SUPREME COURT OF QUEENSLAND

CITATION:	*Powell & Anor v Queensland University of Technology & Anor* [2017] QCA 200
PARTIES:	**JACKSON DAVID POWELL** (first applicant) **CALUM MARTIN THWAITES** (second applicant) **v** **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (first respondent) **THE INFORMATION COMMISSIONER** (second respondent)
FILE NO/S:	Appeal No 13360 of 2016 QCAT No 295 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal Appeal Tribunal at Brisbane – [2016] QCATA 196 (Sheridan DCJ)
DELIVERED ON:	8 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2017
JUDGES:	Sofronoff P and Gotterson and McMurdo JJA
ORDERS:	**1. To the extent required, leave to appeal granted.** **2. Appeal allowed by setting aside the orders in paragraphs 4 and 5 of the decision of the Queensland Civil and Administrative Tribunal made on 19 December 2016.** **3. Appeal otherwise dismissed.** **4. The parties are to file any written submissions as to the costs of the appeal, not to exceed four pages, within 14 days of the date of this judgment.**
CATCHWORDS:	ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REVIEW OF DECISIONS – OTHER STATES AND TERRITORIES – where the applicants applied for access to their personal information held by the Queensland University of Technology (QUT) under the *Information Privacy Act* 2009 (Qld) (the IPA) – where QUT refused the application as invalidly made on the ground that the applicants had not provided identification documents as required by the IPA – where QUT's decision was upheld by the Information Commissioner – where the applicants appealed to QCAT but,

before the determination of that appeal, QUT agreed to treat the applications as if they had been validly made – where QCAT made orders setting aside the decisions below and purporting to remit the matter to QUT to be dealt with according to law, and purporting to reset the time period for processing under the IPA – where the Information Commissioner, who had made the decision under appeal in QCAT, had no power to remit the matter to QUT – whether QCAT had power, under s 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) or otherwise, to remit the matter to QUT or to reset the time period for processing – whether the orders of QCAT, being beyond power and therefore nullities, should be set aside

Information Privacy Act 2009 (Qld), s 3, s 43, s 66, s 123, s 132
Information Privacy Regulation 2009 (Qld), reg 3
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146, s 164

CGU Insurance Limited v Blakeley (2016) 90 ALJR 272; [2016] HCA 2, cited
Cooper & Sons v Dawson [1916] VLR 381; [1916] VicLawRp 51, cited
Hip Hing Timber Co Ltd v Tang Man Kit & Anor (2004) 7 HKCFAR 212; [2004] HKCFA 41, considered
Johns v Australian Securities Commission (1993) 178 CLR 408; [1993] HCA 56, cited
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
Minister for Immigration and Ethnic Affairs v Gungor (1982) 63 FLR 441; [1982] FCA 99, considered
Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343; [2000] HCA 9, cited
Osland v Secretary, Department of Justice [No 2] (2010) 241 CLR 320; [2010] HCA 24, considered
Powell & Anor v Queensland University of Technology & Anor [2016] QCATA 196, reversed
R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389; [1949] HCA 33, cited
R v Elliott; ex parte Elliott (1974) 8 SASR 329, cited
R v Magistrates' Court at Lilydale; Ex parte Ciccone [1973] VR 122; [1973] VicRp 10, cited
R v Williams; Ex parte Phillips [1914] 1 KB 608, cited
Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic) (2001) 207 CLR 72; [2001] HCA 49, considered
Appellants v Council of Law Society (ACT) (2011) 252 FLR 209; [2011] ACTSC 133, considered
Wormald Australia Pty Ltd v Industrial Commission of South Australia (1992) 58 SASR 447, cited
WY Properties Pty Ltd v O3 Capital Pty Ltd [2015] WASC 268, cited

COUNSEL:	A J H Morris QC for the first and second applicants J M Horton QC, with A Low, for the first respondent S A McLeod for the second respondent
SOLICITORS:	No appearance for the applicant Clayton Utz for the first respondent Office of the Information Commissioner for the second respondent

[1] **SOFRONOFF P:** The applicants are, or were, students at the Queensland University of Technology (QUT). On 14 June 2016 Mr Anthony JH Morris QC, acting as their agent, made an application to QUT for access to documents containing information about them pursuant to s 40 of the *Information Privacy Act* 2009 (the IPA).

[2] Pursuant to s 50 of the IPA, QUT's "Principal Officer" was obliged to deal with the application. The same section empowers the Principal Officer to delegate the power to deal with the application to another officer. Mr Ian Wright, described as QUT's "RTI/Privacy Officer", was evidently the delegate for that purpose. On 23 June 2016 Mr Wright wrote to Mr Morris at his chambers, the address of which had been given to QUT as the appellants' address for the purposes of the application, to invite the appellants to narrow the scope of their request for documents in order to permit the applications to be dealt with more quickly. He offered to advise them which parts of the University had had involvement with the appellants by way of assisting them to narrow the field of enquiry. Mr Wright also pointed out that he had not yet received the evidence of identity that s 43 of the Act requires be provided with such an application.

[3] Section 43 of the IPA provides as follows:

> "**43 Making access application**
>
> (1) An individual who wishes to be given access to a document of an agency or a document of a Minister under this Act to the extent it contains the individual's personal information may apply to the agency or Minister for access to the document.
>
> *Notes—*
>
> 1 *Minister* is defined to include an Assistant Minister—see schedule 5.
>
> 2 Section 45 provides for access applications by parents for children and section 196 clarifies the powers of those acting for others.
>
> 3 For an application made for a person, the person (and not the agent) is the applicant—see schedule 5, definition *applicant*.
>
> (2) The access application must—
>
> (a) be in the approved form; and
>
> (b) give sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document; and

(c) state an address to which notices under this Act may be sent to the applicant.

(3) Also, the applicant must provide with the application or within 10 business days after making the application—

(a) evidence of identity for the applicant; and

(b) if an agent is acting for the applicant—evidence of the agent's authorisation and evidence of identity for the agent.

Examples of an agent's authorisation—

- the will or court order appointing the agent to act as the applicant's guardian
- the client agreement authorising a legal practitioner to act for an applicant
- if the application is made in reliance on section 45, evidence the agent is the child's parent

(4) In this section-

evidence of identity means the evidence of identity prescribed under a regulation."

[4] Regulation 3 of the *Information Privacy Regulation* 2009 provides as follows:

"**3 Evidence of identity—Act, ss 43(4) and 44(6), definition *evidence of identity***

(1) For sections 43(4) and 44(6) of the Act, the evidence of identity prescribed for a person is a document verifying the person's identity, including, for example—

(a) a passport; or

(b) a copy of a certificate or extract from a register of births; or

(c) a driver licence; or

(d) a statutory declaration from an individual who has known the person for at least 1 year; or

(e) if the person is a prisoner within the meaning of the *Corrective Services Act 2006*—a copy of the person's identity card from the department administering that Act that is certified by a corrective services officer within the meaning of that Act.

(2) If a document under this section, other than a document mentioned in subsection (1)(e), is a photocopy of an original document, the document must be certified by a qualified witness as being a correct copy of the original document.

(3) In this section—

qualified witness means—

(a) a lawyer or notary public; or

(b) a commissioner for declarations; or

(c) a justice of the peace."

[5] On 28 June 2016, Mr Morris replied to Mr Wright and proffered, in satisfaction of s 43, affidavits that his principals had sworn in the Federal Court in proceedings in which they had been engaged and to which QUT had also been a party. Mr Wright responded on the same day, pointing out that the affidavits did not satisfy the requirements of the Regulation and offered to extend time for compliance. Mr Morris, also on the same day, replied, relevantly:

> "As I read Regulation 3(1) under the *Information Privacy Regulation* 2009, it merely requires "a document verifying a person's identity, including, for example …". I have provided such a document. It is the kind of document which the Federal Circuit Court acts upon, and I am at a loss to think why QUT would not do so.
>
> However, if QUT wishes to pretend it is unaware of the "identity" of two of its students – one of whom is still enrolled – with whom it is a co-defendant in proceedings in the Federal Circuit Court, let it do so, and we will see what the Information Commissioner thinks of that."

[6] On 6 July 2016 Mr Wright wrote to Mr Morris to notify him, on behalf of the appellants, that he had decided that the applications that Mr Morris had filed on their behalf did not comply with s 43(3).

