SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane City Child Care Pty Ltd v Dalton* [2017] QSC 152
PARTIES:	**BRISBANE CITY CHILD CARE PTY LTD ACN 106 662 337** (applicant) **v** **JESSICA DALTON IN HER CAPACITY AS DELEGATE OF THE REGULATORY AUTHORITY AND CHIEF EXECUTIVE, DEPARTMENT OF EDUCATION AND TRAINING OF THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	BS 5621 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	28 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2016
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **(a) The decision of the respondent dated 10 May 2016 be set aside with effect from the date it was made.** **(b) I will hear the parties on the question of costs, and on the question whether I should grant any further relief to the applicant other than the order in (a).**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – where the applicant operates a child care centre – where the statutory framework requires seven square metres of unencumbered outdoor space for each child – where the applicant applied to the regulatory authority for a service waiver to relax the requirement – where the respondent was the delegate of the decision-maker – where the respondent refused the application – whether the respondent breached the rules of natural justice – whether the respondent failed to take into account relevant considerations – whether the respondent took into account irrelevant considerations – whether the respondent misconstrued particular legislative provisions *Judicial Review Act* 1991 (Qld) *Education and Care Services National Law Act* 2011 (Qld), s 4

Education and Care Services National Law, s 3, s 4, s 5, s 51, s 54, s 87, s 89, s 90, s 91, s 93, s 302
Education and Care Services National Law Act 2010 (Vic)
Education and Care Services National Regulations (NSW), r 31, r 41, r 42, r 55, r 56, r 108, sch 1

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576, applied

COUNSEL: P G Bickford for the applicant
M D Hinson QC for the respondent

SOLICITORS: Thomson Geer for the applicant
Clayton Utz for the respondent

Introduction

[1] The applicant conducts a child care centre in Brisbane. Under the applicable statutory framework, the centre was approved to provide care for up to 147 children and was required to ensure that the premises had at least $7m^2$ of unencumbered outdoor space for each child under care. The space requirement limited the ability of the applicant to increase the number of children under care.

[2] The applicant sought a decision from the regulatory authority to grant a "service waiver" to relax the space requirement which would then permit it to provide care for a greater number of children. The respondent was the delegate of the regulatory authority, duly authorized to make the decision in respect of the application.

[3] The respondent refused the application. Pursuant to the *Judicial Review Act* 1991 (Qld), the applicant now brings an application for review and an application for a statutory order of review, with a view to having the respondent's decision set aside.

[4] The grounds for the challenge of the decision which were ultimately pursued before me were:

(a) breach of the rules of natural justice;

(b) failure to take into account relevant considerations;

(c) taking into account irrelevant considerations; and

(d) making errors of law in the form of misconstruction of particular legislative provisions.

[5] I will consider each of those grounds under a separate heading below. However, it is necessary first to set out a little more detail concerning the relevant statutory framework and factual background.

[6] Before embarking upon that task, I should record a difficulty which arose at the hearing. Eight volumes of documentary evidence comprising thousands of pages were tendered. Yet it was evident from the written submissions provided to me before the hearing that only a few documents were actually relevant. Nothing changed during the course of the hearing. I was taken to only a tiny fraction of the contents of the eight volumes.

[7] My initial reaction to this ill-focused approach to the conduct of the trial was that I should require the parties to spend the time and money necessary to remove from the eight volumes all of the irrelevant material. In the end, I determined not to add to the waste of resources which had already occurred, but to inform the parties that I would only be having regard to the documents to which I was taken during the hearing, or to which reference was made in the written submissions.

[8] Ultimately it has become plain that if the appropriate degree of care and attention had been given to the preparation of the case, the relevant documentary evidence could have been encompassed within a single volume. It is to be deplored that this did not occur.

Statutory framework

[9] Pursuant to s 4 of the *Education and Care Services National Law Act* 2011 (Qld), the *Education and Care Services National Law* (**the National Law**) set out in the schedule to the *Education and Care Services National Law Act* 2010 (Vic) applies as a law of Queensland. The regulations made under the National Law are contained in the *Education and Care Services National Regulations* (NSW) (**the National Regulations**).[1]

[10] Section 5 of the National Law defines the "national education and care services quality framework" as comprising:

(a) the National Law;

(b) the National Regulations;

(c) the National Quality Standard (which is set out as a schedule to the National Regulations); and

(d) the prescribed rating system (which is a system by which service providers are rated by reference to whether and at what rating level their service meets the National Quality Standard and the requirements of the National Regulations).

[11] The "national education and care services quality framework" as so defined, is fundamental to the statutory framework. Pursuant to s 4 of the National Law, any entity having functions under the National Law is to exercise its functions having regard to the objectives and guiding principles of the framework as set out in s 3. Section 3 relevantly provides:

3 Objectives and guiding principles

(1) The objective of this Law is to establish a national education and care services quality framework for the delivery of education and care services to children.

(2) The objectives of the national education and care services quality framework are—

(a) to ensure the safety, health and wellbeing of children attending education and care services;

(b) to improve the educational and developmental outcomes for children attending education and care services;

(c) to promote continuous improvement in the provision of quality education and care services;

(d) to establish a system of national integration and shared responsibility between participating jurisdictions and the Commonwealth in the administration of the national education and care services quality framework;

(e) to improve public knowledge, and access to information, about the quality of education and care services;

[1] Section 302 of the National Law requires that the National Regulations be published on the NSW Legislation website.

(f) to reduce the regulatory and administrative burden for education and care services by enabling information to be shared between participating jurisdictions and the Commonwealth.

(3) The guiding principles of the national education and care services quality framework are as follows—

(a) that the rights and best interests of the child are paramount;

(b) that children are successful, competent and capable learners;

…

[12] Under the National Law, a service of the nature of that provided by the applicant can only be provided by an "approved provider" who holds a "service approval" issued under the National Law. The applicant is such a person.

[13] Under the applicant's service approval:

(a) the service was approved to provide education and care to 147 children aged from birth up to and including school children;

(b) the service approval was granted subject to conditions as set out in s 51 of the National Law and any other conditions prescribed in the National Regulations; and

(c) the service approval noted that:

> An approved alternative solution relating to Performance Criteria P5 Outdoor play facilities within Part 22 Child Care Centres of the Queensland Development Code (with a publication date of 1 September 2003) applies to Level 1 of this service. It is a condition of the service approval that:
>
> 1. Opportunities for sand play, water play and interactions with other natural materials must be included in the daily program; and
>
> 2. Shrubs contained in planter boxes must continue to be located in the "enclosed" outdoor play area and be equivalent of 4% of the minimum outdoor play space required for this area (i.e.9.8sq.m).

