconsistent with the whole purpose of the legislation. That is what I am being asked to do, especially in relation to the uncommercial aspects of the Greenacre lease. Even if it could be argued approval might be given on condition that:

MFISL diligently pursued the litigation out of separate funds (because financial assistance provided by the Commonwealth should not be expended on litigation);

the payments to AFIC remain suspended pending the outcome of the litigation and further review; and

any further shortcomings in the policies and procedures and governance arrangements were addressed;

there is no plan for dealing with the ongoing implications of the Greenacre lease. Financial assistance provided by the Commonwealth will continue to leak from MFISL to AFIC. In those circumstances, the only appropriate course is to affirm the decision under review.’

(emphasis added)

1. I will assume in the Applicant’s favour that the emphasised words in [68] do indeed reflect a view that conditions could not be imposed whilst the Applicant did not comply with the AE Act. The word ‘significant’ may provide some reason to doubt whether this is truly so but it is not necessary to dwell upon that matter. This is because s 81 of the AE Act does not operate in the way the Applicant suggests. Subsections 81(1)(a) and (2) and (4) are as follows:

‘**81 Variation or revocation of approval on Minister’s own initiative**

(1) The Minister may, in writing, vary or revoke an approved authority’s approval for one or more schools on the Minister’s own initiative if:

…

(a) the Minister is satisfied that the approved authority does not comply, is not complying, or has not complied, with section 75, 77 or 78; or

…

(2) Without limiting subsection (1), the Minister may vary an approved authority’s approval by making the approval subject to one or more conditions, and the approved authority must comply with those conditions.

…

(4) The Minister may vary an approved authority’s approval for one or more schools only if the Minister is satisfied that the requirements referred to in paragraph 73(1)(b) are, and will continue to be, satisfied in relation to the varied approval.

…’

1. The effect of s 81(4) is that conditions may be imposed only if the requirements of s 73(1)(b) are, and will continue to be, complied with. Subparagraph 73(1)(b) provides:

‘**73 Approval of person**

(1) The Minister may, in writing, approve a person as an approved authority for one or more schools if:

…

(b) the Minister is satisfied that:

(i) the person satisfies, and will continue to satisfy, the requirements in section 75; and

…’

1. Section 75 sets out the basic requirements for approval. The net effect of those provisions is that conditions may only be imposed if they achieve compliance. It is not possible for the Tribunal to impose conditions if it is not satisfied that, having done so, the approved authority will be compliant. Ground 3 should be rejected.

## 6. Conclusion

1. The appeal must be dismissed with costs. After the appeal was reserved, Ball J gave judgment in *Malek Fahd Islamic School Limited v The Australian Federation of Islamic Councils Inc* [2017] NSWSC 1712. The effect of that judgment is that AFIC is to put the Applicant in the position as if the Greenacre lease involved the charging of a market rent both in relation to the past and into the future. That conclusion removes the basis upon which the Tribunal decided this case. However, on an appeal such as the present this Court’s ability to make findings of fact is constrained by the requirement that any such finding not be inconsistent with facts found by the Tribunal (other than findings made by the Tribunal as the result of an error of law): AAT Act s 44(7)(a). I have found there to be no error of law discernible in the Tribunal’s reasons and making a finding that future rent owed by the Applicant to AFIC in relation to Greenacre will be at a market rate would be inconsistent with findings made by the Tribunal. Accordingly, it is not open to this Court to rely upon the judgment of Ball J. The appropriate course is for the Applicant to make a fresh application to the Minister under s 72 of the AE Act. The application to lead fresh evidence about the Supreme Court proceedings should be refused.

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| I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 20 March 2018

REASONS FOR JUDGMENT

MORTIMER J:

# Background to the appeal

1. In his reasons, Perram J has set out the background to this appeal, and to the Tribunal’s decision and I respectfully adopt his Honour’s summary.

# My conclusions on the appeal

1. I agree with Perram J, for the reasons his Honour gives, that the applicant’s “no evidence” grounds in paragraphs 1(a)-(f) of the further amended notice of appeal should be rejected.
2. I take a different view to Perram and Wigney JJ on what Perram J describes as the applicant’s “first ground”, concerning the construction and operation of reg 26 of the *Australian Education Regulation 2013* (Cth). This different view leads me to the conclusion that the appeal should be allowed.
3. On the third ground as argued, concerning the scope and operation of s 81(2) of the *Australian* *Education Act* *2013* (Cth), I agree with the conclusion of Perram and Wigney JJ that this ground should not succeed, although I do so for different reasons.
4. I agree with Perram J (at [33]) that although the decision of Ball J in *Malek Fahd Islamic School Limited v The Australian Federation of Islamic Councils Inc* [2017] NSWSC 1712 has the effect of removing the basis on which the Tribunal determined its review against the applicant, this Court cannot take Ball J’s decision into account in determining whether the applicant has made out any of the errors of law set out in its appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth). Although it is conceivable that fresh evidence may be led on an s 44 appeal (for example, where there are procedural fairness issues), given the nature of the applicant’s ground of appeal in this case, this appeal must be considered the basis of the evidence and material before the Tribunal at the time it made its decision.
5. I also agree with Perram J that the applicant could make a fresh application to the Minister for approval under s 72 of the Australian Education Act. However, my conclusion on the appeal would probably make that course unnecessary. I would set aside the Tribunal’s decision on the basis of errors of law in the Tribunal’s construction and application of s 75(3) of the Act, read with reg 26, and remit the matter to the Tribunal for determination according to law. Before the Tribunal, whose function in reviewing a refusal of approval given under s 73 of the Act is to make the correct or preferable decision on the basis of the evidence available to it at the time of its decision, the applicant would have been able to rely on fresh evidence, including the New South Wales Supreme Court decision.
6. These reasons will now address the statutory scheme, then deal with the argument about the requirement in s 75(3), read with reg 26, and then deal briefly with the s 81(2) argument.

# The statutory scheme

1. The legislative scheme of the Australian Education Act recognises the practical reality that schools need considerable public funding in order to be able to provide education services to Australian students, services which are designed to place Australia internationally as a country with a high quality education system. In relation to the provision of federal funding to states (as opposed to territories), the constitutional authority for this is derived from s 96 of the *Constitution*.
2. The price of public funding by the Commonwealth government is a relatively high level of regulation. The regulation is designed to meet a number of wide ranging objectives, which are set out in s 3 of the Act. The Preamble to the Act also evinces a focus on the provision of internationally recognised high quality education “allowing each student to reach his or her full potential so that he or she can succeed, achieve his or her aspirations, and contribute fully to his or her community, now and in the future”. Aside from emphasising again the objective of securing for all Australian students a high quality and “highly equitable” education, s 3(1)(c) also specifies that the funding arrangements for which the Act provides are to proceed on a “needs-based” funding model. The “needs-based” approach means that large portions of the legislative scheme are devoted to defining and categorising kinds of schools (using matters such as size, location and student demographics) in order to allocate levels of funding.
3. Other objectives set out in s 3 include “quality teaching”, “quality learning”, “empowered school leadership”, “meeting student need” and “transparency and accountability”. The latter objective is of some relevance to the construction issues arising on the appeal and should be set out:

*Transparency and accountability*

(6) Support will be provided to schools to find ways to improve continuously by:

(a) analysing and applying data on the educational outcomes of school students (including outcomes relating to the academic performance, attendance, behaviour and wellbeing of school students); and

(b) making schools more accountable to the community in relation to their performance and the performance of their school students.

1. Part 2 of the Act deals with grants of financial assistance to states and territories. Within Pt 2, s 21 establishes the scheme for payments to states and territories, including in respect of schools and “approved authorities” on an annual basis, and s 22 makes funding conditional upon states and territories implementing what are described as “national policy initiatives” for school education.
2. The concept of an approved authority as a recipient of federal funding is central to the administration of the Act, in relation to non-government schools in particular. Where a government school is concerned, the relevant state or territory government is treated as the approved authority, and the legislative scheme refers directly to the state or territory. Where a non-government school is concerned, there must be a body corporate (s 75(2)) which assumes the role and function of an approved authority and in those circumstances the legislative scheme uses the term “approved authority”. Section 6 defines an “approved authority” in the following way:

***approved authority*** for a school means the person that is approved as the approved authority for the school under section 73.