[7] On behalf of the appellants Mr Morris then made an application for external review to the Information Commissioner pursuant to s 99 of the IPA. Section 103 of the IPA obliges the Commissioner to "identify opportunities and processes for early resolution of the external review application" and to "promote settlement". For that reason the Assistant Information Commissioner wrote to Mr Morris on 22 July 2016 saying, relevantly:

> "I understand Mr Powell is overseas and so unable to provide a certified copy of his driver's licence or birth certificate. The IP Act accepts a statutory declaration from an individual who has known the person in question for at least 1 year as proof of identity. Any individual who has known Mr Powell for at least 1 year may complete it.
>
> You may also provide a statutory declaration for Mr Thwaites, or alternatively, as I understand Mr Thwaites is in the country, you may provide a passport, a copy of a birth certificate, or a driver's licence.
>
> QUT has advised it will accept the above information and continue to process the applications from the date the proof of identity for each applicant is received.
>
> Please let OIC know by **29 July 2016** if you would like to informally resolve your clients' external reviews by providing QUT with the information listed above so that it may continue your applications. Your clients' rights of review are preserved in relation to any future reviewable decisions made by QUT."

[8] Mr Morris replied by email on the same day, indeed within about half an hour, saying:

> "Thankyou for your email.

> Your proposal for an "informal resolution" is not acceptable to my clients, and is therefore rejected.
>
> Please proceed to make a decision in accordance with the Act."

[9] On 26 July 2016 Mr Morris emailed to the Commissioner his clients' submissions in support of their application for external review. Between 25 July and 19 August 2016 Mr Morris, on behalf of the appellants, and the Commissioner's office exchanged correspondence concerning the progress of the application for external review.

[10] On 30 August 2016 the Information Commissioner gave a written decision affirming Mr Wright's decision.

[11] Mr Morris then filed an application on behalf of the applicants to the Queensland Civil and Administrative Tribunal (QCAT) appealing the decisions of the Information Commissioner and on 4 November 2016 he filed lengthy submissions in the Tribunal on behalf of his clients.

[12] On 24 November 2016 QUT filed a submission stating that QUT was "now satisfied as to identity under s 43(3) of the *Information Privacy Act*" and that it would now process the applications "upon it [sic] being re-made or re-presented, whether physically or by confirmation that the Applicants to this proceeding or their agent, seek to do so". QUT also submitted that its change of attitude had rendered the proceedings hypothetical and "[sought] the leave of the Tribunal to participate no further in the present proceeding" save as to costs. The submission did not explain what "participate no further" meant in this context; and notwithstanding that submission, QUT submitted that it "raise[d] for consideration whether the appropriate order, in the circumstances, [was] one under Chapter 2, Part 5 of the *Queensland Civil and Commercial* [sic] *Tribunal Act* 2009". That part of the *Queensland and Civil and Administrative Tribunal Act* (QCAT Act) deals with the early ending of proceedings, decisions by default, transfer of proceedings and consolidation of proceedings. The written submissions did not explain how Chapter 2, Part 5 could be applied and it was never mentioned again.

[13] Mr Dunphy of Clayton Utz, who was now acting as solicitor for QUT, sent the submissions to Mr Morris at his chambers. Mr Morris replied to Mr Dunphy, relevantly, as follows:

> "As QUT now concedes that the initial decision was incorrect, surely the appropriate outcome is a reversal of the OIC decision and a setting-aside of QUT's initial decision of 6 July 2016. The result is that the Application for Access dated 14 June 2016 remains on foot.
>
> This would obviously have some implications for the "processing period" under section 22 of the *Information Privacy Act*. But, given that QUT has taken the decent course of admitting its mistake, I would be prepared to agree that the period whilst QUT was labouring under that mistake – i.e., from 6 July 2016 until today – should be excluded from consideration. By my calculations, that means that QUT, having already used up 17 business days of the "processing period", has 8 business days to go.
>
> This should not be a problem, given that – in reality – QUT has now had over 5 months to identify relevant documents."

[14] Section 22 of the IPA mandates a "processing period" of 25 days for an application for access. Mr Morris invited Mr Dunphy to agree to have the matter relisted before QCAT for the making of consent orders accordingly. For reasons that are not clear to me, but which need not be considered further, QUT declined the offer.

[15] Pursuant to s 155 of the IPA the Information Commissioner is entitled to appear and be heard in a proceeding arising out of the performance of the functions of the Commissioner. He elected to appear and be heard in this case. He had filed written submissions in response to Mr Morris's clients' substantive submissions. Upon receipt of QUT's written submissions disclosing its changed position, the Information Commissioner filed supplementary submissions in which he said, relevantly:

> "11. The second respondent submits that, taking into account the outcome sought by the Applicants [to get access to the documents] and the objects of the QCAT Act, in particular the object set out in paragraph 10 above, the preferable orders for disposal of the appeal are:
>
> (a) the appeal is dismissed; and
>
> (b) the Applicants' access applications are remitted to the First Respondent, effective on the date of the Tribunal's order, for processing under the IP Act."

[16] The appellants also filed fresh submissions. Relevantly, the written submissions stated:

> "33. It is true that subsection 146(d) empowers QCAT to *"make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c)"*. The words *"any other order it considers appropriate"* are very wide, and it is not inconceivable that the power under subsection 146(d) might be used to extend a statutory time-limit where, for example, a delay on the part of QCAT in the hearing and determination of an appeal means that a party's rights – as existing at the time when the appeal was lodged – have been extinguished.
>
> 34. However, the IP Act contains very exacting time-limits defining the applicable 'processing period'; it contains comprehensive provisions specifying the circumstances in which the 'processing period' may be enlarged; it also contains very precise provisions limiting the duration of any such enlargement; and it specifies the consequences if the 'processing period' is not complied with. Against this background, it would be hard to contend that a power to extend the time-limits fixed by Parliament is implicit in the general words of subsection 146(d) of the QCAT Act. (That said, if QCAT is of the view that it does possess such a power, the Appellants would not oppose the exercise of that power, in keeping with the proposal put to QUT's solicitors, as mentioned below.)
>
> 35. In recognition of these difficulties, the following proposal was put to QUT's solicitors by email immediately following

receipt of QUT's submissions:

> "In paragraph 4 of QUT's submissions, it is said that "the First Respondent will process the Application for Access dated 14 June 2016 upon it['s] being either re-made or re-presented". I do not understand that proposition. As QUT now concedes that the initial decision was incorrect, surely the appropriate outcome is a reversal of the OIC decision and a setting-aside of QUT's initial decision of 6 July 2016. The result is that the Application for Access dated 14 June 2016 remains on foot.
>
> This would obviously have some implications for the "processing period" under section 22 of the *Information Privacy Act*. But, given that QUT has taken the decent course of admitting its mistake, I would be prepared to agree that the period whilst QUT was labouring under that mistake – i.e., from 6 July 2016 until today – should be excluded from consideration. By my calculations, that means that QUT, having already used up 17 business days of the "processing period", has 8 business days to go.
>
> This should not be a problem, given that – in reality – QUT has now had over 5 months to identify relevant documents."

36. Had that proposal been accepted, it might have been incorporated into an 'informal resolution' of the 'external review' – and therefore of the appeal to QCAT – as contemplated by subsection 123(2) of the IP Act. Instead, QUT declined that (entirely sensible) proposal, insisting instead that this issue being determined by QCAT:

> "The issue whether the applications for access (which were originally refused by my client and later by the Information Commissioner) "remained on foot", is one where the respective views of our clients will differ and we are unlikely to resolve that point by correspondence."

37. Given that the IP Act specifically provides for the consequences where an agency or minister fails to satisfy the 'processing period', the Appellants are entirely relaxed about the prospect that QCAT's decision may result in a finding that QUT – rather than rejecting the access application in *limine* – should have made a substantive decision on the access application within the prescribed 'processing period', and has failed to do so, with the consequence that there is now a 'deemed decision' not to produce any documents in accordance with the original access application. This simply means that the original access application will now fall to be dealt with by the Information Commissioner, without QUT's having any opportunity to apply its own views or interpretation regarding potential grounds for refusing access under section 67 of the IP Act or section 47 of the

Right to Information Act 2009.

38. This will no doubt be inconvenient for QUT, and perhaps more so for the OIC. But it is a result which those (respective) institutions have brought upon themselves; and it is one which the Appellants face with complete equanimity. Indeed, the Appellants have already exercised their default rights in respect of the "deemed decision", should that be the outcome of this proceeding."

[17] On 15 December 2016 the matter came on for hearing before Sheridan DCJ, the Deputy President of QCAT. The orders sought by the appellants, as stated in their original written submissions, which did not change after QUT had filed its own submission, were as follows:

> "(a) the appeal should be allowed;
>
> (b) the Information Commissioner's decision – or, more accurately, the decision of Corby as the Information Commissioner's delegate – should be set aside;
>
> (c) in lieu thereof, this Tribunal should decide that:
>
> (i) the "internal review" [sic] must be allowed;
>
> (ii) the decision of QUT's "Information Officer" must be set aside; and
>
> (iii) the matter must be remitted to QUT to provide access to documents in accordance with the Applicants' rights under the *Information Privacy Act* 2009;
>
> (d) alternatively, to (c), this Tribunal should remit the matter to the OIC with directions to conduct the "*external review*" in accordance with the law, as exposed in the Tribunal's reasons for its decision."