[14] Section 51 of the National Law relevantly provides:

51 Conditions on service approval

(1) A service approval is granted subject to the condition that the education and care service is operated in a way that—

(a) ensures the safety, health and wellbeing of the children being educated and cared for by the service; and

(b) meets the educational and developmental needs of the children being educated and cared for by the service.

…

(5) A service approval is granted subject to any other conditions prescribed in the national regulations or imposed by—

(a) this Law; or

(b) the Regulatory Authority.

…

(8) An approved provider must comply with the conditions of a service approval held by the approved provider.

Penalty—

$10000, in the case of an individual.

$50000, in any other case.

[15] Amongst the conditions prescribed in the National Regulations are the following:

(a) By regulations 55 and 56, that the approved provider prepare, review and revise a quality improvement plan identifying, amongst other things, areas that the provider considers may require improvement;

(b) By regulation 31, that the approved provider ensure that its current quality improvement plan is kept at its premises, and made available upon request to the Regulatory Authority or parents;

(c) By regulation 108(2):

> The approved provider of an education and care service must ensure that, for each child being educated and cared for by the service, the education and care service premises has at least 7 square metres of unencumbered outdoor space.

[16] The National Quality Standard was set out in schedule 1 to the National Regulations. Relevant provisions included the following:

Schedule 1 National Quality Standard

Notes.

1 The National Quality Standard is used to assess education and care services to determine rating levels under Part 5 of the Law.

2 The Regulatory Authority may suspend a service approval if an education and care service is rated under Part 5 of the Law as not meeting the National Quality Standard, there has been no improvement in that rating and a service waiver or temporary waiver does not apply—see section 70(d) of the Law.

Quality area 1—Educational program and practice

The educational program and practice is stimulating, engaging and enhances children's learning and development. In services for children over preschool age the program nurtures the development of life skills and complements children's experiences, opportunities and relationships at school, at home and in the community.

…

Element 1.1.6

Each child's agency is promoted, enabling them to make choices and decisions and influence events and their world.

…

For the purposes of Quality area 1—

agency involves being able to make choices and decisions, to influence events and to have an impact on one's world;

…

Quality area 2—Children's health and safety

Every child's health and wellbeing is safeguarded and promoted.

Standard 2.1

Each child's health is promoted.

…

Element 2.2.2

Physical activity is promoted through planned and spontaneous experiences and is appropriate for each child.

…

Quality area 3—Physical environment

The physical environment is safe, suitable and provides a rich and diverse range of experiences which promote children's learning and development.

…

Element 3.1.3

Facilities are designed or adapted to ensure access and participation by every child in the service and to allow flexible use, and interaction between indoor and outdoor space.

Standard 3.2

The environment is inclusive, promotes competence, independent exploration and learning through play.

…

Quality area 4—Staffing arrangements

Staffing arrangements create a safe and predictable environment for children and support warm, respectful relationships. Qualified and experienced educators and co-ordinators encourage children's active engagement in the learning program. Positive relationships among educators, co-ordinators and staff members contribute to an environment where children feel emotionally safe, secure and happy.

…

[17] Amongst other things, the National Law confers on the Chief Executive of the Department of Education and Training of the State of Queensland, as the regulatory authority, power to consider and to determine applications made under the National Law, including relevantly an application for amendment of the applicable service approval (s 54) and an application for service waiver. The relevant sections of the National Law and the National Regulations applicable to the latter type of application are as follows:

(a) From the National Law:

87 Application for service waiver for service

(1) An approved provider may apply to the Regulatory Authority for a waiver from a requirement that an approved education and care service comply with a prescribed element or elements of the National Quality Standard and the national regulations as provided for in the national regulations.

…

89 Powers of Regulatory Authority in considering application

For the purpose of determining an application under this Division, the Regulatory Authority may—

(a) ask the applicant to provide further information; and

(b) inspect the education and care service premises and the office of the applicant

90 Matters to be considered

In considering whether the grant of a service waiver is appropriate, the Regulatory Authority may have regard to either or both of the following—

(a) whether the education and care service is able to meet the prescribed element or elements of the National Quality Standard and the national regulations by alternative means that satisfy the objectives of those elements;

(b) any matters disclosed in the application that are relevant to the application for the service waiver.

91 Decision on application

(1) On an application under this Division, the Regulatory Authority may decide to grant the service waiver or refuse the application.

…

93 Effect of service waiver

While a service waiver is in force, the approved education and care service is taken to comply with the element or elements of the National Quality Standard and the national regulations that are specified in the service waiver.

(b) From the National Regulations:

41 Service waiver—prescribed elements

For the purposes of section 87(1) of the Law, the prescribed elements are—

(a) the standards and elements set out in Quality Areas 3 and 4 of the National Quality Standard; and

(b) the following provisions—

(i) regulations 104, 107, 108 and 110; and

…

42 Prescribed information—application for service waiver

An application under section 87 of the Law for a service waiver must include the following information—

(a) the name of the education and care service;

(b) the service approval number;

(c) the name and contact details of the contact person for the purposes of the application;

(d) a statement that specifies—

(i) the elements of the National Quality Standard and the regulations in relation to which a service waiver is sought; and

(ii) the way in which the education and care service does not or will not comply with the specified elements or regulations;

(e) if the education and care service is unable to comply with the specified elements or regulations—

(i) the reasons that the education and care service is unable to comply; and

(ii) details and evidence of any attempts made to comply with the specified elements or regulations;

(f) in any other case, the reasons that the education and care service seeks the service waiver;

(g) the measures being taken or to be taken to protect the wellbeing of children being educated and cared for by the service while the service waiver is in force.

Note. See section 88 of the Law.

Factual background

[18] On 11 March 2016 the applicant made an application for service waiver and an application to amend its service approval.

[19] The application for service waiver was made by email dated 11 March 2016 and provided:

(a) the applicant's application for service waiver;

(b) the applicant's written submissions in support of the application for service waiver;

(c) the applicant's application for an amendment of the service approval;

(d) a registered surveyor's certified plan depicting the indoor and outdoor area floor space occupied by the applicant's education and care services business; and

(e) supporting documentation.

[20] By the application for service waiver, the applicant sought a waiver in respect of regulation 108 "for infants only", based on the evidence and submissions attached to the application. The applicant submitted that:

(a) at any one time it had up to 40 under-15-month-old infants being educated and cared for;

(b) of that number 40% were always sleeping, eating, playing indoors or being changed and, accordingly, only 60% of that number were outdoors; and

(c) therefore, it should be given a waiver in respect of regulation 108(2) permitting it to provide a reduced area in respect of infants only.