1. The approval process in Div 2 of Pt 6 of the Act (including s 73) is central to the arguments on the appeal, and I return to it below. In summary, approval is given by the Minister or his or her delegate, and hinges on satisfaction as to a number of statutory criteria which can be seen to reflect in broad terms the objectives of the Act. Approval can be revoked or varied, including at the Minister’s own initiative. That is what occurred in relation to the revocation of the approval of Malek Fahd Islamic School Limited.
2. Returning to the sequence of the scheme, in relation to all schools, Pt 2 of the Act prescribes methods for determining amounts of funding payable to state and territory governments for education, generally by the relevant Minister, including recurrent funding and capital funding. Part 3 of the Act deals with recurrent funding for participating schools. “Participating schools”, as defined in s 6, are those for which there is an approved authority, and are either non-government schools or government schools located in a participating state or territory (as determined by the Minister under s 14). Part 3 also provides formulae for determining the base amount and loading payable to a state or territory in relation to each participating school located in that state or territory. The “needs-based” approach, as the legislative scheme identifies “needs”, is apparent in the terms of Pt 3, which provides additional loading for schools requiring extra support for, among other things, students with disability, Indigenous students and students who have low English proficiency. Part 4 deals with recurrent funding for a different category of schools (“non-participating schools”) and Pt 5 deals with capital funding.
3. Part 6 concerns the approval of authorities and bodies for the purposes of the Act, and is the key part for the purposes of this appeal. Relevantly, the recurrent funding for which Pt 3 provides will be paid to a state or territory, to be passed on to an approved authority for a non-government school. Obviously, it is this funding which is critical to the school’s day-to-day operation and survival.
4. The approval process begins with an application: s 72 and s 73(1)(a). There can only be one approved authority for each school: s 73(2).
5. Approval is substantively contingent on the Minister’s satisfaction of three matters, which are set out in s 73(1)(b):

(i) the person satisfies, and will continue to satisfy, the requirements in section 75; and

(ii) the ongoing policy requirements in section 77 will be satisfied in relation to the schools; and

(iii) the ongoing funding requirements in section 78 will be satisfied in relation to the schools.

1. Section 73(3) empowers the Minister to impose conditions on an approval, and also imposes an obligation on the approved authority to comply with any conditions imposed. Non-compliance with conditions is one of the grounds for revocation by the Minister: see s 81(1)(b).
2. There are “public interest” provisions which authorise the refusal of an approval to an applicant which would otherwise qualify for approval, or the giving of an approval where it would not otherwise be given: see s 74.
3. Section 75 sets out what are described in the heading as “basic requirements” for approval. The terms of s 76 make it clear that s 75 is primarily directed at non-government schools. The requirements of s 75 were central to the decisions under review and are central to the appeal in this proceeding. Section 75 should accordingly be set out in full:

**75 Basic requirements for approval**

1. This section sets out requirements for a person for the purposes of subparagraph 73(1)(b)(i) and paragraph 81(1)(a).

Note: Approved authorities for government schools may be taken to satisfy the requirements in this section (see section 76).

*Body corporate or body politic*

1. The person is a body corporate or a body politic.

*Not-for-profit*

(3) The person does not conduct for profit any school in relation to which the application is made.

*Financial viability*

(4) The person is financially viable.

*Fit and proper person*

(5) The person is fit and proper to be an approved authority for one or more schools.

*Matters to have regard to*

(6) For the purposes of determining whether a person satisfies the requirement in subsection (3), (4) or (5), the Minister may have regard to:

(a) for the purposes of subsection (3)—whether the State or Territory Minister for a school in relation to which the person is applying considers that the person conducts the school for profit; and

(b) for the purposes of subsection (4)—the amount of financial assistance the person receives, or is likely to receive, from the Commonwealth, a State or a Territory; and

(c) for the purposes of subsection (5)—whether the person has complied, or is complying, with laws of the Commonwealth, a State or a Territory relating to the provision of school education; and

(d) any other matters the Minister considers relevant.

Note: The regulations may prescribe other matters that the Minister may or must have regard to in making a decision under this section (see paragraph 130(2)(b)).

*Permission under law of relevant State or Territory*

(7) For each level and location specified in the approval, the person is permitted under a law of the relevant State or Territory to provide that level of education at that location.

1. By s 130(2)(b), regulations may be made adding to the matters to which a decision-maker may or must have regard in forming the requisite state of satisfaction on an application for approval and, flowing from the terms of s 81 as set out below, on consideration of any variation or revocation of approval. Regulations have been made on this subject matter. Regulation 26 of the Australian Education Regulationamplifies the matters to be considered in forming a state of satisfaction whether an authority operates not-for-profit. It provides:

**26 Not-for-profit requirement**

For paragraph 130(2)(b) of the Act, the matters that the Minister may have regard to for the purposes of determining whether a person satisfies the requirement in subsection 75(3), 84(3) or 92(3) of the Act are:

(a) whether the person has not-for-profit status under a law of the Commonwealth, a State or a Territory; and

(b) whether:

(i) the person has financial policies and practices for a school in relation to which the person has applied to be an approved authority, block grant authority or non-government representative body; and

(ii) if so, the quality of those policies and practices; and

(c) whether money derived from or relating to a school in relation to which the person has applied to be the approved authority, block grant authority or non-government representative body:

(i) has been applied for the purposes of the school or for the purposes of the functions of the authority or body; or

(ii) has been distributed (whether directly or indirectly) to an owner of the authority or body, or any other person; and

(d) if the person is a body corporate—the requirements in any legislation under which the person is established, or in the person’s constitution.

Note: A law of the Commonwealth under which a person may have a not-for-profit status is the *Australian Charities and Not-for-profits Commission Act 2012*.

1. The Regulations also amplify and add to the requirements relating to financial viability (s 75(4)) and the “fit and proper person” requirement in s 75(5).
2. Sections 77 and 78 respectively set out the ongoing policy and funding requirements for approval, but compliance with these provisions was not in issue in the applicant’s circumstances.
3. The regulations also prescribe the purposes for which schools may expend funding they receive. At the time of the Tribunal’s decision, reg 29 was in the following form:

**29 Approved authorities**

*Recurrent funding*

1. For paragraph 78(2)(a) of the Act, an approved authority for a school must spend, or commit to spend, financial assistance that is payable to the authority in accordance with:

(a) Division 2 or 5 of Part 3 of the Act (recurrent funding for participating schools); or

(b) Part 4 of the Act (recurrent funding for non-participating schools);

for the purpose of providing school education.

(2) Without limiting subsection (1), the purpose mentioned in that subsection includes the following:

(a) salaries and other expenses relating to staff at the school, including expenses related to the professional development of the staff;

(b) developing materials related to the school’s curriculum;

(c) general operating expenses of the school;

(d) maintaining the school’s land and buildings;

(e) purchasing capital equipment for the school;

(f) for a school whose capacity to contribute percentage is 0%— purchasing land and buildings;

(g) in any case—administrative costs associated with the authority’s compliance with the Act and this regulation.

Note: See subsection 54(1) of the Act for schools whose capacity to contribute percentage is 0%.

(3) Despite subsections (1) and (2), financial assistance must not be spent, or committed to be spent:

(a) as security to obtain, or comply with, any form of loan, credit, payment or other interest, except for the purposes of paragraph (2)(f); or

(b) for the preparation of or in the course of any litigation, except litigation by a State or Territory to recover a debt from an authority or body as mentioned in paragraph 11(4)(b).

*Special circumstances funding*

(4) For paragraph 78(2)(a) of the Act, an approved authority for a school must spend, or commit to spend, financial assistance that is payable to the authority under section 69 of the Act (special circumstances funding) in accordance with any written directions of the Minister.

(5) For the purposes of subsection (4), the Minister may give written directions to an approved authority.

*Direction not legislative instrument*

(6) A direction given under subsection (5) is not a legislative instrument.

*Time limit for spending, or committing to spend, funding*

(7) Financial assistance mentioned in subsection (1) or (4) must be spent, or committed to be spent:

(a) in the year in which the financial assistance is paid to the approved authority; or

(b) if a determination is made by the Minister under subsection (7A) for the approved authority—before the day, or within the period, specified in the determination.

(7A) For paragraph (7)(b), the Minister may determine, in writing, a day before, or a period within which, an approved authority must spend, or commit to spend, financial assistance mentioned in subsection (1) or (4).

*Interest earned on financial assistance*

(8) Any interest earned on financial assistance mentioned in subsection (1) or (4) must be spent, or committed to be spent, in the same way as the financial assistance.

1. Some emphasis was placed on the terms of reg 29 in argument, in the sense that the text indicates that the scheme is primarily concerned with the actual expenditure of the financial assistance provided by the Commonwealth. The scheme aims to quantify the amount of financial assistance given according to the Parliament’s objectives and priorities, and then to monitor and control how the funds provided through that assistance are acquitted. It is not, so the applicant contended, a scheme concerned with how funds are accounted for, unless that accounting affects or impacts on how the funds are in reality spent. I accept that submission. This scheme is concerned with funding the delivery of education services through schools, ensuring the quality and appropriateness of education provided, and controlling the expenditure of public funds to ensure those funds are spent on what the scheme envisages they are to be spent on.
2. The terms of reg 29 had additional relevance for the Tribunal’s reasoning, in that the Tribunal used the (non-exhaustive) list of purposes in reg 29(2) as a “convenient reference point for the assessment required under reg 26”: see [31] of the Tribunal’s reasons.
3. As I have indicated, the power exercised in relation to the applicant, was the revocation and variation power in s 81 which, in turn, expressly picks up the terms of s 75. Section 81 provides:

**81 Variation or revocation of approval on Minister’s own initiative**

(1) The Minister may, in writing, vary or revoke an approved authority’s approval for one or more schools on the Minister’s own initiative if:

(a) the Minister is satisfied that the approved authority does not comply, is not complying, or has not complied, with section 75, 77 or 78; or

(b) the Minister is satisfied that the approved authority is not complying or has not complied with a condition to which the approval is subject; or

(c) the Minister is satisfied that varying or revoking the approval is in the public interest; or

(d) for an approved authority for government schools located in a State or Territory—the Minister is satisfied that the State or Territory has not complied with a condition under section 22 or 24, any of paragraphs 23(2)(a) to (d), or subsection 23(3).