[18] At the beginning of the hearing, Mr Morris objected to the Information Commissioner's being heard. He submitted:

> "MR MORRIS: ... What has happened here, as your Honour will have seen, is that we propose, in our submissions, a form of orders, which, leaving aside questions of costs – which fall into a slightly separate category – Mr Horton's client doesn't oppose; indeed, doesn't make any submissions about. So as between applicant and first respondent, the only parties with any interest in the outcome of this hearing, there is only one view being advanced. But we get a lengthy submission from the second respondent ---
>
> ...
>
> MR MORRIS: Thank you, your Honour. If I can take your Honour to page 2, where there's the subheading:
>
> *Form of orders for disposition of appeal –*

> paragraphs 8 to 11 set out a series of submissions by the Information Commissioner regarding the Information Commissioner's view as to the form of appeal, directly contrary to that of the parties who have an interest in the proceeding, and arriving at the conclusion, as your Honour will see in paragraph 11, that the Information Commissioner, with no interest in the proceedings, submits that:
>
> *... The preferable orders for disposal of the appeal are (a) the appeal is dismissed, and (b) our access applications are remitted to QUT, effective on the date of the tribunal's order for processing under the IP Act.*
>
> I mean, all else aside, I don't know how your Honour gets the power to take applications that were made in June and say that they're remitted to QUT effective December, but that's beside the point. The point is that the Office of the Information Commissioner has no business – no business – coming to this tribunal, interposing itself in a debate between my client and QUT and pushing a barrow of its own. And let me say, the case law on this so clear that in a – where federal decision makers have played this sort of game, the courts – the Federal Court, in particular – indeed, the full bench of the Federal Court – have ordered costs against the decision maker for improperly interposing themselves in the debate between the parties who are interested in the matter, and made the point, in that context, that if people are going to have confidence in a body like the Information Commissioner as an independent decision maker, you can't have a situation where the Information Commissioner is coming to this tribunal and taking sides with one party or the other.
>
> All else aside, this matter, when it gets remitted to QUT, I expect – and my clients expect – that QUT will do its best to decide the matters properly. But there may be a further application for external review to the Information Commissioner. And how are my clients going to have confidence in the Information Commissioner's impartiality and independence in dealing [with] that further review when the Information Commissioner has chosen, for no good reason, to bring itself along here and tell this tribunal that what my clients want, and what QUT doesn't oppose, should be the – should not be the form of order, and that the tribunal should make a different form of order.
>
> DEPUTY PRESIDENT: So if I make - - -
>
> MR MORRIS: Those are my submissions on that issue."

[19] The learned Deputy President then heard from Mr McLeod, counsel for the Information Commissioner. The question whether the Information Commissioner should be heard about the forms of order was never resolved.

[20] QUT maintained the position that it wished to make no submissions about the forms of order that should now be made. In response to a question from the Deputy President, Mr Horton QC who appeared for QUT said that:

> "It really does not matter much. That is, this Tribunal's overriding purpose is to reach the substantively just result without undue legal

> technicality. So long as that's being served, what happens between here and that point, so long as in [sic] accordance with the law, is really immaterial. Nothing much turns on it."

[21] At the beginning of the hearing Mr Morris had informed the learned Deputy President that there were two issues that she had to determine. Mr Morris then made submissions about the first of these, namely whether, having regard to the attitude of QUT, the appeal should be allowed, as Mr Morris contended, or dismissed, as Mr McLeod had contended.

[22] Argument then turned to the question of costs. Mr Morris made his submissions that a costs order should be made in favour of the appellants. Mr Horton made submissions in reply. In the course of these, in an attempt to explain his client's rejection of Mr Morris's overture to agree to consent orders, Mr Horton said:

> "MR HORTON: And so our main difficulty was with being limited to having 17 business days, or eight business days to go, when on any view, in our respectful submission, when this goes back as it is being treated by our client, then we have the full statutory limits, partly because of practicality for not other reason [sic] is we need it. Now, it's reasonable for the same administrator who could not be - - -
>
> DEPUTY PRESIDENT: So – so just on that, and I know the position that you've taken has been not to comment on the form of the orders, but in actual fact, Mr Morris's formal order does not seek a comment about time periods.
>
> MR HORTON: Yes, and we could not agree to that. …"

[23] A little later, Mr Horton submitted:

> "And, we would add, in any event it is neither practical nor the right legal result to have only a few remaining days on a process commenced a long – long [time] ago to comply with what seems to be a wide request."

[24] The Deputy President heard from Mr Morris in reply:

> "DEPUTY PRESIDENT: And in doing so though, Mr Morris, I would like your comments on your draft order does not make [sic] any provision in terms of how you'd see – given what I've just been taken to by Mr Horton, does not make any comment about [indistinct].
>
> MR MORRIS: We think it does and that's because of paragraph 4, which no one has raised any argument about, says that the access application of 14 June on behalf of the appellants Powell and Thwaites be returned to the first respondent. Not to be treated as QUT wishes to treat it, as if there was a new access application made on the 24th of November. What we see quite specifically is that the access application of the 14th of June be returned to QUT and I haven't heard a word from anyone at the bar table saying that's not in the appropriate order. Indeed, it's the only thing that this tribunal can remit. The tribunal's power is to send back - - -

> DEPUTY PRESIDENT: But you say, Mr Morris, just in terms of that, 14 – if it were application having been properly received on the 14 June and all matters, the time period would've well expired, wouldn't it?
>
> MR MORRIS: It would and that means that QUT misses out on its chance to delay the process any further and it just goes straight to the Officer of the Information Commissioner to deal with. It's very straightforward. It's set out in the legislation. If QUT doesn't do the job within the time required, then the Information Commissioner's office becomes involved and does. But I don't wish to take up more time on that because it's explained in my supplementary submissions, particularly Part E on page 11 of those supplementary submissions."

[25] Mr Morris's reference to Part E on page 11 of his supplementary submissions are to the parts of the appellants' supplementary submissions that I have quoted in paragraph [16] above.

[26] After the Deputy President said that she would reserve her decision, the following further exchange took place:

> "MR HORTON: Your Honour, in the meantime, we are, in any event, processing – to use that word if I might use a neutral term – the application but we do require more than just a few days to complete that process.
>
> DEPUTY PRESIDENT: Yes. But consistent with what - - -
>
> MR HORTON: Yes.
>
> DEPUTY PRESIDENT: - - - your material says, you have commenced that process on the 28th of November.
>
> MR HORTON: Yes.
>
> MR McLEOD: 24th, I think.
>
> MR HORTON: 24th, your Honour. Yes. That's correct. I can confirm that.
>
> MR McLEOD: And with your Honour's leave, earlier this morning, I think, you asked me did we accept order 4. It would have to be that the access application of the 24th of November - - -
>
> MR MORRIS: There has been no access application of the 24th of November and I object to my learned friend - - -
>
> MR McLEOD: Well - - -
>
> MR MORRIS: - - - having another bite of the cherry at this stage of the proceedings.
>
> DEPUTY PRESIDENT: Yes [indistinct]
>
> MR McLEOD: I'm sorry. Well, I was picking up what Mr Horton [indistinct]

DEPUTY PRESIDENT: Yes. Thank you. I think I understand the position of the parties."

[27] On 19 December 2016 the Deputy President made orders and published her reasons. The decision of the Tribunal was:

> "1. The appeal is allowed.
>
> 2. The decisions of the second respondent of 30 August 2016 are set aside.
>
> 3. The decisions of the First Respondent of 6 July 2016 are set aside.
>
> 4. The access applications of 14 June 2016 on behalf of each of the appellants be returned to the first respondent to be dealt with according to law.
>
> 5. For the purposes of calculating the processing period, the applications be treated as having been received on 24 November 2016.
>
> 6. Each party is to bear their own costs."

[28] The appellants now appeal as of right against order 5 of the Deputy President's orders pursuant to s 149(2) of the QCAT Act. They also apply for leave to appeal against order 6 pursuant to ss 149(2) and (3)(b).