[21] The hypothesis on which the application was based was that if at any one time only 60% of the total number of infants were outside, then the outdoor space requirement for infants could be reduced to 60% of the $7m^2$ which would otherwise apply, namely to 4.2 m^2.

[22] By the application for amendment of the service approval, the applicant sought to amend the maximum number of children that might be educated and cared for at any one time from the existing maximum of 147 to a proposed maximum of 163. The hypothesis advanced was that if the service waiver was granted, then the total outdoor space available would permit 163 children as follows:

(a) 40 infants at the reduced area permitted consequent upon the service waiver; and

(b) 123 other children at the $7m^2$ space required under regulation 108(2).

[23] Between 11 March 2016 and 9 May 2016, the applicant exchanged correspondence with the respondent in relation to the application for service waiver, including an email dated 18 March 2016 and a further email dated 23 March 2016. Amongst other things, the applicant invited the respondent to attend its business premises to assist her with processing the applicant's application.

[24] By letter to the applicant dated 22 April 2016 (**the preliminary view letter**), the respondent expressed a preliminary view in relation to the application for service waiver. I make the following observation concerning the content of the preliminary view letter:

(a) The letter stated that it provided the applicant with the preliminary view of the Department in relation to the application, but was not the decision on the application.

(b) The respondent recited relevant background facts, including that the applicant held a service approval which included the matters referred to at [13](a) and [13](c) above. As to that last requirement the respondent noted that the certificate of classification for the applicant's premises was granted after a decision by the Building and Development Tribunal on 13 March 2006, which determined that it was inappropriate to reduce the required outdoor play space below $7m^2$ per child.

(c) The respondent correctly characterized the nature of the application in these terms:

> You have applied for a service waiver, requesting approval to operate your early childhood service from a premise which is waived from the requirement to provide 7 square metres of unencumbered outdoor play space per child (as required under Regulation 108(2) of the Education and Care Services National Regulations (the National Regulations)).
>
> Based on the information provided in your application for a service waiver, I understand that you seek approval to provide:
>
> - 4.2 square metres of outdoor space per child for up to 40 children aged birth to 15 months old; and
> - 7 square metres of outdoor space per child for all children over 15 months of age.
>
> I note that you have applied for an amendment to your service approval to increase the maximum number of children approved to be provided with education and care at your service by 16 children (from 147 children to 163 children).

(d) The respondent identified that she had considered all the material which the applicant had provided, departmental records, the relevant aspects of the National Law and the National Regulations, and certain other research publications associated with outdoor play space for children. The latter were summarized in an attachment entitled "Departmental Information Research: The importance of outdoor space for Babies and Toddlers". The attachment contained reference to research material which emphasized the need for children up to 15 months of age to have at least as much space available to them as older children. The respondent invited the applicant to review the research referred to in the attachment.

(e) The respondent identified the relevant considerations in these terms:

> The design and layout of an early childhood education and care environment can have a significant impact on the delivery of robust education and care programs and practices including the way that spaces and resources are used by children.

Outdoor space is not an optional add-on to a children's service but a necessary component of an education and care premises. Accordingly, a consideration must be given to:

- The National Quality Standards (particularly Quality Area 3 – Physical Environment) contained in Schedule 1 of the National Regulations; and
- The safety, health and wellbeing of children attending the education and care service as required in the objectives and guiding principles under section 3 of the National Law.

(f) The respondent recorded that based on her consideration of the material she had made certain findings of fact, including:

1. I find that your application offers a total unencumbered outdoor play space of 1030.10 square metres which is sufficient outdoor play space for 147 children as required under Regulation 108(2).

   I am not satisfied it is safe or reasonable to reduce the amount of outdoor play space at the service below the 7 square metres required under Regulation 108(2) for 40 children aged between birth to 15 months (to support an increase in the maximum number of children).

2. I find that your application proposes that the service be approved to operate with a shortfall of 112 square metres of outdoor play space for the children at the service aged less than 15 months of age.

   I am not satisfied that the service has proposed sufficient unencumbered outdoor space at the proposed premise to accommodate 16 additional children in a manner that promotes the health, safety and wellbeing of children at the service.

   I am supported in this view by the outcome of the Building and Development Tribunal on 13 March 2006 which did not support a reduction in the required outdoor play space area per child for the Brisbane City Child Care, and which noted that the amount for outdoor play space was to remain at 7 square metres per child.

3. I find that the publications you provided to support your application for service waiver do not support a reduction in outdoor play space (below 7 square metres per child).

(g) The respondent advised the applicant that she intended to refuse to grant the service waiver because she had "taken the preliminary view to refuse this application as I am satisfied there would be a risk to children's health, safety and wellbeing should the waiver be granted". She invited the applicant "to make a submission in response to the matters contained in this letter and the material attached to this letter before I make a decision." The submission was to be in writing, however she invited the applicant's CEO to contact her by telephone if he had any queries.

[25] By email of 27 April 2017, the applicant sent a further letter to the respondent, dated 26 April 2016, providing a response to the matters raised in the preliminary view letter and inviting the respondent to attend the business premises of the applicant to assist her to "grasp all issues of importance prior to application and finalisation". The letter dealt with some of the research which had been referred to in the preliminary view letter, but also indicated that it had not been able to obtain full copies of all of it and requested that the respondent provide the research. Amongst other things the letter advised the respondent that:

(a) the applicant unequivocally supported $7m^2$ outdoor space for all non-infant children;

(b) the applicant did not support less than $7m^2$ per general infants in care; and

(c) the application, "very specifically defines necessary approval conditions" to ensure that "inappropriate industry wide precedent" would not occur.

[26] On 5 May 2016, the applicant received two separate emails from the respondent to which was attached some, but not all, of the material to which reference was made in the preliminary view letter. The omitted material was copyright material. In that regard the respondent provided reference to the material and copies of the relevant extracts. The respondent advised that "a service visit will not be required to determine the current service waiver application".