Note 1: Decisions under paragraphs (1)(a), (b) and (d) are reviewable decisions (see Division 3 of Part 9).

Note 2: A report must be laid before each House of the Parliament if the Minister makes a decision under paragraph (1)(c) (see section 127).

(2) Without limiting subsection (1), the Minister may vary an approved authority’s approval by making the approval subject to one or more conditions, and the approved authority must comply with those conditions.

(3) The Minister may do either of the following if the Minister is satisfied that a school has ceased to provide primary education or secondary education:

(a) if the approved authority for the school is approved only for that school—revoke the authority’s approval;

(b) if the approved authority for the school is approved for other schools as well—vary the authority’s approval by removing the school from the approval.

(4) The Minister may vary an approved authority’s approval for one or more schools only if the Minister is satisfied that the requirements referred to in paragraph 73(1)(b) are, and will continue to be, satisfied in relation to the varied approval.

Note: This subsection is subject to paragraph 74(4)(b) (approval or refusal on public interest grounds).

(5) A variation or revocation must specify the day on which the variation or revocation takes effect, which may be earlier than the day the Minister varies or revokes the approval.

(6) In varying or revoking an approval of an approved authority under subsection (1) (including by imposing conditions as referred to in subsection (2)), the Minister must have regard to any relevant arrangement of the approved authority.

1. As the respondent submitted, the text of s 81(1)(a) is intended to include past, present and continuing non-compliance.

# The s 75(3) requirement

1. By three grounds, the applicant challenges the Tribunal’s findings that the school continued to be operated “for profit”, in contravention of s 75(3), read with reg 26. In its grounds of appeal, some of the grounds as expressed were “no evidence” grounds, but there was no doubt during the hearing of the appeal that the applicant advanced an argument that the Tribunal had misunderstood and misapplied s 75(3), when it was read with reg 26. The applicant also specifically challenged (in ground 1(i) as I set out below) the Tribunal’s alternative reasoning on the s 75(3) requirement.
2. These grounds concern the Tribunal’s interpretation of reg 26(c)(i) in the agreed factual circumstances before it. Those circumstances were that the applicant had not transferred or paid any funds to the Australian Federation of Islamic Councils Inc (AFIC) since April 2016, but there was nevertheless a recognition in the applicant’s accounts of the accrual of a continuing liability to pay rent under the Greenacre lease because, at the point in time of the Tribunal’s review, the Greenacre lease remained on foot despite a challenge in the New South Wales Supreme Court. This argument was said by the applicant to be encapsulated, in several ways, in grounds 1(g), (h) and (i) of its further amended notice of appeal. Those grounds alleged that the Tribunal “erred in law by finding or concluding” that:

g. “Funds are in fact being applied at the point when the liability accrues but before anything is paid” (RFD, para 49) when such finding or conclusion was not reasonably open on the evidence;

h. The applicant is “still applying money otherwise than for the purposes of the School, even if it is not distributing those funds pending the outcome of the litigation” (RFD, para 68) when such finding or conclusion was not reasonably open on the evidence;

i. Even if the obligation to make payments to AFIC under the Greenacre lease did not lead to the “application” of funds, that was a “matter that is properly to be taken into account pursuant to s 75(6)(d) of the Act” (RFD, para 50);

1. The applicant submits these grounds challenge the Tribunal’s finding that, notwithstanding the applicant had not paid monies to AFIC since April 2016 and, following an undertaking to this Court on 21 June 2016, it could not do so after 21 June 2016 without leave of this Court (see orders made by Rares J in *Malek Fahd Islamic School Limited v Minister for Education and Training* [2016] FCA 807), funds were nevertheless being “applied” to AFIC in breach of reg 26(c)(i).
2. The reasoning of the Tribunal to this conclusion was as follows.
3. The Tribunal’s opening paragraph about the “not-for-profit” requirement is instructive in understanding its approach. At [18], the Tribunal stated:

The expression ‘not for profit’ is not defined in the Act. The expression is commonly used in relation to companies and other associations operated for charitable, scientific, educational, religious or community purposes. But to say an organisation is ‘not for profit’ says little enough about the way the business of that organisation is run. While many of these organisations merely aim to avoid insolvency or generate a modest surplus, some ‘not for profit’ organisations run businesses that generate substantial profits. The key quality of a ‘not for profit’ entity in the law of corporations and associations is that the entity does not distribute profits to its members in the form of dividends. The expression ‘not for profit’ is, in that sense, a misnomer. But the expression may have a broader meaning in the present context.

1. As I explain below, this kind of analysis might inform the operation of reg 26(c)(ii), but it misunderstands reg 26(c)(i).
2. At [32], the Tribunal noted that it was agreed between the parties that there was non-compliance in the past, so that the discretion to revoke was “triggered”. It noted the Minister’s contention to the Tribunal was that the “applicant remains non-compliant and cannot be compliant in the foreseeable future”, because the Greenacre lease remains in place, although at the time of the decision the validity and enforceability of the lease itself was not challenged in the New South Wales Supreme Court proceeding. At [34]-[43], the Tribunal then described the transactions between the applicant and AFIC in the period from 1990 to approximately January 2011. It concluded (at [44]), uncontroversially on the evidence, that the applicant had–in the past–been conducting a school “for profit” within the meaning of s 75(3), because of the way the monies had been “applied” for purposes unconnected with the functions of an approved authority and had been “distributed” to “any other person”.
3. In making these findings, it is clear the Tribunal used the terms “applied” and “distributed” to mean that funds had in fact left the custody, possession or control of the applicant and been transferred to third parties in a way which was unconnected with the educational purposes of the school. At [30], the Tribunal referred to the list in reg 29(2) as indicative of what would be considered expenditures for the purpose of providing school education. The terms of that regulation are set out at [57] above.
4. Having noted as a matter of chronology the commencement of proceedings by the applicant against AFIC in the New South Wales Supreme Court in September 2016 to recover monies paid, damages and declaratory relief about, amongst other things, the rental advances it had made to AFIC, the Tribunal then referred (at [46]-[47]) to the applicant’s contention that it had stopped making payments to AFIC while acknowledging liabilities under existing legal commitments “continue to accrue”, so that the school could not be said “presently” to be conducted on a “for profit” basis.
5. It is important to set out the next passage of the Tribunal’s reasons (at [48]) because, in my opinion, the first dot point in this passage may be the origins of what I consider to be the misconstruction of reg 26(c):

The Minister disagrees that events occurring since mid-2016 have changed everything. Ms Williams, counsel for the Minister, said there were still doubts over the quality of the policies and practices of MFISL. She also said the commencement of the Supreme Court proceedings was not as significant as MFISL argues because the proceedings may be unsuccessful. But there are two other problems because:

* Liabilities continue to accrue while the proceedings are on foot – and the fact MFISL must make provision for those liabilities in its accounts means those funds are still being *applied* within the meaning of reg 26(c)(i), even if they are not *distributed* within the meaning of reg 26(C)(ii);
* The proceedings do not adequately address the problems with the Greenacre lease.

(Emphasis in original.)

1. The Tribunal then expressed doubts about the Minister’s characterisation of the significance of the Supreme Court proceedings, but as to the first dot point, the Tribunal stated (at [49]):

There is more force in the Minister’s next contention: I think funds are in fact being *applied* at the point when the liability accrues but before anything is paid. But the Minister’s last point is even more powerful.

(Emphasis in original.)

1. The Tribunal then continued, expressing its conclusions about the operation of s 75(3) read with reg 26 (at [50]-[51]):

I agree the prayer for relief in the Supreme Court proceedings does not adequately address the problems with the Greenacre lease. Even if the proceedings are ultimately successful, the Greenacre lease will remain in place for the balance of the 25-year term. The statement of claim does not dispute that the obligation to pay the inflated rental due under that lease will continue into the future, even if MFISL succeeds in recovering earlier payments. That means MFISL’s funds will continued to be applied otherwise than for the purposes of the school, and they will continue to be distributed (if indirectly) to AFIC. The current moratorium on payments – if that is how it is properly characterised – can only be temporary. While there might be more room for doubt over the other payments and obligations that are subject to challenge, I am satisfied the liability to make payments under the Greenacre lease leads to the *application* of funds. But even if I am wrong in that conclusion, I am satisfied it is a matter that is properly to be taken into account pursuant to s 75(6)(d) of the Act. It is undesirable that the school should be accruing significant liabilities in this way. Those liabilities hang over its head and threaten its viability if things do not go well in court.

Mr Coleman SC, counsel for MFISL, suggested the statement of claim might yet be amended to enlarge the claim in a way that might address the Minister’s concerns about the Greenacre lease. I suppose it is also possible AFIC might make concessions. But none of that has occurred as yet. I must make my decision with reference to the material in front of me. Even if I accept the financial policies and procedures are substantially compliant – in other words, if I accept the evidence of Mr Dornan and Ms Silva at its highest – the totality of the material before me suggests MFISL is *still* being conducted for profit, and that it will *continue* to be conducted for profit into the foreseeable future.