[29] At the hearing of the appeal Mr Morris informed the court as follows:

> **"**McMURDO JA: Mr Morris ---
>
> MR MORRIS: Your Honour, yes.
>
> McMURDO JA: --- since QCAT's decision last December, what has happened to your clients' application for access? Has there been a response to it by QUT?
>
> MR MORRIS: Yes, there has been. QUT has responded within the time. I mean, this is – none of this is in the record, so I'm simply informing your Honour ---
>
> McMURDO JA: Yes.
>
> MR MORRIS: --- as is my duty, of the – my understanding of the facts relevant to your Honour's question.
>
> McMURDO JA: Yes.
>
> MR MORRIS: There has been a response and documents have been produced.
>
> McMURDO JA: Now, is that – so there's been a decision made by QUT to – no, actually I shouldn't talk in those terms because that has a premise about a decision. So is that process at an end or is it ongoing?
>
> MR MORRIS: No. That process is at an end as far as – if I can put it this way: QUT is not proposing to do anything further, and my clients are not asking QUT to do anything further."

[30] Mr Horton, who appeared for QUT, informed the court that the documents the subject of the access application had been given to the appellants on 17 January 2017.

[31] It is necessary to consider the provisions of the IPA and the QCAT Act.

[32] Section 40 of the IPA confers upon an individual a right of access to documents of an "agency" that contain an "individual's personal information". QUT was an agency for the purposes of the Act and it was common ground that it held documents containing the appellants' personal information.

[33] I have already set out s 43 relating to the requirement that applicants for access furnish evidence of identity. Section 53 makes provision for a failure to provide such evidence. Pursuant to s 65, upon an access application being made, the agency "must", after considering the application, make a decision whether access is to be given to the document. Once a decision is made, then pursuant to ss 65(b) and 68 an agency must give a "prescribed written notice" informing the applicant of the decision. The definition of such a notice in s 199 requires such a notice to be in writing and it must state the decision, the day it was made, the reasons for it, the name and designation of the person making it and, if the decision is not the decision sought by the applicant, inform the applicant of any rights of review given by the Act.

[34] Section 66 provides that a failure to give a decision by the end of the "processing period" means that a decision is taken to have been made refusing access. This decision is referred to in the Act as a "deemed decision" in contradistinction to a "considered decision" when one is actually made by the agency.

[35] Pursuant to s 83, once a decision has been made to grant access to documents, the agency must make the documents available to the applicant in one of a number of appropriate means set out in that section.

[36] Section 99 entitles a person affected by a "reviewable decision", which includes the decision made in this case, to apply to have the decision reviewed by the Information Commissioner by way of "external review". Section 100 places the onus of establishing that the decision was justified upon the agency. Section 108 of the Act puts the procedure for an external review in the discretion of the Information Commissioner and requires those proceedings to be conducted with as little formality and technicality as the requirements of the Act and a proper consideration of the matters before the Commissioner allow. Section 110 requires that the procedures be fair. Section 113 entitles the Commissioner to "full and free access at all reasonable times to the documents of the agency" in the course of conducting an external review. The Information Commissioner has power to obtain information and documents from third parties and to require the attendance of witnesses to answer questions: see ss 115, 116 and 117.

[37] Of course, the form of any external review, the procedures under which it is conducted and the nature of the powers that are exercised depend entirely upon the subject matter of the dispute between an applicant and an agency. In this case the review was conducted upon the papers.

[38] Pursuant to s 123, after conducting such a review, the Information Commissioner must make a written decision that:

> "(a) affirms the decision;

(b) varies the decision; or

(c) sets aside the decision and substitutes another decision."

[39] The Act confers a right of appeal upon a participant to an external review to QCAT in the following terms:

"**132 Appeal to Queensland Civil and Administrative Tribunal on question of law**

(1) A participant in an external review may appeal to the appeal tribunal against a decision of the information commissioner on the external review.

(2) The appeal may only be on a question of law.

(3) The notice of appeal must, unless the appeal tribunal orders otherwise—

(a) be filed in QCAT's registry within 20 business days after the date of the decision appealed from; and

(b) be served as soon as possible on all participants in the external review.

(4) The appeal tribunal—

(a) has jurisdiction to hear and decide the appeal; and

(b) must be constituted by 1 judicial member.

(5) The appeal may only be by way of a rehearing."

[40] Such an appeal, expressed to be to "the Appeal Tribunal" invokes s 146 of the QCAT Act. That section provides as follows:

"**146 Deciding appeal on question of law only**

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision; or

(c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—

(i) with or without the hearing of additional evidence as directed by the appeal tribunal; and

(ii) with the other directions the appeal tribunal considers appropriate; or

(d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c)."

[41] The decision made by the Deputy President in this case was a decision that could be appealed as of right to the Court of Appeal pursuant to s 149 of the QCAT Act. That provision is an analogue of s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act).

[42] The nature of the jurisdiction conferred upon the Victorian Court of Appeal by s 148 of the VCAT Act was considered by Gaudron, Gummow, Hayne and Callinan JJ in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)*.[1] Their Honours said:

> "Section 148 of the VCAT Act is concerned with the invocation of judicial power to examine for legal error what has been done in an administrative tribunal. Although s 148 uses the word "appeal", it is clear that the Supreme Court is asked to exercise original, not appellate, jurisdiction and to do so in proceedings which are in the nature of judicial review. That is not to say that there are no other avenues for judicial review. The VCAT Act makes no express provision excluding the general supervisory jurisdiction of the Supreme Court. It may, therefore, be doubted that s 148 should be understood as doing more than providing, in some cases, an important discretionary reason for not permitting resort to that general supervisory jurisdiction on the basis that s 148 provides a suitable alternative remedy. Nevertheless, it is important to recognise that the essential character of s 148 is that it provides for the institution of proceedings in the Supreme Court, by leave, in which the legal correctness of what the Tribunal has done can be challenged."

[43] Section 148 of the Victorian statute is relevantly replicated by parts of ss 146 and 153 of the QCAT Act.

[44] In the present statutory context, the appellants' initial right of judicial review was not to the Court of Appeal, or to the Trial Division, as is the case under the VCAT, but to QCAT. However, in QCAT the Tribunal must be constituted by a judicial member, who will be either a District Court judge or a Supreme Court judge. Consequently, the reasoning in *Roy Morgan* is apt in its application not only to ss 146 and 153 of the QCAT Act, but also to s 132 of the IPA. Each provision confers upon a person a right of judicial review, in the one case by a member of QCAT constituted by a judge and in the other by the Supreme Court itself.

[45] In *Osland v Secretary, Department of Justice [No 2]*,[2] French CJ, Gummow and Bell JJ considered further the character of the jurisdiction conferred by s 148 of the VCAT Act. Their Honours said:

> "18. Section 148 confers "judicial power to examine for legal error what has been done in an administrative tribunal". Despite the description of proceedings under the section as an "appeal", it confers original not appellate jurisdiction; the proceedings are "in the nature of judicial review".
>
> 19. The jurisdiction conferred by s 148(1) is confined to appeals on questions of law. Section 148(7) does not enlarge that jurisdiction. It confers powers on the court in aid of its exercise. That feature of s 148 resembles s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the Commonwealth AAT Act), which defines the analogous jurisdiction of the Federal Court to hear appeals on questions

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1 (2001) 207 CLR 72 at [15]. Kirby J agreed at [40] (citations omitted).

2 (2010) 241 CLR 320 at [18]-[20].

> of law against decisions of the Administrative Appeals Tribunal (AAT). Under s 44(4) of the Commonwealth AAT Act, the Federal Court, in determining an appeal, may "make such order as it thinks appropriate by reason of its decision". But wide as that power may be, the Court "should not usurp the fact-finding function of the AAT". Those observations turn upon the text of s 44. They do not depend upon the separation of judicial and executive powers, which limits the functions that can be conferred upon federal courts. They have application to the jurisdiction conferred upon the Court of Appeal by s 148 of the VCAT Act, which is, in concept and in terms, modelled on, although not identical to, s 44.
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> 20. The Court of Appeal, in the exercise of its jurisdiction under s 148 of the VCAT Act, may make substitutive orders where only one conclusion is open on the correct application of the law to the facts found by the Tribunal. Such a case arises when no other conclusion could reasonably be entertained. In that event, the Court can make the order that the Tribunal should have made. The language of s 148(7) is also wide enough to allow the Court of Appeal to make substitutive orders in other circumstances. But its powers must, as with the equivalent powers of the Federal Court in relation to the AAT, be exercised having regard to the limited nature of the appeal. Absent such restraint, a question of law would open the door to an appeal by way of rehearing. Where there is a factual matter that has to be determined as a consequence of the appeal, it may be that it is able conveniently to be determined by the Court of Appeal upon uncontested evidence or primary facts already found by the Tribunal. When the outstanding issue involves the formation of an opinion which is, as in this case, based upon considerations of public interest, then it should in the ordinary case be remitted to the body established for the purpose of making that essentially factual, evaluative and ministerial judgment."