[27] On 5 May 2016, the applicant sent a further letter to the respondent in which the applicant provided the applicant's second response to the matters raised in the preliminary view letter. It again invited the respondent to visit the applicant's premises. The thrust of the submission was:

(a) to reiterate the matters referred to at [25](a), [25](b) and [25](c) above;

(b) to suggest that its application relied on an international standard which required $7m^2$ "for each child playing outside at any one time";

(c) to suggest that its application was not seeking to reduce each child's outdoor space provision but sought to recognize that "only 60% of such a total large cohort of just infants are playing outside at any one time";

(d) to amend its service waiver application in a way said to reflect the necessary approval conditions which would ensure that "no wide precedent" would occur, with the result that the requested service waiver application became that:

> National Law Regulation 108 (2) is waivered to for up to 40 birth to 15 month old infants at Brisbane City Child Care provided that at least 7 square metres of unencumbered outdoor space be provided for sixty percent of those birth to 15 month old infant children being educated and cared for by the service where more than 32 under 15 months of age infants are attending the Service, as the Service has considered of infant outdoor space geometry to ensure safety, constant human attention and supervision is achieved with safe and hygienic infant environments, as the Service has separate Service infant sleep rooms for all infants attending, as a Service crib or cot for each infant attending is provided, as the Service has dedicated infant only play spaces, and as the Service demonstrates the ability to fully evacuate all infants (and all children) safely from the Service in less than 4 minutes.

[28] By exchange of emails on 6 May 2016, the timeframe for the applicant's submission in response to the preliminary view letter was extended to 9 May 2016. The applicant advised that its invitation to visit its premises prior to the making of the final decision remained open.

[29] On 9 May 2016, the applicant sent a letter to the respondent containing the applicant's further written submissions in response to the preliminary view letter and again invited the respondent to attend the business premises of the applicant so that she might "appreciate the unique design of our space and size of our infant facilities".

[30] The respondent provided her final decision by letter dated 10 May 2016.

[31] The respondent first recited relevant background facts, including the fact of the preliminary view letter, the further material provided on 27 April 2016 and 5 May 2016, the extension

of time which had been granted, and the further material provided on 9 May 2016. The respondent advised that her decision was to refuse the application and she identified all the material which she had relied upon.

[32] Second, the respondent identified the relevant considerations in these terms:

> The design and layout of an early childhood education and care environment can have a significant impact on the delivery of robust education and care programs and practices including the way that spaces and resources are used by children. The physical environment plays an important role in keeping children safe, noting that overcrowding may: place children at risk of harm; increase the risk of unintentional injuries; contribute adversely to children's wellbeing, happiness, creativity and developing independence; and impact the quality of children's learning and experiences, affecting children's optimal development.
>
> Outdoor space is a necessary component of an education and care premises. Accordingly, consideration must be given to:
>
> - Regulation 108(2) of the National Regulations;
> - The NQS (particularly Quality Areas 1, 2 and 3 – Educational Program and Practice; Children's Health and Safety and Physical Environment – Element 1.1.6 – agency, choice and influence; Element 2.2.2 – planned and spontaneous physical activity; Element 3.1.3 – flexible use; Standard 3.2 – inclusive, competence, independence and learning through play; Element 3.2.1 – engaging every child in quality experiences in the natural environment) as contained in Schedule 1 of the National Regulations; and
> - The safety, health and wellbeing of children attending the education and care service as required in the objectives and guiding principles under section 3 of the National Law.

[33] I interpolate here that the reference to the "NQS" is a reference to the National Quality Standard referred to in s 87(1) of the National Law and set out as schedule 1 to the National Regulations. The provisions to which the respondent specifically referred were quoted at [16] above.

[34] The respondent then made findings of fact including the following (emphasis added):

> 1. I find that **Regulation 108(2**) of the National Regulations **prescribes that a centre-based service must provide at least 7 square metres of unencumbered outdoor play space for each child** being educated and cared for by the service. **The requirement under this Regulation is calculated across a service and does not make any reference to the ages of children.**
> 2. I find that **your service currently offers** a total unencumbered **outdoor play space of 1030.10 square metres which is sufficient outdoor play space for 147 children as required under Regulation 108(2).**
> 3. I find that your application for a Service Waiver received by the Department dated 11 March 2016 sought that:
>
>   BCCC has in one Service up to 40 of under 15 month old infants attending and with such large infant numbers, 40% of total infants 'being educated and cared for' are always sleeping, eating, playing indoors or being changed resulting in not more than 60% of infants outdoors at any one time therefore practically requiring only 60% of 7 sq.m, ie only 4.2 sq.m. of outdoor space for attending birth to 15 month old infants. This concept is supported by NAEYC 9.B.04 (Ref J), where 40 infants would require

40 infants x 60% (playing outside at any one time) x 7.0 sq.m. per infant or 168sq.m. of outdoor space cf. E&CS National Reg 108 (2) requirement 280 sq.m. BCCC therefore requests a BCCC Service Waiver based upon the above evidence based infant outdoor space requirements being 4.2 sq. m. outdoor space for up to 40 to 15 months of age infants at BCCC and only in BCCC's very specific situations which would be:-

a) where more than 32 under 15 months of age infants are attending the Service;

b) with consideration of infant outdoor space geometry to achieve safety, constant human attention and supervision as achieved at BCCC (Reg 115);

c) with safe and hygienic infant environments as at BCCC (Reg 77 for infants);

d) where/with separate BCCC infant sleep rooms/facilities are provided (Reg 81 for infants);

e) where/with a BCCC crib or cot for each infant attending is provided (Reg 81 for infants); and

f) where the Service (BCCC) has dedicated infant only play spaces (Reg 77 for infants).

and find further that correspondence received from you on 9 May 2016 confirmed your waiver application was for the following:

BCCC requests that, the requested Service Waiver application becomes that:-

"National Law Regulation 108 (2) is waivered to for up to 40 birth to 15 month old infants at Brisbane City Child Care provided that at least 7 square metres of unencumbered outdoor space be provided for sixty percent of those birth to 15 month old infant children being educated and cared for by the service where more than 32 under 15 months of age infants are attending the Service, as the Service has considered of infant outdoor space geometry to ensure safety, constant human attention and supervision is achieved with safe and hygienic infant environments, as the Service has separate Service infant sleep rooms for all infants attending, as a Service crib or cot for each infant attending is provided, as the Service has dedicated infant only play spaces, and as the Service demonstrates the ability to fully evacuate all infants (and all children) safely from the Service in less than 4 minutes."

4. I find from the above wording of your applications for a service waiver (outlined at point 3 above) that **your proposal would have the effect of reducing outdoor play space at the service to less than the 7 square metres (as required under Regulation 108(2)) for all children**.

   I am not satisfied it is safe or reasonable to reduce the amount of outdoor play space at the service below the 7 square metres that is required under Regulation 108(2).

5. I find that **your waiver application and supporting information also proposed that the service be approved to operate with a shortfall of 112 square metres of outdoor play space for the maximum children at the service including children aged less than 15 months of age**.