(Emphasis in original.)

1. Counsel informed the Court that since the Tribunal’s decision, an amended summons had indeed been filed in the New South Wales Supreme Court, in which part of the relief sought was the setting aside of the Greenacre lease. As Perram J sets out in his Honour’s reasons for judgment, the situation developed even further while this Court was reserved on the appeal. I agree with Perram J, for the reasons he gives, that the developments after the Tribunal’s decision can have no bearing on the outcome of the s 44 appeal against the Tribunal’s decision. If it were contended those developments had rendered relief futile, that is a matter the Court could consider. However no such submissions have been made. Clearly the doubts the Tribunal had about the efficacy of the Supreme Court proceedings were a factor in its decision but of itself this matter could not affect or influence the proper construction of s 75(3) read with reg 26.
2. I consider that read together, [48], [49] and [50] of the Tribunal’s reasons demonstrate that the Tribunal in fact reached its conclusion based only on reg 26(c)(i) and not (ii). It discounted the relevance of reg 26(c)(ii) because it appeared to accept that the term “distributed” did involve the actual disbursement of funds. That is precisely what the text of reg 26(c)(ii) conveys: it describes a distribution “to” another person or entity.
3. At [53], the Tribunal also used the liability under the Greenacre lease to support its finding that the applicant was not a “fit and proper” person because it “continues to pay out monies for impermissible purposes”, repeating a similar finding at [60]. The description of the applicant “paying out” monies is inapt, and supports my view that the Tribunal adopted an incorrect approach to the construction and application of s 75(3). So too the finding at [68] by the Tribunal that “[f]inancial assistance provided by the Commonwealth will continue to leak from MFISL to AFIC”.

## The Tribunal’s approach in summary

1. It is clear on a fair reading of the Tribunal’s reasons that, in determining whether, at the time of the Tribunal’s decision, the applicant met the “not-for-profit” basic requirement for approval in s 75(3), the Tribunal focussed on the terms of reg 26(c) and made its decision based on its construction of the terms of reg 26(c)(i) but not (ii).
2. I deal with the Tribunal’s reliance on the “catch all” consideration in s 75(6)(d) at [66]-[74] below.

## Applicant’s construction

1. The applicant contends the ordinary meaning of “applied” in reg 26(c)(i) is “appropriated”, “put to use” or “disposed of”, being the meanings listed in the Shorter Oxford Dictionary. An accrual of unpaid rent on the applicant’s “books” cannot, it submits, come within the regulation. The applicant notes this definition was used by Sheppard J in *Flynn v Commissioner of Stamp Duties* [1975] 1 NSWLR 208, at 210G-211A. There, his Honour was considering “applied” in the context of s 3(1) of the *Stamp Duties Act 1920* (NSW).
2. The applicant submits that Mr Dornan was not cross-examined to the effect that any funds were set aside or “earmark[ed]” for the payment of the Greenacre lease. Rather, he was cross-examined only about the existence of the accounting entries, which was clear on the accounts in evidence before the Tribunal. I understand the point the applicant seeks to make is that there was no evidentiary basis for the Tribunal to be satisfied the then non-payment of the Greenacre lease payments, or of any monies to AFIC directly or indirectly, would change in the foreseeable future and that payments would resume.
3. The applicant also points to the Tribunal’s acceptance that the applicant fell within reg 26(a) (its not-for-profit status for the purposes of Commonwealth and State law, for example the *Australian Charities and Not-for-profits Commission Act* *2012* (Cth)) and reg 26(d) (the requirement in its constitution that it not operate for profit): see [22] of the Tribunal’s reasons.

## Respondent’s construction

1. The respondent points to the substantial liabilities accrued and continuing to accrue under the Greenacre lease. It submits that for 2016 the amount owing was $1.5 million, and that rental liability was accruing on a monthly basis as part of the loan balance owing by the applicant to AFIC at the rate of $125,000 per month excluding GST. Referring to Board minutes, the respondent submits that the way the Board was treating the non-payment was as a “suspension”. The respondent submits this characterisation was correct, and that there was no doubt that the applicant was compelled to make provision for the rental payments in its accounts because it had an existing legal obligation to pay the rental.
2. The respondent submits the Tribunal was correct that reg 26(c)(i) of the Regulation “expands the scope of inquiry beyond direct or indirect distributions of money”, which it submits is the subject matter of reg 26(c)(ii).
3. Finally, relying on different authorities (including *Ardmona Fruit Products Co-operative Co Ltd v Federal Commissioner of Taxation* [1952] HCA 40; 86 CLR 530, *Trustees, Executors and Agency Co Ltd v Acting Federal Commissioner of Taxation* [1917] HCA 56; 23 CLR 576, *Commissioner of Taxation v Bargwanna* [2012] HCA 11; 244 CLR 655, and *R v Easton* [1994] 1 Qd R 531), the respondent contended that the word “applied” could have many different meanings, depending on context, and that it did not necessarily include “immediate” expenditure.

#### The correct construction of reg 26(c)

1. I agree with the conclusion urged in the applicant’s submissions. My agreement does not stem from resort to any dictionary, but rather a consideration of the appropriate meaning of the word “applied” in its context, and taking into account the purpose of a “not-for-profit” requirement as one of the basic conditions for approval.
2. In *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; 202 CLR 629 at [27], the plurality (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) said:

The purpose of s 11(3)(b) is a strong indicator that the purpose of s 11 is to enable a party to proceedings in a federal court relating to a State matter to bring new proceedings in the Supreme Court whenever the federal court has disposed of its proceedings on the basis that it had no jurisdiction to deal with them. That being so, the textual points upon which the defendants rely cannot prevail. In construing a statutory provision, we should always keep in mind what Judge Learned Hand said in *Cabell v Markham* [(1945) 148 F 2d 737 at 739]:

“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”

1. In *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 at [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) the Court again endorsed this approach.
2. With the possible exception of circumstances where the same term is used in “similar” legislation (see the Privy Council’s decision on appeal from the High Court in *Lennon v Gibson and Howes Ltd* [1919] AC 709; 26 CLR 285 at 287), there is little utility in looking at the way a word has been applied in different statutory contexts. As this Court has emphasised, using the interpretation of a word or term in one statute to supply the interpretation in a different statutory context is generally inappropriate and “can be a distraction or worse”: *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] FCAFC 117; 206 FCR 92; see also *Bacon v Salamane* [1965] HCA 22; 112 CLR 85 at 90 (Windeyer J) and 97 (Owen J), Barwick CJ agreeing. The proper construction of a statute arises from an interpretation of the text used in that statute, in its particular context and from which, taking the statutory scheme as a whole, the purposes of the statute can be derived: see generally *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at [24]–[25], French CJ and Hayne J.
3. It can be accepted that as the respondent submitted, in a particular context Parliament might use the word “applied” in relation to funds without intending that it be restricted to a situation where there is an immediate disbursement of monies, and intending to include accounting entries. All will depend on context.
4. In relation to reg 26(c) and its context, I consider the applicant’s approach is correct for both textual and contextual reasons.
5. At a textual level, I consider both the respondent’s submissions and the Tribunal’s approach stem from a misunderstanding of reg 26(c). Each limb of reg 26(c) deals with different conduct by which the entity responsible for running a school might deal with funds granted or paid to it.
6. Subregulation (i) concerns how the entity *spends* the money it receives: that is, what it spends money on. How money is spent may itself indicate a departure from the underlying rationale of the term “not-for-profit”. That term is generally understood to mean that all of the entity’s expenditure of profits or money received must be connected to the promotion of the purposes and objects for which it is established, and not for the purpose of enriching other persons or entities: see, for example: *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51; 281 ALR 147 at [13] (Gzell J, with Allsop P and Handley AJA agreeing); *Re Lutheran Laypeople’s League of Australia Inc* [2016] SASC 106, [63]-[66] (Hinton J). What an entity spends money on may also be evidence of inappropriate syphoning or channelling of funds away from the school for the private gain of other individuals or entities.
7. Subregulation (ii) concerns the disbursement of funds “to” identified persons or entities. First, to the “owner” of the entity, which would obviously be evidence of an entity operating for profit. Second to any “other person”, which is in my opinion, inserted so as to catch indirect payments to the owners of the authority, or to persons or entities connected to the owners of the authority. The term “owner” is not defined in the regulations or in the Act, but I take it to mean those who control the entity. The use of the word “distributed”, while in my opinion requiring there to be an actual disbursement (as the respondent appears to accept), is also intended to signify a profit-sharing kind of arrangement.
8. Thus, subregulation (i) asks the decision-maker to examine the purpose of payments made, and subregulation (ii) asks it to examine to whom the payments were made as well as their purpose. In each case, the focus is on expenditure or disbursement of monies. It is not correct, as the respondent submits, that subregulation (i) “expands the scope of inquiry beyond direct or indirect distributions of money the subject of” subregulation (ii). Rather, the two subregulations deal with two distinct ways in which funds could be disbursed contrary to the objectives of the funding scheme established by the Act. The focus of subregulations (i) and (ii) on, respectively, the purpose of expenditure and the persons to whom funds are disbursed are consistent with the discussion in the authorities to which I have referred at [92] about the general understanding of the concept of “not-for-profit”.
9. Contextually, the first point to make is that the requirement that an entity act “not-for-profit” in s 75(3) is the governing requirement. Regulation 26 provides a partial and non-exhaustive set of considerations which may assist a decision-maker in reaching the conclusion required by s 75(3). It seems the Tribunal treated “failure” on the criterion in reg 26(c) as necessarily indicating an entity is acting for profit. That may have led the Tribunal to interpret reg 26(c) too broadly, and may also explain why the Tribunal appeared to have discounted to naught the fact that the applicant satisfied reg 26(a) and (d).
10. Matters properly within the scope of reg 26 may support a conclusion a school is operating not-for-profit, but having considered the matters in reg 26, the decision-maker must always return to the principal provision in s 75(3). That provision directs attention to how the responsible entity “conducts” the school itself. Attention is directed to how the school functions, and what its funds are spent on. The school’s accounts may provide evidence of a school’s spending and how the school is “conducted”, but that is all.
11. The focus of the legislative scheme as a whole, as I have explained above, is on the facilitation and achievement of the delivery of high quality education to school students, including continual improvements to raise the standard of education available to all Australian students, and to raise the performance of Australian school students in a comparative sense internationally. Public funding is accepted by the scheme as an integral part of achieving that outcome, and is allocated on a needs-based model (as the scheme identifies the concepts of needs). A core part of pursuing these objectives, advancing the purposes of the legislative scheme and ensuring accountability to the Australian community for the significant sums of money involved in education grants, is the regulation of how schools spend the funds they are given. They are to be spent on matters which are consistent with the Act’s objectives and purposes. The two sides of the coin – grant and actual expenditure of funds – are the focus of the Act.
12. I leave to one side circumstances which might involve the concoction of fraudulent accounts for illegitimate purposes. In my opinion, such conduct need not be brought in as a disqualification on approval through the terms of reg 26(c). Such conduct will likely mean a corporation, and those who control it, are not “fit and proper” for the purposes of s 75(5).