[46] Consequently, the jurisdiction that the appellants have invoked by the present appeal is one in the original jurisdiction of the Court of Appeal for judicial review.

[47] The relevance of this characterisation is that it informs the nature of the powers conferred upon the Court of Appeal by s 153. It does this in two ways.

[48] First, the terms of s 153, and its Victorian analogue, were derived from the Commonwealth legislation which pioneered these statutory forms of judicial review.

[49] Section 44 of the *Administrative Appeals Tribunal Act* 1975, which creates a right of appeal to the Federal Court of Australia on a question of law from any decision of the Administrative Appeals Tribunal, makes it plain that the remedies that the court can grant are wholly discretionary. Section 44(4) provides:

> "The Federal Court of Australia shall hear and determine the appeal and may make such order as it thinks appropriate by reason of its decision."

[50] Section 16 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) conferred powers upon the Federal Court to grant certain remedies. Those powers were expressly stated to be powers that the court could exercise "in its discretion". Neither the QCAT Act nor the VCAT Act use the word "discretion"; however, the word "may" in s 153(2) achieves the same result. Such a construction conforms to the characterisation of the jurisdiction under s 153 as original jurisdiction by way of judicial review and also to the historic nature of judicial review remedies at common law as discretionary remedies.

[51] The second reason why that characterisation of the power conferred by s 153 is important is that it is serves to confirm the limitation upon such powers.

[52] In a passage that has often been cited with approval, in *Minister for Immigration and Ethnic Affairs v Gungor*[3] Sheppard J said:

> "It is in my opinion not correct to say that this Court is by these provisions given wide powers to make such order as it thinks fit. Implicit in its powers are a number of restrictions. The appeal is expressly limited to error of law, which alleged error is the sole matter before this Court and is the only subject matter of any order made consequent on the appeal. The order which this Court can make after hearing the appeal is also similarly restricted to an order which is appropriate by reason of its decision. It follows that the only order which can be properly made is one the propriety of which is circumscribed by and necessary to reflect this Court's view on the alleged or found error of law. To go further I would see as amounting to exceeding the jurisdiction of this Court under this section."

[53] In *Minister for Immigration and Multicultural Affairs v Thiyagarajah*[4] Gleeson CJ, McHugh, Gummow and Hayne JJ accepted that this was a correct view of scope of the powers conferred by s 44 of the *Administrative Appeals Tribunal Act*. In *Johns v Australian Securities Commission*[5] Brennan J observed that s 16 of the *Administrative Decisions (Judicial Review) Act* 1977, which confers powers in similar terms, does not confer power "at large" so as to enable a court to make an order even when the general law does not confer a right to relief upon a party.

[54] The same considerations apply, obviously, to the powers conferred upon the judicial member of QCAT who, also by way of review, exercises the jurisdiction conferred by s 132 of the IPA.

[55] Consistently with the dicta in the cases that considered s 16 of the *Administrative Decisions (Judicial Review) Act* 1977, s 148 of the VCAT Act and s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth), the jurisdiction conferred upon QCAT in the present proceedings is one that is limited to orders which reflect the Tribunal's conclusion about the alleged error of law which grounded its jurisdiction. This could not involve a power to deviate from the time limit prescribed for dealing with an application for access pursuant to s 22 of the IPA or a power to remit the

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3 (1982) 63 FLR 441 at 454.
4 (2000) 199 CLR 343 at 357.
5 (1993) 178 CLR 408 at 433.

matter to someone other than the person who made the decision the subject of the review.

[56] In the circumstances of this case there was no power to remit the matter for further consideration by QUT. The Tribunal could have set aside the decision of the Information Commissioner and substituted for that decision the decision which the Information Commissioner ought to have made, namely to set aside the decision of QUT in respect of the inadequacy of the applications, if there was a basis for so doing. Although the issues which would justify the making of such an order were never litigated, the lack of opposition to the orders sought by the appellants might have justified the making of such an order.

[57] In this Court, Mr Morris argued, correctly, that order 5 was one that the Tribunal had no power to make. He relied upon the dicta that I have referred to in *Osland*. He pointed out that while an extension of time for processing might have been asked for and granted under s 106 of the IPA, no such application had been made and, for reasons that he developed in written submissions, no such application could have been made successfully. Moreover, as Mr Morris pointed out, the Deputy President did not expressly invoke s 106 as the source of the power to make order 5. Mr Morris's argument went on that, apart from s 106, there was no express power contained in the Act to extend the processing period.

[58] He then submitted that the only other possible source of power might have been a power implied by s 146(d). Contrary to the submission that he made to the Deputy President, he now submitted that the words of s 146(d) were "very wide – so wide, perforce, that they must be read as subject to an implicit limitation". He relied on dicta of French CJ, Gummow and Bell JJ at paragraphs 19 and 20 of *Osland* to support his argument about the limits upon the scope of the power under s 146(d) so as to exclude any power to extend time in terms of order 5.

[59] His written submissions also referred to the reasons of Refshauge ACJ in *Appellants v Council of Law Society (ACT)*.[6] That case concerned s 416 of the *Legal Profession Act* 2006 (ACT) which also contained the words "any order it considers appropriate". Mr Morris's written submission cited extensive passages from the reasons of Refshauge ACJ to support his argument that the power under s 146(d) was limited in the way that he had submitted. Relevantly, the written submissions cited paragraph 122 of Refshauge ACJ's reasons in which his Honour said:

> "122. In my view, the principle to apply then to the construction of s 416(3) is that it permits the ACAT to make any order that the ACAT otherwise has power to make. As a statutory tribunal, those powers must be found in the relevant statutes. Neither the *Legal Profession Act* nor the ACAT Act provide any statutory power, express of implied, to order costs in a case such as the one subject to this appeal.
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> …
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> 137. Having carefully considered these matters, in particular the authorities referred to above, I consider that when a statute permits a body to make "any orders it considers appropriate", such a provision does not confer any jurisdiction on the body

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6 (2011) 252 FLR 209.

> that it does not already possess either expressly or by such implication that the law may permit."

[60] Finally, in support of this proposition, Mr Morris referred to *WY Properties Pty Ltd v O3 Capital Pty Ltd*[7] in which Martin J considered the meaning of the words "any order the court considers appropriate" in s 105(9) of the *State Administrative Tribunal Act* 2004 (WA). In that case his Honour construed those words consistently with the previous cases that Mr Morris had cited.

[61] Accordingly, Mr Morris submitted that the "order which the learned Deputy President made is one which, on any view, the Commissioner could not make on an 'external review'". Given that the Commissioner could not make such an order, nor could QCAT.

[62] As to the appearance of the Information Commissioner at the hearing before the Tribunal, Mr Morris reiterated that he had objected to the Commissioner's appearance. He submitted:

> "Having initially informed QCAT that it was agreeable to an order in the terms proposed by the appellants, the Commissioner recanted at a very late stage in the hearing before QCAT, and argued for an order to the effect of paragraph 5 of the QCAT orders. The Commissioner was permitted to do so over objection on the ground that the Commissioner had no standing or relevant legal interest. Even then, QUT did not join in seeking such an order."

[63] As I have said, the appellants' submission that order 5 was beyond power must be accepted. Order 4 was also beyond power, but the appellants did not appeal against it; rather, they pressed the Deputy President to make that order.

[64] However, the conclusion that these orders were beyond power does not conclude the appeal. As I have said, the powers conferred upon the Court of Appeal are discretionary.

[65] In its submissions in this appeal, QUT changed its stance yet again. It now, finally, has adopted a firm position, albeit the wrong one. It now submits that there was indeed a power to make an order extending time and that power is to be found in s 146(d). It cites no authorities and refers only to one provision of the QCAT Act to support that submission, by a footnote which states "See also QCAT Act s 61". That section confers express power upon the Tribunal to extend the time fixed for procedures in proceedings in QCAT. It has nothing whatsoever to do with the question whether the Commissioner, and therefore QCAT, had power to extend the processing period set by s 22 of the IPA. QUT also submitted that if the Deputy President had set aside the Commissioner's decision and "returned the matter to QUT" (something that I have concluded is beyond power), then the "processing period would have started from the date of the orders". QUT offered no argument in support of that submission either.

[66] As to the Information Commissioner, having introduced into the Tribunal's deliberations the proposition that an order extending time should be made and,

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7 [2015] WASC 268.

implicitly, that it could be made, the Commissioner did not attempt to defend the submissions in this Court.