   I am not satisfied that the service has proposed sufficient unencumbered outdoor space (the prescribed 7 square metres) at the premise to accommodate any additional children (irrespective of age) and in a manner that promotes the health, safety and wellbeing of children at the service.

I am supported in this view by the decision of the Building and Development Tribunal on 13 March 2006 (File 3/06/018) which did not support a reduction in the required outdoor play space area per child for the Brisbane City Child Care at that time, and which noted that the amount for outdoor play space was to remain at 7 square metres per child. Specifically, Mr Leo F Blumkie, Tribunal member at page 14 of his decision noted the following with respect to outdoor play space and age groups:

> ... "The Department of Communities recent review of Part 22, the square meter rate per child for both indoor play space and outdoor play space was discussed with a number of key childcare organisations including relevant state departments, Childcare Queensland, Crèche and Kindergarten Association, National Association of Community Based Children's services and Childcare National Association, The outcome of the Department's review is that 7 square metres should remain irrespective of the age group";

and further also at pages 14 and 15 that:

- "It would be inappropriate of the Building and Development Tribunal to agree to reduce the area per child".
- "The square meter rate for outdoor place space should remain at 7sq. m per child."

6. **I find that the proposed reduction of outdoor play space would negatively impact the service's ability to deliver a robust outdoor program to children enrolled and attending the service. This is particularly given the need to ensure the individual developmental needs of children are consistently met with respect to accessing outdoor play space, in a flexible manner, taking into consideration the importance of agency of children (in accordance with the NQS - Quality Areas 1 to 3).**

   I am not satisfied that the proposed amount of outdoor play space would be safe and adequate for the ongoing delivery of an education and care service in accordance with Section 3 of the National Law (objectives and guiding principles).

7. I find that **the publications you have provided to support your application for service waiver are not relevant to this decision as they do not support a reduction in outdoor play space (below 7 square metres per child).** Rather, they indicate that different standards exist throughout the world. I refer to the following texts:

…

   I am not satisfied the above evidence is sufficient to warrant a reduction from the outdoor play space requirements under the National Law to be safe and adequate for the ongoing delivery of an education and care service in accordance with Section 3 of the National Law (objectives and guiding principles).

8. I find that **your Application does not provide adequate reasons (other than a desire to increase the maximum number of children) why the education and care service is unable to comply with the outdoor place space requirements under the National Regulations**. Nor does the application detail any evidence of any attempts made to comply with the specified elements under the NQS or the National Regulations (as required under Regulation 42 of the National Regulations).

[35] The reasons for the decision relevantly stated (emphasis added):

Under section 91(1) of the National Law, I have decided to refuse to grant the Service Waiver to Brisbane City Child Care in light of the above findings of fact and for the following reasons:

- **I am satisfied that you have not provided adequate reasons (other than a desire to increase the maximum number of children) to satisfy the Department why the education and care service is unable to comply with the outdoor place space requirements under the National Regulations or any evidence of any attempts made to comply with the specified elements under the NQS or the National Regulations (as required under Regulation 42 of the National Regulations).**
- **I am satisfied that there would be a risk to children's health, safety and wellbeing should the waiver be granted**.

My reasons relating to the impact on children's health, safety and wellbeing when considering reduced outdoor play space include that:

- I am satisfied that there would be a risk to children's health, safety and wellbeing should the waiver be granted as **any permanent reduction in the available outdoor play space for children would likely not guarantee an environment free from overcrowding**. An area of reduced outdoor space would enhance the risk of overcrowding and increase the risk of injury to children.
- **7 square metres of outdoor play space as prescribed in the National Regulations is the current national benchmark,** ensuring delivery of a robust outdoor program to children enrolled and attending a service. **This is particularly given the need to ensure the individual developmental needs of children are consistently met with respect to accessing outdoor play space, in a flexible manner, taking into consideration the importance of agency of children, particularly with reference to the following Quality Areas under the NQS**:
    - Quality Area 1 Educational Program and Practice - Element 1.1.6 - agency, choice and influence;
    - Quality Area 2 - Children's Health and Safety - Element 2.2.2 - planned and spontaneous physical activity; and
    - Quality Area 3 - Physical Environment - Element 3.1.3 - flexible use; Standard 3.2 -inclusive, competence, independence and learning through play; Element 3.2.1 - engaging every child in quality experiences in the natural environment.

[36] The relevance of the identified parts of the National Quality Standard and of the importance of agency was elaborated upon by the respondent in an affidavit prepared by her for the purpose of the hearing. Relevantly she deposed (at [35)]):

> The Application for Service Waiver was in my view premised on an incorrect assumption. That is there could be a strictly enforced consistency of timeframe in respect of the activities of infants aged less than 15 months – i.e. that at any given time a set number of infants aged less than 15 months would be, for instance, asleep, eating, playing indoors or being changed and so would not require outdoor space. It is a fundamental concept of child care that children should be permitted as far as possible the right of self-determination. The premise of the Application for Service Waiver in my view did not satisfactorily incorporate that consideration. It was in this sense that the proposed variation of the required outdoor space requirements would present a risk to children's health, safety and wellbeing. I explained this in the final paragraph of my Final Decision Letter by reference particularly to Quality Areas 1, 2 and 3.

[37] Against that background I turn to consider the particular grounds on which the respondent's decision was impugned by the applicant.

Breach of the rules of natural justice: the hearing rule

[38] The relevant content of the rules of procedural fairness is sufficiently summarised for present purposes in the following passage from the decision of the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty* Ltd (1994) 49 FCR 576 at 590-592 per Northrop, Miles and French JJ:

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and be informed of the nature and content of adverse material: *Dixon v Commonwealth* (1981) 55 FLR 34 at 41. However, as Lord Diplock said in *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369:
>
> > "...the rules of natural justice do not require the decisionmaker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished."
>
> A person likely to be affected by an administrative decision to which requirements of procedural fairness apply can support his or her case by appropriate information but cannot complain if it is not accepted. On the other hand, if information on some factor personal to that person is obtained from some other source and is likely to have an effect upon the outcome, he or she should be given the opportunity of dealing with it: *Kioa v West* at 587 (Mason J), 628 (Brennan J). Within the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case: *Sinnathamby v. Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502 at 506 (Fox J), 513 (Neaves J). In *Ansett Transport Industries Ltd v Minister for Aviation* (1987) 72 ALR 469 at 499, Lockhart J expressly agreed with the observations of Fox J in *Sinnathamby* on this point. See also *Geroudis v Minister for Immigration Local Government and Ethnic Affairs* (1990) 19 ALD 755 at 756-7 (French J) and *Somaghi v Minister for Immigration, Local Government, and Ethnic Affairs* (supra) at 103 (Keely J), 119 (Gummow J).
>
> The general propositions set out above may be subject to qualifications in particular cases. Two such qualifications were enunciated by Jenkinson J in *Somaghi* at 108-109:
>
> 1. The subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it: *Kioa v West* at 587 (Mason J); *Sinnathamby* at 348 (Burchett J); *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 (Burchett J).
> 2. The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material: *Minister for Immigration and Ethnic Affairs v Kumar* (unreported, Full Court, Federal Court, 31 May 1990); *Kioa v West* at 573, 588 and 634.
>
> His Honour observed that those qualifications may be no more than an application of the general requirement of procedural fairness in particular cases. As Gummow J there said at 359:
>
> > "...in a particular case, fairness may require the applicant to have the opportunity to deal with matters adverse to the applicant's interests which the decision-maker