## The Tribunal’s alternative reasoning

1. I note that at the end of [50], the Tribunal relied on the applicant’s liability under the Greenacre lease, to find that the accrual of a significant liability was “undesirable” and threatened the school’s viability “if things do not go well in court”. This view led the Tribunal also to rely on the outstanding liability in the school’s accounts under the Greenacre lease as a matter it could take into account under s 75(6)(d).
2. In my opinion, if the Tribunal erred, as I have found it did, in the way it took into account the liability under the Greenacre lease as a basis to find the applicant was operating the school “for profit”, it follows that this alternative reasoning is also affected by legal error. Once it is concluded that accounting entries could not have been used as the basis of a general conclusion adverse to the applicant under s 75(3), because it does not represent how the school in fact spends or disburses funds granted to it, then subject to what I have said about fraud or other dishonesty at [98] above and that such conduct would go to the other qualifying condition of “fit and proper”, the existence of an accounting liability is properly seen as legally irrelevant. The four matters set out in 75(6) are no more than permissible considerations to be taken into account in determining one or more of the three core requirements in s 75(3), (4) and (5). The matters in s 75(6) are not free standing requirements or considerations – they are, as the provision is structured, to be used to determine whether one or more of the requirements in subsections (3), (4) and (5) are met.
3. In the present case, the Tribunal’s reasons suggest first, that it may have erroneously seen the consideration in s 75(6)(d) as an independent basis for its decision. That is not the function of s 75(6)(d). Rather, the paragraph permits the Minister (or the Tribunal) to look at “other matters” considered relevant – for the purposes of determining one of the three core requirements. The language used by the Tribunal, even read as fairly as it could be, seems to suggest the Tribunal was determining for itself what was desirable or undesirable about the present circumstances the new school board found itself in, and in that context potential risks the extant rental liability might pose to the school.
4. Viewed in this way, the Tribunal reasoned one of two ways. Either, by the use of the phrase “threaten its viability”, it was taking the accounting entries into account in determining the question in s 75(5), but it does not appear to have raised the use of the accounting entries in that way with the applicant. It would also be quite a different exercise for the Tribunal to embark on examining the future risks to the viability of the applicant, rather than (as s 75(4) requires) its financial viability at the time of the Tribunal’s decision.
5. Second, this paragraph of the Tribunal’s reasons appears in that part of its reasons headed “The not for profit requirement”. Earlier at [15] of its reasons, where the Tribunal had set out the structure of its reasons, it had indicated there were two components of s 75 that it proposed to consider in detail. They were the “not for profit” requirement and the “fit and proper person” requirement. The Tribunal expressly found at [15] that:

The first substantive requirement in s 75 is easily satisfied in this case: MFISL is a body corporate. It also appears to be financially viable, and it has permission under the laws of New South Wales to operate. But there are two further substantive requirements which raise issues, namely…

1. That is where the Tribunal set out the two issues it went on to consider.
2. In other words, the Tribunal made a finding in favour of the applicant on the financial viability requirement in s 75(4).
3. That means, as the structure of its reasons indicate, that in [50], its observations there were directed to the “not for profit” requirement in s 75(3). For the reasons I have explained above, in my opinion the Tribunal misconstrued and misapplied s 75(3). That being the case, it is impermissible to reintroduce the same consideration through s 75(6)(d). It is not an “other matter”. It is the same matter, the same misconstruction. The scheme does not permit such an approach. If it is more than the same matter then, for reasons I have set out at [63] the Tribunal has not taken the accounting entries into account for the purpose of determining one of the three requirements in ss 75(3), (4) or (5) but rather it has elevated the accounting entries to some kind of independent ground for refusing approval not permitted by the Act.
4. Accordingly, unlike Perram J (see his Honour’s reasons at [17]), I do not consider that the two sentences at the end of the Tribunal’s reasons in the “not for profit” section of its reasons avoid the error I have identified, or render the error sufficiently immaterial to the Tribunal’s conclusions to justify withholding relief on a discretionary basis.

# The sECTION 81(2) argument

1. By s 74(1)(b), the Minister has a power to give an approval to an entity that would not meet the requirements of, amongst other things but relevantly here, s 75 of the Act. Section 74(1) provides:
2. Despite subsection 73(1), the Minister may, in writing, do the following:

(a) refuse to approve, as an approved authority, a person that the Minister would otherwise approve, if the Minister is satisfied that it would be contrary to the public interest to approve the person;

(b) approve, as an approved authority, a person that the Minister would not otherwise approve, if the Minister is satisfied that it is in the public interest to approve the person.

Note 1: A decision under this section is not a reviewable decision.

Note 2: A report must be laid before each House of the Parliament if the Minister makes a decision under this section (see section 127).

1. Section 74(4) empowers the Minister to specify the period during which the Ministerial approval is in force, and or alternatively which of the requirements, amongst other things, in s 75 the person is relieved from complying with.
2. Thus, the scheme does contemplate that a person may operate a school without having to meet all of the otherwise “core” requirements in, amongst other provisions, s 75.
3. It will be recalled, as s 74 identified, that there are three usual sets of requirements for approval:
	1. the “basic requirements” in s 75;
	2. the ongoing policy requirements in s 77; and
	3. the ongoing funding requirements in s 78.
4. The two variation powers in ss 80 and 81 operate on either the application of an approved authority (s 80) or on the Minister’s initiative (s 81). It was not disputed that the Tribunal could also exercise both of these powers. The fact was that the applicant had asked the Tribunal to impose conditions, but it appears this request was treated as involving the power in s 81 of the Act.
5. The power to vary an approval by imposing conditions is conferred by s 81(2):

(2) Without limiting subsection (1), the Minister may vary an approved authority’s approval by making the approval subject to one or more conditions, and the approved authority must comply with those conditions.

1. The exercise of that power was, at the time of the Tribunal’s decision, conditioned by s 81(4):

(4) The Minister may vary an approved authority’s approval for one or more schools only if the Minister is satisfied that the requirements referred to in paragraph 73(1)(b) are, and will continue to be, satisfied in relation to the varied approval.

Note: This subsection is subject to paragraph 74(4)(b) (approval or refusal on public interest grounds).