[67] In considering whether to exercise the discretion to grant a remedy, it is relevant that none of the submissions now made on behalf of the appellants were made to the Deputy President. On the contrary, in his written argument, to which he referred the Deputy President in the course of oral submissions, Mr Morris submitted that the Tribunal might have the power to extend time. He submitted that the words of s 146(3) were "very wide, and it is not inconceivable that the power under subsection 146(d) might be used to extend a statutory time-limit". He then adverted to an opposing argument that, having regard to the "very exacting time-limits" upon the processing period, "it would be hard to contend that a power to extend the time-limits fixed by Parliament is implicit in the general words of subsection 146(d)". But, he then went on:

> "That said, if QCAT is of the view that it does possess such a power, the Appellants would not oppose the exercise of that power, in keeping with the proposal put to QUT's solicitors, as mentioned below."

[68] It is true that some parts of Mr Morris's written submissions to the Deputy President are capable of being read as objections to any extension of time. Thus, he submitted:

> "Now that QUT has (finally) admitted its error in rejecting the original access application, it is no comfort whatsoever for the Appellants to be treated as if the entire process had begun 6 months later than it did."

[69] However, this submission was not a submission that an order should not be made of the kind that was made; it was a submission against the proposition that time would start afresh. It was made to meet QUT's submission that:

> "Accordingly, the First Respondent will process the Application for Access dated 14 June 2016 upon it being either re-made or re-presented, whether physically or by confirmation that the Applicants to this proceeding or their agent, seek to do so."

[70] The position of the appellants before the Deputy President concerning her power to make order 5 was equivocal. No direct submission was made that she had no power to make that order. Of the greatest significance is that in the face of Mr Horton's expressions of concern about QUT's need for extra time, no submission was made that the Tribunal did not have the necessary power. The submissions now made to the Court of Appeal were not made below and the learned Deputy President did not have any assistance from any counsel on this point. This is not surprising. The way the proceeding was conducted was that a short extension of time was not a matter that was controversial.

[71] Of the greatest significance in reaching this conclusion is the appellants' submission that if the Deputy President concluded that she had power to make an order extending the processing period then "the Appellants would not oppose the exercise of that power". The Commissioner did conclude that she possessed such a power but, contrary to what they led Sheridan DCJ to believe, they now opposed the exercise of that power.

[72] There are many cases in which courts have refused to grant discretionary remedies in cases where parties have acquiesced in the making of orders.

[73] In *R v Williams; Ex parte Phillips*[8] Rowlatt J said:

> "It is a very salutary rule that a party aggrieved must either shew that he has taken his objection at the hearing below or state on his affidavit that he had no knowledge of the facts which would enable him to do so."[9]

[74] In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*[10] Latham CJ, Rich, Dixon, McTiernan and Webb JJ said, in connection with the discretion to grant *mandamus*:

> "There are well recognized grounds upon which the court may, in its discretion, withhold the remedy.
>
> For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld."

[75] In *R v Magistrates' Court at Lilydale; Ex parte Ciccone*[11] McInerney J said:

> "For myself, I doubt whether any one test should be regarded as the exclusive test. Certainly, if a case of "lying by" is made out, certiorari would be refused. Equally, if a clear case of election is made out, that is, that the applicant knowing the facts and knowing what alternative courses are open to him on those facts, intentionally chooses one rather than the other, he will be held to that choice (or election). In my view, however, an applicant for certiorari may also be refused relief if it is shown that with knowledge of the facts entitling him to object to a continuance of the legal proceeding, he has not objected but has taken an active part in the proceedings right down to judgment."

[76] In a case that has frequently been cited, a decision of the Full Court of the Supreme Court of South Australia, *The Queen v Elliott; ex parte Elliott*,[12] Sangster J said:

> "In the exercise of its discretion, the superior court will not grant certiorari … where the matter complained of was done with the consent of, or lack of objection by, the party seeking certiorari …"

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8 [1914] 1 KB 608.
9 *Supra* at 615 (citations omitted).
10 (1949) 78 CLR 389 at 400.
11 [1973] VR 122 at 134.
12 (1974) 8 SASR 329 at 366.

[77] Finally, in *Wormald Australia Pty Ltd v Industrial Commission of South Australia*[13] the Full Court of South Australia was concerned with an application for judicial review of a decision by the South Australian Industrial Tribunal. That Tribunal had found that the dismissal by the plaintiff of the defendant had been harsh, unjust and unreasonable and had granted relief. The plaintiff, seeking relief in the Full Court, had initially taken a jurisdictional point at the Tribunal but had then not pressed the point upon the hearing. The court held that the Tribunal should have been bound to hold that it had no jurisdiction. However, Mohr J, with whom Legoe and Duggan JJ agreed, concluded that relief should be refused. He was of the view that the plaintiff had:

> "… deliberately and for its own purpose refrained from leading the necessary evidence and taking the point before Judge McCusker and was content, until it commenced these proceedings to have the matter dealt with on its merit. As a result of the plaintiff's attitude and the way in which it allowed the proceedings before the Commission to be conducted there will be inordinate delay in bringing the matters to a decision should one grant the relief sought. Further the Commission and the other parties to the dispute have been put to great cost and expense."[14]

[78] Mohr J made it clear that relief should be refused even if there was no jurisdiction.

[79] The conduct of the appellants in this case was conduct that, in my opinion, disqualifies them from obtaining the relief that they seek. Their submissions in this Court make it plain beyond any argument that the Tribunal lacked the power to make the order complained of. Why the making of the order was not opposed by the making of these submissions to the Deputy President is a mystery. Undoubtedly, had Mr Morris chosen to make these submissions to her, the Deputy President would have concluded correctly that there was no power to make such an order. Instead, the appellants chose to reserve their argument for the Court of Appeal.

[80] The appellants now also submit that the Deputy President's brief reasons for making the order were "admirably succinct". Indeed they were and they ought to have been having regard to the fact that, as Mr Morris submitted to her, there were only "two issues that have to be determined in these proceedings" apart from the preliminary matter about the right of the Information Commissioner to appear. Those two matters were whether the appeal to QCAT should be allowed or dismissed and who should pay the costs. The proposal to extend time was not put into contention by the party in whose interest it was to do so.

[81] In any case, there would be no point in granting the remedy sought. The order was always a nullity. An order setting it aside now would achieve nothing. There are cases in which a person who has been subjected to an order that was made in excess of power will nevertheless need a judicial remedy. Such an order may, despite being void, have a reputational effect upon a person.[15] Also, in some cases unless the court declares that the making of the order was unauthorised, the order might still be treated as effective by government officials and by others. In such cases a court will grant an appropriate remedy because it can be expected that the public or,

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13 (1992) 58 SASR 447.

14 at 455.

15 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

as the case may be a government bureaucracy, will then recognise the true legal position because the court has declared it.

[82] This is not such a case. The appellants have admitted that the documents have been delivered and that they propose to take no further steps to agitate QUT in relation to those documents.

[83] When asked why this appeal was ever brought, Mr Morris explained as follows:

> "McMURDO JA: What's the utility of the appeal so far as the challenge to order 5 is concerned?
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> MR MORRIS: I do not put it higher than that which I've already put; that in the circumstances which obtain, the legislation gives my clients what I characterise as the benefit of having disclosure supervised by an independent agency. I put it no higher than that."

[84] A little later there was the following exchange:

> "McMURDO JA: So if we're with you on your argument about order number 5, you would ask us to make an order setting aside order number 5.
>
> MR MORRIS: Yes.
>
> McMURDO JA: Now, what would be the utility of that?
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> MR MORRIS: Then, your Honour, the process would have to start again. It may be that the Information Commissioner will be satisfied with the searches that have been conducted and will be satisfied without further enquiry.
>
> McMURDO JA: When you say the process, do you mean the – well, is that the process with QUT or - - -
>
> MR MORRIS: Yes.
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> McMURDO JA: Why would that start again? There's been an application, there's been a decision.
>
> MR MORRIS: No, I'm sorry. The process of producing documents would start again because now it would be the Information Commissioner's decision what to produce or not."

[85] The rationale that can be understood from these submissions is that if the Court sets aside order 5 then it would follow that QUT had failed to make a decision within time. The consequence of that, it seems, would be that there would have been a deemed refusal to process the application. In that event the appellants would be entitled to seek external review of that deemed decision. Upon that review, the appellants contend that it would "be the Information Commissioner's decision what to produce or not".

[86] The problem with that as a rationale for this appeal is that any deemed decision was made over a year ago. The time to apply for external review also expired over a year ago and events have overtaken any such deemed decision. The appellants have been given documents and have not challenged the provision of those documents in any way. Consequently, any application for external review could well invoke the

Information Commissioner's power under s 107 to decide not to deal with the application on the grounds that it is frivolous, vexatious, misconceived or lacking in substance.