> proposes to take into account, even if the source of concern by the decision-maker is not information or material provided by the third party, but what is seen to be the conduct of the applicant in question."
>
> Where the exercise of the statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interest. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question. …

[39] The basis upon which it was contended that there was a breach of the hearing rule changed during the course of the hearing before me. Ultimately two principal bases were advanced.

[40] The first was advanced pursuant to an amendment to the application which was made during the course of hearing in these terms:

> [T]he [Respondent] failed to inform the Applicant or give the Applicant an opportunity to be heard in relation to the following views, which were held by the [Respondent] prior to the issue of the Preliminary View letter, dated 22 April 2016:
>
> (a) that the Application for Service Waiver was premised on an incorrect assumption, that is, that there could be a strictly enforced consistency of time frame in respect of the activities of infants aged less than 15 months, i.e. that at any given time a set number of infants aged less than 15 months would be, for instance, asleep, eating, playing indoors or being changed and so would not require outdoor space.
>
> (b) that the Application for Service Waiver did not satisfactorily incorporate the consideration that children should be permitted, as far as possible, the right of self-determination;
>
> (c) that it was for the reasons referred to in (a) and (b) hereof that the [Respondent] held the view that the proposed variation of the required outdoor space requirements in Regulation 108 of the National Regulations would present a risk to children's health, safety and wellbeing;

[41] It was established during the following passage of cross-examination that as at the time the respondent wrote the preliminary view letter of 22 April 2016, she already held the views she expressed in the last passage of her reasons in the final decision of 10 May 2016 (as elaborated upon in her affidavit and quoted above at [36]):

> MR BICKFORD: And your view was that there couldn't be a strictly enforced consistency of timeframe in respect of the activities of infants aged less than 15 months, ie, that at any given time a set number of infants aged less 15 months would be, for instance, asleep, eating, playing indoors or being changed and, so, would not require outdoor space. That was your view, wasn't it?---Well, my view – this – what was in my affidavit is an explanation of what the background of – I guess, what I mean is about children's agency. So that's explaining the term children's agency that children can drive the – the program at their service.
>
> But it was always your view, wasn't it? That's always been your view?---Yes.

> And it's not a new thing. It's not something you just arrived at when you came to the final decision stage, is it?---I guess it was more apparent towards the final decision, but definitely in my mind as the process went through. Yes.
>
> And it's a view that that you'd formed before the preliminary review letter, wasn't it, because you'd formed a preliminary review to refuse the application because of unacceptable risk to children's health, safety and etcetera?---That's right. That's form a part of children's wellbeing.
>
> So you'd formed these specific views that you related in paragraph 35 quite early on before you sent the preliminary review letter of the 22nd of April?---I can't recall specifically, but I suppose.
>
> You can't deny it?---No. It's part of what is, I guess, ensures the robust delivery of a educational program.
>
> HIS HONOUR: That's getting to the merits of it. That's getting to whatever is in your view good and proper about how to do it. What we're more concerned with at the moment is the timing of when you formed those views. And I think you – the impression I have at the moment is that you must have had that concern about agency in the way you explain at 35 of your affidavit before you wrote the preliminary letter?---I had - - -
>
> But what I was wanting to get at is, if that's right or wrong?---I had regard to all of the elements of the National Quality Standards before I wrote the preliminary review letter, yes, of which agency is one.
>
> MR BICKFORD: And you've said in paragraph 35 in the penultimate paragraph:
>
> It was in this sense that the proposed variation of the required outdoor space requirements would present a risk to children's health, safety and wellbeing.
>
> Now, that's true, isn't it? That's part of the reason for you forming that view?---Yes.
>
> And you had that view when you wrote the preliminary review letter as well, didn't you?---Yes.
>
> And the reason why you had that view or, at least, one of the reasons why you had that view was what you've said in paragraph 35 of your affidavit?---Yes.

[42] The applicant's complaint is that nothing in the preliminary view letter flagged this as an issue, and it was accordingly denied an opportunity to address the issue. I agree that the preliminary view letter did not identify this issue.

[43] It is true, as senior counsel for the respondent contended, that in a general sense the degree of congruence between the applicant's proposal and the objectives of the National Quality Standard was always (and obviously) relevant. The applicant was an experienced operator and must already have participated in the assessment and rating system and the need for development of a quality improvement plan. And the applicant must be taken to have known about the requirements of s 3 and 4 of the National Law and the provisions of the National Quality Standard.

[44] However, the language of the National Quality Standard is aspirational in nature and expressed at a high level of generality. I do not think that the fact that congruence with the objectives of the National Quality Standard was generally in issue means that the issue which the respondent apparently regarded as critical was (to modify the language of *Alphaone* slightly) "an issue critical to the decision which was apparent from its nature or the terms of the statute under which it is made". And I think that the lack of apparence was all the more significant in light of the fact that the view was held by the respondent at the time of the preliminary view letter but not actually identified as an issue which should

be dealt with by the applicant. Indeed, no reference at all was made to the significance of Quality Areas 1 and 2 of the National Quality Standard, to the question of the promotion of "agency" of children, or to the relevance of self-determination.

[45] In my view there has been a breach of the hearing rule. In the circumstances of this case, the hearing rule required that the respondent convey to the applicant the substance of the issue ultimately articulated in the respondent's affidavit, quoted at [36] above, in order to permit the applicant to deal with it. The failure to do so denied the applicant of an opportunity of being heard on this critical issue.

[46] The second basis on which the applicant contended that there had been a breach of the hearing rule had the following elements.