1. The reference to s 73(1)(b) essentially picks up the requirements of s 75 of the Act.
2. Approaching the matter taking into account the purpose of these provisions, which is to ensure that the standards considered appropriate by the Parliament for schools to first receive, and second use, public funds are met, I see no reason to construe s 81(4) in a way which precludes the imposition of a condition designed to ensure that an entity can meet the basic requirements set out in s 75. Non-compliance with a condition will expose the entity to revocation of the approval: see s 81(1)(d). In any event, as I have outlined, the scheme contemplates that entities may operate as approved authorities and receive and use public funds even without meeting these requirements, if the Minister is satisfied they should be able to do so. The imposition of conditions is another way the Minister might allow that situation to occur, and one with a tighter supervisory regime.
3. Rather, what s 81(4) is designed to ensure is that however the conditions power is exercised, it achieves the outcome that the Minister is satisfied the three requirements in s 75 (not for profit, fit and proper person, and financial viability) are met. That is the work to be done by the language “are, and will continue to be” in s 81(4). In other words, the Minister must be satisfied that whatever condition or conditions are imposed, the effect is that the three basic requirements in s 75(3), (4) and (5) are met at the time of the Minister’s decision (by reason of the condition) and will continue to be met. It may well be the case that the formulation “are, and will continue to be” affects the kind of conditions which might be imposed.
4. To take an example: the Minister could find that of the persons on the Board of an approved entity, one person has such a well-established criminal record in relation to crime involving fraud that she or he puts at risk the use of public funds by that entity. A condition could be imposed that the person resign from the Board and have no role, direct or indirect, in the administration of the approved authority or the school itself, and on that resignation, the s 73 approval will come into effect (see s 81(5)). Without the imposition of that condition, it would be open to the Minister not to be satisfied, for the purposes of s 75(5), that the entity was a fit and proper person to be an approved authority. However, the choice is not a binary one. If the Minister was otherwise satisfied it was appropriate to do so, a condition could be imposed and if the entity chose to comply, and to continue to comply, it could secure approval. In my opinion this is a construction which advances the objects of the scheme and provides the kind of flexibility one would expect to see in a legislative scheme dealing with very practical matters such as the administration of large institutions such as schools. In each case it is of course a matter for the Minister (or the Tribunal on review) whether the discretion to impose conditions should or should not be exercised.
5. Notwithstanding the construction of s 81(1) and (2), read with s 81(4) as in force at the time of the Tribunal’s decision, that I consider to be correct, and notwithstanding that the Tribunal did not adopt an approach consistent with the construction I consider to be correct, in the circumstances I would nevertheless not uphold the applicant's grounds of appeal concerning the conditions.
6. In its reasons the Tribunal set out at [65] the situation in which it might have given approval subject to conditions:

Since the change in management in March 2016, I am satisfied many things have changed, or are changing. The change in personnel and the introduction of new policies and practices suggest the organisation is making progress towards the goal of being considered fit and proper. It is also more likely to be capable of satisfying its obligations under s 78. If the internal governance arrangements and the policies and practices were the only issue, I would not be inclined to revoke the approval – although I would require the ongoing approval to be subject to conditions that would reassure the Minister, the school community and the wider public that MFISL was complying with its obligations.

1. Then, at [68], it set out its reasons on why it did not consider it should exercise the power to approve with conditions:

While I have the power to vary an approval and make it subject to conditions under s 81(2), I do not think that power extends far enough to permit me to effectively waive significant ongoing non-compliance. That would be inconsistent with the whole purpose of the legislation. That is what I am being asked to do, especially in relation to the uncommercial aspects of the Greenacre lease. Even if it could be argued approval might be given on condition that:

* MFISL diligently pursued the litigation out of separate funds (because financial assistance provided by the Commonwealth should not be expended on litigation);
* the payments to AFIC remain suspended pending the outcome of the litigation and further review; and
* any further shortcomings in the policies and procedures and governance arrangements were addressed;

there is no plan for dealing with the ongoing implications of the Greenacre lease. Financial assistance provided by the Commonwealth will continue to leak from MFISL to AFIC. In those circumstances, the only appropriate course is to affirm the decision under review.

1. Putting to one side that the Tribunal may have read its power too narrowly, this passage reveals that the Tribunal understood it was being asked to impose three possible conditions.
2. During argument on the appeal, senior counsel for the applicant confirmed to the Court that the applicant did ask the Tribunal to impose the first two conditions set out in [68]. He disputed the applicant had sought the third condition, or that on the evidence it could be said to be necessary. He added that the applicant had submitted to the Tribunal it should impose “such further or other conditions as the Minister might suggest or the tribunal might see fit to impose”. If that was the extent of the submission on conditions, it was hardly of much assistance to the Tribunal and, alone, could not provide grounds for an identification of an error of law by the Tribunal which was material to its decision. Conditions with some precision would have needed to be proposed by the applicant to render any error of construction about ss 81(1) and (2) material to the decision of the Tribunal.
3. The difficulty for the applicant with its reliance on the first two conditions set out by the Tribunal at [68] as the foundation for a submission that the Tribunal’s error in construction was material to the outcome or conclusion of the Tribunal is that neither is directed at changing the position as it appeared on the evidence before the Tribunal. The applicant was, on its evidence, diligently pursuing litigation against AFIC. The applicant had, on the evidence, suspended lease payments to AFIC. If the Tribunal took the view (as it did, and for the purposes of this discussion putting to one side the error I have identified with the Tribunal’s approach to s 75(3) and reg 26, that the applicant was not compliant with the three basic requirements, the conditions as formulated by the applicant were not capable of rendering it compliant. This can be contrasted with the example I have given at [118] above, where the condition contemplates a change from the position on the evidence before the decision-maker.
4. The conditions put forward by the applicant to the Tribunal were simply not capable of affecting the conclusion the Tribunal had reached. Whatever error might be apparent in the Tribunal’s construction of s 81(1) and (2), it was not one which had a material effect on the conclusion reached by the Tribunal. It would not have been open to the Tribunal, given its other findings, to see the two conditions proposed by the applicant as capable of rendering the applicant, on approval, compliant with the three basic requirements and the Tribunal would have been required, in any event, to affirm the decision under review.

# Conclusion

1. I would allow the appeal, set aside the decision of the Tribunal and remit the matter to the Tribunal for determination according to law.

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| --- |
| I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 20 March 2018

REASONS FOR JUDGMENT

WIGNEY J:

1. This is an appeal by Malek Fahd Islamic **School** Limited from a decision of the Administrative Appeals **Tribunal** to affirm a decision of the **Minister** for Education and Training to revoke the School’s approval as an approved authority under the *Australian Education* ***Act*** *2013* (Cth).
2. I have read the reasons to be published by both Perram J and Mortimer J. I agree with Perram J that the appeal must be dismissed. Subject to the additional reasons that follow, I also agree with his Honour’s reasons. I regret that I am unable to agree with Mortimer J that the Tribunal relevantly erred in law in arriving at its conclusion that the School continued to be operated for profit and therefore did not meet the requirement in s 75(3) of the Act.
3. While the School’s grounds of appeal were lengthy and complicated, the appeal raised essentially two broad issues. The first concerned whether the Tribunal’s finding that the School continued to fail to comply with the not-for-profit requirement in s 75(3) of the Act was somehow infected by a misconstruction of reg 26(c)(i) of the *Australian Education* ***Regulation*** *2013* (Cth), or was otherwise not open on the evidence. The second concerned whether the Tribunal took a legally erroneous approach to the School’s application that, if it did fail to comply with the not-for-profit requirement, its approval should be varied rather than revoked.

# The not-for-profit issue

1. The School’s primary argument was that the Tribunal erred in finding that it continued to be operated for profit. The School appears to have accepted, or at least not disputed, that under its previous management it had been operated for profit and therefore did not comply with the not-for-profit requirement in s 75(3) of the Act. That was because it had applied money for the benefit of the Australian **Federation** of Islamic Councils Inc. otherwise than for the purposes of the School. It followed that the Minister’s discretion in s 81(1)(a) of the Act to revoke the School’s approval as an approved authority was enlivened. The School contended, however, that things had changed under its new management. It argued that it was no longer being operated for profit, and that the Tribunal accordingly should not exercise the discretion to revoke the School’s approval. The Minister accepted that some things had changed as a result of the change in the School’s management, but maintained that the School continued to be operated for profit.
2. The dispute centred on the fact that the School had, under its previous management, entered into an uncommercial **lease** with the Federation over its campus at Greenacre. The rent payable under the lease was inflated above the market rate. In that way, some of the School’s money was being diverted to the Federation and was not being used for the purpose of providing school education.
3. In about April 2016, the School’s new management suspended its payment of rent under the lease. The evidence showed, however, that the School continued to record its ongoing liability to the Federation under the lease in its financial accounts.
4. In proceedings in this Court in June 2016, the School undertook not to pay any money to the Federation and to commence proceedings against the Federation in relation to certain past events and transactions. Presumably in accordance with that undertaking, in September 2016, the School commenced proceedings against the Federation in the Supreme Court of New South Wales. As at the time of the School’s review application in the Tribunal, however, the Supreme Court proceedings did not directly challenge the School’s ongoing commitments under the lease.
5. One of the questions for the Tribunal in the School’s review application was whether, in the circumstances just summarised, the School continued to fail to comply with the not-for-profit requirement in s 75(3) of the Act? The Tribunal found that it did.
6. Before considering the Tribunal’s reasons for arriving at that conclusion, it is necessary to briefly expand on some of the material facts and the evidence that was before the Tribunal in respect of the School’s treatment of its ongoing commitment and liabilities under the lease. It is also necessary to set out the relevant provisions of the Act and Regulations.