[87] As to order 4, that was an order that was made beyond power, but it was an order that the appellants actively sought and against which they have not appealed. It is an order that has no effect anyway for it seeks to achieve a result that follows in any event from orders 2 and 3 of the Tribunal's orders.

[88] But for one additional matter, I would have refused relief and dismissed the appeal.

[89] Section 164 of the QCAT Act establishes the Tribunal as a court of record. This is not a mere technicality. It connotes two things. First a court of record possesses an inherent power to punish for contempt.[16] Indeed, s 219 of the Act confers upon the Tribunal "all the protection, powers, jurisdiction and authority [of] the Supreme Court … in relation to contempt".

[90] For present purposes, it is the second characteristic of courts of record that is significant. It is that the record of a court is conclusive evidence of what is recorded therein.

> "A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself ..."[17]
>
> (footnotes omitted)

[91] The Tribunal's status as a court of record renders it undesirable that its record, which is unquestionably subject to review by the Supreme Court, should contain an order that the Tribunal has no jurisdiction to make.

[92] There may be cases in which the Tribunal *ought* not to have made an order, as distinct from cases in which it *could* not make an order. In the former, the discretion conferred upon this Court by the Act to hear appeals based upon errors of law might be properly exercised, in particular circumstances, by refusing relief. However, when the orders made were orders that were beyond the power of the Tribunal to make, it would, at least generally, be inappropriate to refuse relief and to leave the Tribunal's record in its imperfect state.

[93] For that reason only, I would allow the appeal, set aside orders 4 and 5 of the orders of the Tribunal made on 19 December 2016 and otherwise dismiss the appeal.

[94] As to costs, I would refuse leave to appeal. Although the order about costs was made upon the erroneous footing of orders 4 and 5 being valid, leave ought not be granted for the following reasons.

[95] Section 100 of the QCAT Act provides that each party must bear the party's own costs of a proceeding other than as provided under the Act. Section 102(1)

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16 Holdsworth, *A History of English Law,* (1924), vol 5 at 158; *Cooper & Sons v Dawson* [1916] VLR 381 at 391-394.

17 Blackstone, *Commentaries on the Laws of England*, (1769), vol 3 at 24.

empowers the Tribunal to make an order requiring a party to the proceeding to pay costs of another party "if the Tribunal considers the interests of justice require it to make the order". The applicants pressed a wholly technical point on external review when it would have been simple to provide one of the forms of evidence that QUT requested. One of the appellants was overseas and the other was in Brisbane. No explanation has ever been given why the appellant who was in Brisbane preferred to embark upon litigation rather than furnish one of the prescribed forms of identification. In an age of instant worldwide communication, it is impossible to conclude that the appellant who was overseas at the relevant time was unable, by reason of his absence from Australia, to furnish a copy of any of the forms of identification prescribed by the regulation. Parties are free, if they wish, to invoke the jurisdiction of courts or tribunals. But if they wish to take technical points like these, rather than to adopt pragmatic means to get what they want while insisting that it is their opponent who is being unreasonable, it should not be surprising if a court or tribunal declines to favour them with a costs order.

[96] Moreover, it has not been demonstrated that the appellants' case about the identity provisions of the IPA was right.

[97] It is true that the appellants were students at QUT and it is notorious that they had become generally well known within university circles by reason of their unfortunate involvement in proceedings in the Federal Court to which QUT was a party. However, the IPA is concerned with applications made to "agencies", many of which will be large bodies. In many cases the identity of a particular applicant will not be known to the actual person who must process the application. The Act must take account that there will be a receipt of many applications by many agencies. It is therefore essential to have a system of identification that is effective to preserve the confidentiality of personal information when it is sought. For this reason the statutory provision does not allow idiosyncratic, happenstance, personal knowledge to be brought to bear instead.

[98] This is the reason why the IPA requires identification in a form that emanates from third parties and not from an applicant himself or herself. It is far from an obvious conclusion that the affidavits which were offered would satisfy the regulatory definition of identification evidence just because a court received them for an entirely different purpose. It is far from obviously right that, merely because the appellants were known to many within the university that that fact, peculiar to this case, obviated the need for the statute provisions to be satisfied.

[99] However, I express no conclusions about these matters because they have not been argued. For that reason also, the learned Deputy President was right not to award costs in favour of the appellants.

[100] As to costs of this appeal, the parties should make submissions in writing within 14 days of the delivery of judgment in this appeal. In the circumstances of this particular case, I would invite parties to make submissions whether the appellants personally should or should not be ordered to pay the costs of this appeal.

[101] **GOTTERSON JA:** I have had the advantage of reading in draft the reasons for judgment of each of Sofronoff P and McMurdo JA. I agree with their Honours that Orders 4 and 5 under appeal were beyond the jurisdiction of the Deputy President to make.

[102] I agree also with McMurdo JA that, consistently with the observations of Lord Millett NBJ cited by his Honour, these orders should be set aside by this Court as nullities. The Queensland Civil and Administrative Tribunal is a court of record.[18] It is both appropriate and necessary in my view, that its record be corrected by setting them aside.

[103] It is for this limited reason that I would grant leave to appeal and allow the appeal. The appeal should otherwise be dismissed with the consequence that the other orders made by the Deputy President are affirmed.

[104] **McMURDO JA:** Under the *Information Privacy Act* 2009 (Qld) (the IPA), a person has a right of access to his or her personal information which is in the possession of an "agency", a term which is defined to include government entities and other public authorities. The first respondent to this appeal (QUT) is an agency.[19]

[105] A person dissatisfied with an agency's response to his or her application for the information may apply to have the agency's decision reviewed by the Information Commissioner, who is an officer of the Parliament and independent of the agency.[20] The Commissioner, after conducting a review of the agency's decision, must decide to affirm it, vary it or set it aside and make a decision in substitution for it.[21] However if the agency's decision is set aside, the Commissioner has no power to return the matter to the agency for the agency's reconsideration.

[106] A decision of the Information Commissioner may be appealed to the appeal tribunal of the Queensland Civil and Administrative Tribunal (QCAT).[22] The appeal lies only on a question of law.[23] The powers of the appeal tribunal in deciding such an appeal are conferred by s 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (the QCAT Act). They include a power to make "any … order it considers appropriate". The principal question in this case is whether that permits the appeal tribunal of QCAT, having set aside the decision of the Information Commissioner, to make an order in substitution for that decision which the Commissioner could not have made.

[107] In the present case, QUT decided that applications made by the appellants for access to their personal information within documents in its possession were not applications duly made according to the IPA. QUT's decision was upheld by the Information Commissioner and the appellants appealed to the tribunal. Before the determination of that appeal, QUT agreed to treat the applications for access as if they had been made regularly. The appeal tribunal, constituted by the Deputy President of QCAT (Sheridan DCJ), made orders setting aside the decisions of both the Commissioner and QUT. She further ordered that the access applications be "returned to [QUT] to be dealt with according to law."

[108] By this time, the period prescribed by the IPA for the processing by an agency of an access application had long expired. By s 66, the IPA provides that upon the expiry

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18 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 164(1).

19 See the definition of "agency" in s 17 of the IPA, which adopts the definition of that term in s 14, read with s 16 of the *Right to Information Act* 2009 (Qld).

20 The Information Commissioner under the IPA being the person holding that office under the *Right to Information Act* s 123; schedule 5 of the IPA.

21 IPA s 123(1).

22 IPA s 132.

23 IPA s 132(2).

of that period without a decision by the agency, an access application is deemed to be refused. At least once QUT's original decision was set aside, there was no decision which it had made within the processing period. Sheridan DCJ recognised that complication, and to the end of avoiding it, made the order which is now challenged, which was as follows:

> "5 For the purposes of calculating the processing period, the applications be treated as having been received on 24 November 2016."

The apparent effect of that order was that the processing period recommenced on 24 November 2016 and expired 25 business days later.[24]

[109] The appellants argue that there was no power to make that order, because it was not an order which the Information Commissioner could have made. They wish to have that order set aside with the consequence that QUT could not deal with the applications; instead they would have to be dealt with by the Commissioner.

[110] For the reasons that follow, I accept that the order which is challenged was beyond the power of the appeal tribunal. For the same reason, I conclude that so too was the order that the applications be returned to QUT to be dealt with by it.

[111] As it happens, because of events which occurred after the orders were made by the appeal tribunal, the outcome would be the same if these orders had been validly made. To explain that, after these orders were made, documents were provided by QUT to the appellants in response to their access applications. The Court was informed that the documents were not provided by QUT until 17 January 2017,[25] which was a date beyond the expiry of a processing period which commenced on 24 November 2016. Consequently, if the tribunal's orders were valid, (again) there was a deemed refusal of the access applications and (again) they became matters, if the appellants so required, for the consideration of the Commissioner.