[47] First, the respondent took into account, in making the decision under review, as a matter adverse to the exercise of the power to grant the waiver application:

(a) a direction said to have been made to Mr Jeffery, a person employed in the office of the regulatory authority who worked under the supervision of the respondent, on 21 March 2016 by two of the respondent's superiors within the department, that the applicant's service waiver was not a suitable request; and

(b) the contents of a telephone conversation on 6 May 2016 between Mr Jeffery and Ms Kelly Charlton from the Victorian Department responsible for administration of the Victorian National Law, to the effect that the Victorian Department has not, and would not, lower the minimum standard for space requirements for outdoor space required pursuant to Regulation 108 of the National Regulations on any permanent waiver application and "expects other States will commit to the same minimum standards";

[48] Second, the respondent did not alert the applicant of her intention to rely upon either matter. Her failure so to do amounted to a breach of the hearing rule.

[49] The foundation for the proposition that the two matters were taken into account derives from a file note which the Mr Jeffrey had prepared and which was exhibited to an affidavit sworn by him. The respondent explained that Mr Jeffrey assisted her in relation to dealing with the applicant's service waiver application and that his practice was to pin on the file concerned iterations of the file note showing a running chronology of events to date.

[50] The respondent's evidence in relation to that chronology, and of the events relevant to this argument (which I accept), was as follows:

(a) She knew of Mr Jeffrey's file note but did not regard it to be paramount to her decision making.[2] She was aware of it but did not rely on it.[3]

(b) She herself was never instructed by the two superiors concerned to refuse the application,[4] but was aware that it was their opinion that the service waiver application was not an application that was suitable.[5] But she did not take that consideration into account in forming either her preliminary or final views concerning the application, because she was the decision maker and the relevant decision was entirely a matter for her opinion, not theirs.[6]

(c) The telephone conversation of 6 May 2016 had occurred because the respondent instructed Mr Jeffery to make the call to ascertain the views of the Victorian

[2] Transcript, p 1-31 at line 5.
[3] Transcript, p 1-32 at line 1.
[4] Transcript, p 1-35 at lines 40-46.
[5] Transcript, p 1-35 at lines 40-46.
[6] Transcript, p 1-36 at lines 1-5.

Department. The respondent regarded those views as important because Victoria is the lead drafting agency for the legislation.[7] The respondent was aware that the call had been made and what had been said, and, although it was not paramount to her thinking, she took it into account in making her final decision.[8]

[51] In my view the applicant's argument fails in relation to the so-called "direction" of 21 March 2016 for two reasons. First, it was not a direction, but rather an expression of opinion. Second, it was not taken into account by the respondent. However, the same cannot be said of the information obtained concerning the views of the Victorian Department. That information was to be regarded as adverse material which was relevant to and in fact taken into account by the respondent and in respect of which the applicant should have been accorded the right to rebut or qualify by further information, and comment by way of submission.

[52] The two breaches of the hearing rule justify my acceptance of the applicant's contention that the decision should be set aside with effect from the date it was made.

The remaining grounds on which the decision was impugned

[53] In light of my conclusion that the decision should be set aside consequent upon the two breaches of the hearing rule which I have identified, I will deal relatively briefly with the remaining grounds.

Breach of the rules of natural justice: actual and apprehended bias

[54] The applicant contended that the respondent demonstrated actual bias by way of prejudgment prior to making the final decision. The prejudgment was said to be constituted by the fact and terms of the preliminary view letter.

[55] I reject this submission. I accept the respondent's contention that to establish prejudgment the applicant would have to demonstrate that the decision-maker had done more than express a preliminary view. The application would have to demonstrate that she was so committed to a conclusion already formed so as to be incapable of altering that conclusion, whatever evidence or arguments might have been presented. Whilst the fact that the preliminary view letter referred to findings of fact rather than proposed findings of fact is unfortunate, the applicant did not challenge the respondent's affidavit evidence that she regarded the preliminary view letter as expressing proposed findings. Nor did the applicant make any attempt in cross-examination to establish the proposition that the respondent had in fact pre-judged the matter.

[56] The applicant also contended that there was a reasonable apprehension of bias on behalf of the respondent. That contention was founded upon:

(a) the so-called "direction" of 21 March 2016 to which I have earlier referred;

(b) the fact that on 11 April 2016, Mr Jeffrey:

(i) advised the person who was going to have to determine the application for amendment of the service approval (the success or failure of which inevitably turned on the disposition of the service waiver application) that the current assessment of the service waiver application was that it was likely to fail; and

(ii) explained the preliminary decision letter to that person; and

(c) the fact and terms of the preliminary decision letter of 22 April 2016.

---

[7] Transcript, p 1-48 at lines 11-13.
[8] Transcript, pp 1-48 to 1-49.

[57] I agree with the respondent that there is no basis for inferring that it would be reasonably apprehended that the final decision was made by the respondent otherwise than on the merits. I observe as follows:

(a) I have already explained why the so-called "direction" should be regarded as having little moment.

(b) The fact that Mr Jeffrey conveyed the substance of the preliminary view to the person who was going to have to decide the logically subsequent issue of the application for amendment of the service approval was dictated by the short time frames which would be concerned, especially given the fact that all recognized that the amendment application effectively rose and fell according to the determination of the service waiver application. It did not mean that there was no possibility that the preliminary view could not change.

(c) A reasonable person would have regarded the preliminary view letter as serving the purpose which it purported to serve, namely to give an applicant a fair view of the preliminary views of the decision maker, so as to be able to deal with those views more effectively.

Failure to take into account relevant considerations

[58] In the present case the National Law did not specify precise or quantifiable criteria for consideration in deciding a waiver application:

(a) Section 4 of the National Law mandated that the respondent have regard to the objectives and guiding principles of the national education and care services quality framework set out in s 3.

(b) Section 3 relevantly required the respondent to make the decision having regard to the objective of ensuring the safety, health and wellbeing of children attending a service and improving educational and developmental outcomes for such children, and having regard to the guiding principles of the paramountcy of the rights and best interests of a child and an expectation of best practice in the provision of services.

(c) Section 90 contemplated only that the respondent determine whether the grant of a service waiver is "appropriate", identifying only some but plainly not all of the relevant criteria. And even insofar as it referred to criteria, it used language of a high degree of generality, permitting, for example, the respondent to take into account whether the proposal satisfied by alternate means the objective of the prescribed element sought to be waived.