## Evidence concerning the School’s treatment of its liabilities under the lease

1. The School conceded before the Tribunal that its financial records showed and continued to record and accrue liabilities to the Federation as a result of its obligations under the lease. It tendered a “cash flow model” which showed that the School had not made any cash payments referable to rent since April 2016, and did not forecast making any such cash payments in the immediate future. That was not, however, the entirety of the facts and evidence.
2. The Minister’s **Statement** of Facts, Issues and Contentions in the Tribunal included a number of relevant facts that were not disputed by the School. The facts included that the School’s financial statements for the years ending 31 December 2012 to 31 December 2015 recorded a loan owing by the School to the Federation. During the period 1 January 2014 to 30 June 2016, the School’s liability under that loan increased as a result of, amongst other things, a net increase in the amount owing by the School for rent in respect of the Greenacre campus. During 2016, the monthly rent of $125,000 payable by the School was added to the balance of the loan owing to the Federation. On 7 April 2016, the School’s board resolved to suspend rental payments to the Federation, but continued to accrue that liability on a monthly basis. In other words, the loan owing by the School to the Federation continued to increase by $125,000 per month. As at 30 June 2016, $3,181,818 of the School’s liability to the Federation was attributable to rent in relation to the Greenacre campus.
3. An accounting record that the School produced to the Minister that was in evidence before the Tribunal provided more detail as to exactly how the School continued to account for its rental liabilities. That document, which was a list of debits and credits on various accounts on an accruals basis, appeared to show that on 29 July 2016, the School’s rent expense account was credited $125,000. This tended to suggest, consistently with what was said in the Minister’s Statement, that the School’s rent expense of $125,000 for July 2016 was discharged and that $125,000 was added to the School’s loan from the Federation. There was no reason to suppose that this was not how the rental expense was accounted for each month.
4. The final piece of evidence relevant to the treatment of the rental expense was a minute of a meeting of the School’s board held on 3 August 2016. That minute noted, in the context of a discussion concerning cash flow, that “the rent payments to AFIC [the Federation] … have been suspended but will need to be reinstated at some stage in the future”. That meeting occurred before the commencement of the Supreme Court proceedings. It may explain, however, why the School’s liability under the lease was not challenged in the Supreme Court proceedings.

## Relevant provisions of the Act and Regulations

1. Part 6 of the Act contains provisions concerning approved authorities. Approved authorities are the bodies to whom recurrent funding under the Act is provided. Section 73(1)(b) of the Act provides that the Minister may approve a person as an approved authority if the Minister is satisfied that the person satisfies and will continue to satisfy the requirements in s 75, the ongoing policy requirements in s 77 and the ongoing funding requirements in s 78. Section 81(1)(a) provides that the Minister may vary or revoke an approved authority’s approval if the Minister is satisfied that the approved authority does not comply, is not complying, or has not complied with section 75, 77 or 78.
2. Section 75 of the Act contains the requirements for the purposes of ss 73(1)(b)(i) and 81(1)(a). They are: that the person is a body corporate or a body politic (s 75(2)); that the person does not conduct for profit any school in relation to which the application is made (s 75(3)); that the person is financially viable (s 75(4)); and that the person is fit and proper to be an approved authority for one or more schools (s 75(5)). As has already been noted, the Tribunal’s decision, and the issues on this appeal, primarily relate to the so-called not-for-profit requirement in s 75(3). Section 75(6) provides a list of matters that the Minister may have regard to for the purposes of determining whether a person satisfies the requirements of s 75(3), (4) or (5). Paragraph (d) of s 75(6) is “any other matters the Minister considers relevant”.
3. Section 130 of the Act provides that regulations may be made, including in relation to matters that a decision-maker may or must have regard to in making a decision under the Act: s 130(2)(b). Regulation 26 of the Regulation, which were made under s 130(2)(b) of the Act, specifies four matters that the Minister may have regard to for the purposes of determining whether a person satisfies the requirement in, inter alia, s 75(3). One of those requirements, reg 26(c), is relevantly in the following terms:

(c) whether money derived from or relating to a school in relation to which the person has applied to be the approved authority …:

(i) has been applied for the purposes of the school or for the purposes of the functions of the authority or body; or

(ii) has been distributed (whether directly or indirectly) to an owner of the authority or body, or any other person;

…

## The Tribunal’s decision and reasons concerning the not-for-profit requirement

1. The School argued before the Tribunal that its treatment of its ongoing liabilities under the lease of the Greenacre campus did not fall within reg 26(c). It submitted, in short, that because it had ceased paying the Federation money in respect of the lease, and had undertaken not to make any further payments, money was no longer being applied otherwise than for the purposes of the School. It was implicit in this submission that money could not be “applied” unless it was paid, expended or appropriated. In the School’s submission, the fact that it continued to accrue a liability in respect of rent in its books did not mean that it applied money.
2. The Tribunal rejected that submission. While the Tribunal’s reasons are not always expressed in the clearest terms, it is tolerably clear that it rejected the School’s construction of reg 26(c)(i). It found that, because the School continued to recognise and accrue its liability to the Federation for rent under the lease in its accounts, it thereby “applied” money otherwise than for the purposes of the School. The Tribunal reasoned that “funds are in fact being *applied* at the point when the liability accrues but before anything is paid” (Reasons at [49]); that “the liability to make payments under the Greenacre lease leads to the *application* of funds” (Reasons at [50]); and that, even though the School was not currently “paying out on its obligations” to the Federation, because it was required to make provision for those obligations in its accounts “it is still *applying* money otherwise than for the purposes of the school” (Reasons at [67]) (emphasis in original).
3. Importantly, however, the Tribunal also reasoned that if it was wrong in concluding that the manner in which the School was dealing with its ongoing liability under the lease amounted to applying money, it was nevertheless satisfied that this was a matter which was properly taken into account pursuant to s 75(6)(d) of the Act, in determining whether the School satisfied the non-for-profit requirement (Reasons at [50]). It found that the “totality of the material” before it suggested that the School “is *still* being conducted for profit, and that it will *continue* to be conducted for profit into the foreseeable future” (Reasons at [51]) (emphasis in original). While the Tribunal’s reasons for so concluding are again not always entirely clear, what appeared to be decisive for the Tribunal was that the School had not at that time challenged its liability under the lease, but was instead continuing to incur and accrue significant liabilities to the Federation in respect of rent. The Tribunal found that the School’s current “moratorium” on making payments to the Federation was temporary. It appears to be implicit in the Tribunal’s reasoning that it considered that it was likely that, at some stage in the future, the School would be required to repay its growing liability to the Federation, and would recommence making payments of rent.

## Did the Tribunal err in law in arriving at its findings concerning the s 75(3) requirement?

1. The School’s grounds of appeal and submissions raise essentially three questions in relation to the Tribunal’s findings concerning the School’s continuing non-compliance with the not-for-profit requirement in s 75(3) of the Act. First, did the Tribunal err in law in rejecting the contention that, for money to be “applied” for the purposes of reg 26(c)(i), money had to be paid or expended? Second, was it open on the evidence for the Tribunal to find that the School was applying money, within the meaning of reg 26(c)(i), in respect of its rental obligations? Third, if the School’s treatment of its ongoing liabilities under the lease did not amount to applying money within the meaning of reg 26(c)(i), did the Tribunal err in law in having regard to that matter pursuant to s 75(6)(d) in determining whether the School met the not-for-profit requirement in s 75(3) of the Act?
2. In my opinion, the answer to the first question is “no” and the answer to the second question is “yes”: the Tribunal did not misconstrue reg 26(c) and it was open for it to find that the School was still applying money in respect of its rental obligations. Perhaps more significantly, like Perram J, I consider that even if the Tribunal erred in law in relation to its findings concerning reg 26(c), it nevertheless did not err in having regard to the evidence concerning the School’s treatment of its rental obligations in concluding that the School did not meet the s 75(3) requirement.

### The proper construction of reg 26(c)(i)

1. The first issue is not easy to resolve. The wording of reg 26(c)(i) is, at least in some respects, rather obscure. Ultimately, however, I incline toward the view that the meaning of “applied” in reg 26(c)(i) of the Regulation should not be confined or restricted to the actual payment or expenditure of money as contended by the School.
2. The word “apply” is a “word of many meanings” and accordingly “[i]ts particular meaning in any given case must be derived from the context in which it is used”: *Ardmona Fruit Products Co-operative Co Ltd v Federal Commissioner of Taxation* (1952) 86 CLR 530 at 534.
3. The context in the case of reg 26(c)(i) is that it is, or forms part of, a consideration that may, not must, be taken into account by the Minister in determining whether a person meets the not-for-profit requirement in s 75(3). Importantly, the matters that the Minister might otherwise have regard to are not limited. As has already been noted, the Minister may have regard to any other matters that the Minister considers relevant: s 75(6)(d) of the Act.
4. Perhaps more significantly, s 75(3) forms part of a detailed statutory scheme relating to the provision of Commonwealth financial assistance for schools. Part 6 of the Act, which includes s 75, concerns approved authorities which, in the case of non-government schools, must be a body corporate approved by the Minister for the particular school. Section 75 is one of the basic requirements for an approved authority. The others are s 77, which concerns ongoing policy requirements, and s 78, which concerns ongoing funding requirements. The apparent purpose of those provisions is to establish a system or process whereby the Minister can ensure that approved authorities are, and continue to be, appropriate bodies to receive and apply Commonwealth funding for schools. The apparent policy behind s 75(3), in particular, is that it is not appropriate for the Commonwealth to provide funding to a body which conducts a school for profit.
5. Those contextual considerations make it difficult to see why reg 26(c)(i) should be given a narrow or confined operation. Such a construction would tend to stymie or frustrate the Minister’s capacity to ensure the appropriateness of the bodies that receive Commonwealth funding for education. A narrow construction of reg 26(c)(i) would make it easy for an approved authority to avoid its operation by incurring or discharging liabilities for purposes other than those of the relevant school, but in ways that do not involve paying money.
6. It would, however, in any event be fairly pointless or a self-defeating exercise to give reg 26(c)(i) a narrow construction because, even if the facts and circumstances of a given case fell outside reg 26(c)(i) narrowly construed, the Minister could nonetheless take those circumstances into account under s 75(6)(d) of the Act if they were considered to be relevant to determining whether the person satisfied the requirements in s 75. Equally, the mere fact that a person’s circumstances fall within reg 26(c) would not necessarily be decisive. The Minister is not bound to take that into account in determining whether the person satisfies s 75.
7. At a textual level, reg 26(c) itself contains two subparagraphs. Subparagraph (i) concerns the purpose for which money is applied by the approved authority. If money is applied for purposes other than the purposes of the school or the authority, that may be indicative of the authority conducting the school for profit. Subparagraph (ii) concerns the “distribution” of money to an owner of the authority or another person. That too may be seen to be indicative of the authority conducting the school for profit. It can be seen, then, that the two subparagraphs of reg 26(c) are directed at different considerations which might suggest that an authority is conducting the school for profit: one is directed to the *purpose* of the application of money, the other is directed at the destiny of the money, or the identity of the person to whom money is distributed. That might explain why the two subparagraphs use different verbs: “applied” in the case of subparagraph (i) and “distributed” in the case of subparagraph (ii). The verb “distributed” is frequently employed when referring to profits being returned to the owner or owners of a body. The verb “applied” is more commonly associated with the use to which money is put.
8. It is to be noted that neither reg 26(c)(i) or (ii) use the verb “spend”. That word is, however, employed in other parts of the statutory scheme. Section 78(2)(a) of the Act concerns the ongoing funding requirements and requires the approved authority to “deal” with financial assistance in accordance with the Regulation. Regulation 29 specifies the prescribed requirements concerning recurrent funding. Regulation 29(1) provides that the approved authority must “spend” or “commit to spend” certain funding for the purpose of providing school education. The same expression is used in reg 29(7).
9. The final textual point to note is that reg 26(c) concerns the application or distribution of “money”. Given the contextual considerations referred to earlier, it is doubtful that the word “money” in reg 26(c) should be construed narrowly as referring to currency, or bullion, or even more technically, as a debt owed by a bank. That would again make it easy to avoid the operation of reg 26(c) because an approved authority could simply apply or distribute the authority’s resources by way of transactions that do not involve currency.
10. The ultimate question is whether the text, context and purpose of reg 26(c) supports a construction which restricts the meaning of “applied” to paid or expended, or whether it can extend, relevantly, to accruing or incurring a liability to pay money at some later time. While the matter is not entirely free from doubt, in my opinion, in the specific context of reg 26(c), the word “applied” should be construed as being broad enough to encompass accruing or incurring a liability. It should not be narrowly construed as being limited to the actual spending or payment of money.
11. A hypothetical example may assist in illustrating why that is so. If an approved authority borrowed money from a bank for the purpose of acquiring houses for the relatives of its owners, or the members of its board, it is difficult to see why that could not be regarded as applying money for purposes other than the purposes of the school. That would be so even if the principal and interest in respect of the loan was not repayable for 10 years. While the approved authority may not have immediately spent or expended money, it could relevantly be said to have applied money because the loan liability would have to be recorded in its accounts and, more significantly, the loan would have to be repaid in the future. It is difficult to see why the incurring of a liability for that purpose could not be seen to be indicative of the approved authority operating the school for profit.

### Was it open to the Tribunal to find that money had been applied?

1. Once it is accepted that “applied” in the context of reg 26(c) is broad enough to encompass accruing or incurring a liability to pay money at some later time, it is clear that there was evidence to support the Tribunal’s finding that the School was applying money for purposes other than the purposes of the School. Indeed, as noted earlier, the evidence in fact went beyond merely showing that the School was accruing liabilities referrable to rent in its accounts. It actually showed that the School’s accounts recorded that its rental obligations were discharged and replaced with an increasing loan liability to the Federation.

### Did the Tribunal err in law in having regard to the matter under s 75(6)(d) of the Act?

1. It is difficult to see why it was not open to the Tribunal to have regard to the evidence concerning the way the School was treating its ongoing liabilities under the lease in considering whether the School met the s 75(3) not-for-profit requirement, irrespective of whether or not that treatment fell within reg 26(c)(i). The Tribunal was expressly permitted by s 75(6)(d) of the Act to have regard to any other matter it considered relevant. The Tribunal plainly considered that the School’s treatment of its rental obligations was relevant to whether the School satisfied s 75(3) of the Act. There is no basis for concluding that it was not open to the Tribunal to consider that evidence to be relevant to that issue. Nor, as Perram J points out, is there any basis for concluding that the School’s treatment of its ongoing rental obligations was a mandatory irrelevant consideration within the meaning of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40.
2. It was effectively common ground between the School and the Minister that, at the time the School’s review application was heard and determined by the Tribunal, the litigation that had been commended by the School did not extend to seeking relief that would have had the effect of terminating or avoiding the lease, or otherwise putting an end to the School’s ongoing obligations and liabilities under the lease. Nor, indeed, had the School evinced any clear or definitive intention to extend or expand the litigation to include its ongoing lease obligations, or indeed to permanently cease making payments under the lease. At its August 2016 board meeting, it was noted only that the rental payments had been “suspended” but would “need to be reinstated at some stage in the future”. That perhaps explained why the rental liabilities continued to be recognised in the School’s accounts, and indeed why the effect of the accounting entries was to discharge the rental liabilities and replace them with a loan liability. In all the circumstances, it was plainly open to the Tribunal to consider that the manner in which the School had dealt with, and continued to deal with, its rental obligations under the lease was relevant to whether the School complied with the not-for-profit requirement in s 75(3) of the Act.
3. It was also open, on the facts and evidence before the Tribunal, for the Tribunal to conclude that the School was not meeting the requirement in s 75(3). A different decision-maker may have reached a different conclusion, but that is not to the point. It may be that some of the Tribunal’s reasoning was somewhat questionable. It is, for example, difficult to see why the fact that it was “undesirable” for the School to continue to accrue significant rental liabilities strictly bore on the question whether the School satisfied the not-for-profit requirement. Nevertheless, a fair reading of the Tribunal’s reasons discloses that it found that the School did not meet that requirement because, on the evidence before it at the time of the review application, the School was continuing to incur significant liabilities in respect of inflated rental payments that it would, or was likely to have to, eventually pay to the Federation. I am unable to see any legal error in that reasoning.
4. It follows that, even if the Tribunal was wrong to conclude that reg 26(c)(i) was relevantly engaged on the facts and evidence before it, it was nevertheless open to the Tribunal, pursuant to s 75(6)(d) of the Act, to have regard to the evidence concerning the School’s treatment of its ongoing lease obligations in reaching its critical finding that the School continued to fail to meet the not-for-profit requirement in s 75(3). The Tribunal’s finding that the School continued to fail to meet that requirement was also open to it on the facts and evidence before it. The School’s contention that that finding was legally erroneous is rejected.

# The variation of approval issue

1. I agree with Perram J that the School’s grounds of appeal and submissions in relation to the proposed variation of the School’s approval have no merit for the reasons given by his Honour. I should, however, make two additional observations.
2. First, on my reading of the Tribunal’s reasons, the Tribunal refused to vary the School’s approval on discretionary grounds because it was not satisfied that the conditions proposed by the School would secure compliance with the basic requirements and s 75(3) in particular. That was because, to use the Tribunal’s words, “there is no plan for dealing with the ongoing implications of the Greenacre lease”. While the Tribunal’s reference to waiving “significant ongoing non-compliance” is rather confusing, a fair reading of the Reasons does not substantiate the School’s claim that the Tribunal considered that it did not, in the circumstances, have the power under s 81(1) or (2) of the Act to vary the approval.
3. Second, it follows that, while I am unable to see any legal error in the way the Tribunal dealt with the School’s submission that its approval should be varied rather than revoked, I nevertheless agree with Mortimer J that the conditions proposed by the School were not capable of affecting the conclusions the Tribunal had reached concerning the School’s non-compliance. That provides a sufficient basis to affirm the Tribunal’s decision to refuse to vary the approval.

# SUBSEQUENT Developments AND FRESH EVIDENCE

1. I agree with what both Perram J and Mortimer J have said in relation to the events that occurred after the hearing of the appeal, and the refusal of the School’s application to lead fresh evidence. One can only hope and expect that, given those developments and the circumstances generally, any new approval application by the School would receive favourable consideration.

# Conclusion

1. The appeal must be dismissed with costs.

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| I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney. |

Associate:

Dated: 20 March 2018