[59] Counsel for the applicant conceded during oral argument that the argument as to failure to take into account relevant considerations rose or fell depending on the view I took of the propositions advanced in his written submissions at [22] to [33]. In those paragraphs, the applicant developed the submission that the respondent had made a fundamental error in her apprehension of the nature of the application, namely that:

(a) she "wrongly regarded the application for service waiver as being made on the basis that the Applicant was unable to comply with the outdoor space requirements contained in Regulation 108 of the National Regulations"; and

(b) her "approach to the application was to regard the application as requesting a reduction of outdoor play space at the service to less than 7 square metres for all children".

[60] This contention was entirely misconceived.

[61] I agree that the language of the first dot point quoted at [35] above inappropriately uses the language of regulation 42(e) when it should have expressed itself in a future conditional way. However this was merely a matter of poor expression. There can be absolutely no doubt that the respondent knew that the applicant's service was presently compliant and that she was addressing the question whether a waiver should be granted which would authorize the degree of non-compliance which the applicant sought and which would exist if the numbers of children were increased as the applicant desired. That much is obvious from the second dot point quoted at [35]. It is also obvious from factual findings 2, 4, 5 and 6, and from the terms of the preliminary view letter.

[62] Nor can there be any doubt that the respondent understood that the applicant put its case for reduction on the basis that there would be reduced space for infants up to 15 months and the prescribed space for other children. The respondent's approach was to construe regulation 108 as prescribing a standard of at least $7m^2$ unencumbered outdoor space calculated across the entire cohort of children under care and regardless of the age composition of the cohort of children concerned. It was mathematically true to form the view that relaxation of the space requirement for one part of the cohort as proposed by the application would lead to a reduction of the figure calculated as an average across the whole cohort. The respondent plainly understood the hypothesis which underlay the application, it was just that she disagreed with it for the reasons she articulated best in her affidavit, quoted at [36] above.

[63] The respondent did not make the error which the applicant submits she made. She did not fail to take into account relevant considerations as alleged.

[64] I observe, for completeness, that the respondent made no reviewable error in determining not to take advantage of the applicant's repeated invitations to inspect the applicant's premises.

Taking into account irrelevant considerations

[65] The first irrelevant consideration said to have been taken into account was the so-called "direction" of 21 March 2016 to which I have earlier referred. This may be disregarded because the evidence of the respondent, which I accept, is that it was not taken into account.

[66] Otherwise the applicant relied on:

(a) the fact that the respondent took account of the decision of the Building and Development Tribunal on 13 March 2006 (as to which see finding of fact 5 quoted at [34] above); and

(b) the fact that the respondent took account of the information conveyed to her as to the attitude of the Victorian Department in relation to the space requirement (as to which see [47](b) above).

[67] As to the former issue:

(a) The service approval contained the conditions referred to at [13](c) above. The approved alternative solution referred to in the conditions was the decision made by the Tribunal.

(b) The parts of the Tribunal decision to which the respondent referred formed an integral part of the Tribunal's reasoning in its approval of the alternative solution, which approval contained the two specific conditions nominated in the service approval.

(c) It is not irrelevant to note and find support in a consistency of approach between the respondent's decision and part of the Tribunal's reasoning which led to service approval conditions which had not been impugned.

(d) In any event, the significance of the Tribunal's decision, such as it was, was first mentioned by the respondent in the preliminary view letter and then dealt with by the applicant in submissions after the preliminary view letter.

(e) Ultimately the only purpose of referring to it in the context of the final decision was as a consonant piece of evidence, supporting a decision independently reached.

(f) The result is that I think the breadth of considerations which were relevant to the decision of the respondent is such that it could not be said that it was erroneous to take the fact of the Tribunal's decision into account. But even if I am wrong in reaching that view, the materiality of the consideration was not such as would require a remedy.

[68] As to the latter issue:

(a) The application itself recognized that the decision sought by the applicant could have implications for the national scheme in terms of potentially setting a precedent. The applicant in fact sought to amend its service waiver application in a way said to reflect the necessary approval conditions which would ensure that no wide precedent would occur: see [27](d) above. Moreover s 3 of the National Law required the respondent to consider that the objective of the National Law was to establish a national framework. I do not consider it to be an irrelevant consideration for the respondent to enquire into the approach which the regulators in other parts of the nation took to equivalent matters.

(b) It seems to me that the vice in relation to this issue was not the fact that it was considered, but the fact that the applicant was not given the opportunity to address it specifically. I have already dealt with that matter.

<u>The decision involved an exercise of power in a way that was so unreasonable that no reasonable person could have so exercised the power</u>

[69] This ground was abandoned at the conclusion of oral argument.[9]

<u>The decision involved errors of law in the form of misconstruction of particular legislative provisions</u>

[70] The applicant contended that the decision under review involved the misconstruction of ss 90 and 91 of the National Law and regulations 42 and 108 of the National Regulations, and repeated and relied on its written submissions at [21] to [33].

[71] However the applicant was not able to identify any actual misconstruction of those provisions by the respondent. Its case here seemed to rely on the misconceived notion I have discussed at [58] to [64] above.

[72] I agree with the respondent's submissions that there is no proper basis on which it may be inferred that the decision involved a misconstruction of any of the identified provisions.

<u>Conclusion</u>

[73] I have found that the decision made by the respondent should be set aside with effect from the day it was made because of the respondent's failure to comply with the requirements of procedural fairness.

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[9] Transcript, p 1-89 at lines 1-10.

[74] As initially constituted, this proceeding had as a second respondent the person constituting the regulatory authority under the National Law. And the applicant sought an order that the matter be remitted back to "the Respondents" with a further direction that the new decision be made by "a person other than the First Respondent or any other person directly involved in the decision under review".

[75] Had the proceeding remained so constituted, I would have been inclined to agree with the proposition that, in order to avoid any future debate concerning apparent bias, it would be appropriate that the matter be remitted back to the second respondent with a direction that the new decision be made by someone other than the first respondent.

[76] However it was common ground that the proceeding had been discontinued against the second respondent.[10] Accordingly, it presently seems to me that I ought not make an order or give a direction affecting the person who had been the second respondent, because he was not a party to the proceeding at the time it was heard by me. Nor does it seem appropriate to remit the decision to the respondent with a direction that the new decision be made by someone other than her, because she is not the person who determines who should be the appropriate delegate of the regulatory authority for the purpose of making the new decision. It may suffice that I have expressed the view that I have in the previous paragraph. However I will hear the parties further on this question.

[77] I order as follows:

(a) The decision of the respondent dated 10 May 2016 be set aside with effect from the date it was made.

(b) I will hear the parties on the question of costs, and on the question whether I should grant any further relief to the applicant other than the order in (a).

[10] Transcript, p 1-24 at line 35 to p 1-25 at line 16.