[112] Therefore this appeal has no apparent practical utility: whichever view is taken of the validity of these orders made in the tribunal, in the events which have occurred it was for the Information Commissioner, if required to do so, to decide what documents (or further documents) should be provided to the applicants. Moreover, documents have been provided to the appellants who have not claimed that anything has been withheld. The only part of this appeal which has any apparent practical utility is the appellants' argument that they should have been given their costs in the tribunal, where it was ordered that each party should bear its own costs.

The applications to QUT

[113] By s 40 of the IPA, an individual has a right to be given access to documents of an agency to the extent that they contain the individual's personal information. By s 41, an individual has a right under the IPA to amend, if they are inaccurate, incomplete, out of date or misleading, documents of an agency to the extent that they contain the individual's personal information.

[114] The appellants sought access to documents containing their personal information by applications dated 14 June 2016. By s 43 of the IPA, such an application (described in the IPA as an access application) must be in the approved form and contain certain information. By s 43(3), an applicant must provide with the application, or

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24 IPA s 22.

25 Transcript of the hearing in this Court T1-41.

within 10 business days after making it, "evidence of the identity for the applicant". By s 43(4), the required evidence of identity is that prescribed under a regulation.

[115] Section 3 of the *Information Privacy Regulation* 2009 (Qld) provides that for the purposes of s 43(4),[26] the necessary evidence of identity is "a document verifying the person's identity", of which examples are there given which include a passport, a copy of a certificate or extract from a Register of Births, a driver's licence or a statutory declaration from an individual who has known the person for at least a year. No document of that kind was provided with these applications.

[116] The relevant officer of QUT raised what he said was a non-compliance with the requirement for the provision of evidence of the identity of the applicants. Immediately there began a lengthy rally of written exchanges between that officer and Mr Morris QC, who as well as appearing as the appellants' counsel in the tribunal and in this Court, acted as the appellants' representative in the pursuit of these applications from the outset. Mr Morris QC made many submissions to the QUT officer to the effect that QUT well knew who the applicants were and that proof of evidence of their identity was not necessary. But the officer pointed to the mandatory terms of s 43(3), by which evidence of identity was required and maintained that it had not been provided. Rather than providing a document of the kind described in the regulation (such as a copy of a driver' licence), the appellants provided copies of their affidavits in a proceeding in the Federal Circuit Court, which had been brought by an unrelated party against several respondents including QUT and the appellants. QUT's position was that these affidavits did not comply with the evidence of identity requirements. On 28 June 2016, QUT gave the appellants an extension of time in which to provide that evidence, an offer which was quickly refused.

[117] On 6 July 2016, the relevant officer of QUT wrote to formally advise that he had decided that the applications did not comply with s 43(3). By s 53(6) of the IPA, if, after giving an applicant an opportunity to comply with all relevant application requirements, an agency decides that the access application does not comply with those requirements, the agency must give a prescribed notice of the decision. The letter of 6 July was such a notice.

The review by the Information Commissioner

[118] Section 99 of the IPA provides that a person affected by a "reviewable decision" may apply to have the decision reviewed by the Information Commissioner. The term "reviewable decision" is defined[27] to include a decision under s 53(6) that an access application does not comply with all relevant application requirements.

[119] On such a review (described in the IPA as an "external review"), the agency who made the decision under review has the onus of establishing that the decision was justified.[28] The participants in an external review are the applicant for review and the agency.[29] By s 103, the commissioner must look for ways to achieve an early resolution of the external review application, including by a settlement of the dispute.

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26 And s 44(6), which provides for an application for the amendment of information.
27 IPA, sch 5.
28 IPA s 100(1).
29 IPA s 102(1).

[120] Section 107 of the IPA enables the Commissioner to decide not to deal with, or further deal with, an external review application in certain circumstances, including where the Commissioner is satisfied that the application is frivolous, vexatious, misconceived or lacking substance.[30]

[121] Division 4 of Chapter 3 of the IPA provides for the conduct of an external review. Division 5 sets out the powers of the Commissioner in that respect. Division 6, in particular s 123, defines the types of decisions which the Commissioner may make upon an external review. Section 123(1) provides:

> "(1) The information commissioner, after conducting an external review of a decision, must make a written decision –
>
> (a) affirming the decision; or
>
> (b) varying the decision; or
>
> (c) setting aside the decision and making a decision in substitution for the decision."

[122] It is common ground in this Court that the Commissioner, having set aside a decision of an agency, has no power to remit the matter to the agency for another decision by it. Rather, if the agency's decision is set aside, there must be a decision of the Commissioner in substitution for it.

[123] On 30 August 2016, the Commissioner gave a decision for each of the access applications, affirming QUT's decision. The Commissioner decided that QUT "was entitled to decide, under s 53 of the IPA Act, that the access application did not comply with all relevant application requirements".[31]

The appeal to QCAT

[124] On 31 August 2016, the appellants filed a proceeding in QCAT, appealing against the Commissioner's decision. It named QUT as the only respondent to the appeal. It sought orders that the decisions of the Information Commissioner be set aside and that in lieu of those decisions, QUT be ordered to provide access to the information in accordance with the IPA. The grounds of appeal, running to some five pages, were complaints of errors of law by the Commissioner in deciding that the access applications had not been duly made.

[125] On 28 September 2016, the Information Commissioner applied to be joined as a respondent to that proceeding, upon the basis that the Commissioner might be able to assist the tribunal by making relevant submissions on the Commissioner's powers and procedures and, as a party, could be required by the tribunal to file material upon which the Commissioner had relied in making the decision. In that respect, the grounds of appeal raised, amongst others, a complaint that the Commissioner had denied natural justice to the appellants, by not disclosing to them inquiries which the Commissioner had made of QUT. The Commissioner was joined as a party by an order made on 6 October 2016. At the same time, directions were made for the conduct of the proceeding, including for written submissions by the appellants, QUT and the Information Commissioner and for the determination of the proceeding on the papers without an oral hearing unless requested by any party.

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30 IPA s 107(1)(a).

31 The decision was made by an Assistant Information Commissioner with the authority of the Commissioner by delegation under s 139 of the IPA.

[126] On 24 November 2016, QUT delivered what was described as its outline of submissions. It was more a statement of why QUT would make no submissions. Relevantly it was as follows:

> "2. The First Respondent had originally declined to process the Access Application made on behalf of the Applicants on the grounds of non-compliance with s 43(4) of the *Information Privacy Act* 2009 and s 3(1) of the *Information Privacy Regulation* 2009.
>
> 3. Having given the matter further consideration, the First Respondent is now satisfied as to identity under s 43(3) of the *Information Privacy Act*.
>
> 4. Accordingly, the First Respondent will process the Application for Access dated 14 June 2016 upon it being either re-made or re-presented, whether physically or by confirmation that the Applicants to this proceeding or their agent, seek to do so.
>
> 5. The First Respondent therefore makes no substantive submission in this appeal, other than to suggest the proceeding is now hypothetical by reason that the matters set out in the preceding paragraph.
>
> 6. The First Respondent seeks the leave of the Tribunal to participate no further in the present proceeding (save as to any question of costs) and raises for consideration whether the appropriate order, in the circumstances, is one under Chapter 2, Part 5 of the *Queensland Civil and Commercial Tribunal Act* 2009."

[127] The appellants responded by an email, suggesting that the matter be re-listed for the making of consent orders "in accordance with the position now taken by QUT". On 28 November 2016, QUT responded that although the proceeding had become "hypothetical", it should be listed for the tribunal to decide, after submissions, upon the orders "that will end the proceedings on an early basis". Consequently, the tribunal was asked to re-list the matter for a hearing as to the appropriate orders to dispose of the proceeding. The tribunal issued directions requiring the parties to make submissions about those orders and as to costs.

[128] The appellants filed submissions seeking orders corresponding with those which were ultimately made by the tribunal, save that no order was sought which would affect, or purport to affect, the processing period. The appellants further submitted that they should have their costs against QUT and on the indemnity basis. In the alternative, they sought costs from the Commissioner.

[129] Curiously, QUT declined to make any submission as to what orders should be made by the tribunal: a stance which Sheridan DCJ described as "particularly unhelpful."[32] Taking a position which Sheridan DCJ described as "equally unhelpful and also misguided",[33] the Information Commissioner submitted that the appropriate orders were for the dismissal of the appeal, but with an order for the

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32 *Powell & Anor v Queensland University of Technology & Anor* [2016] QCAT 196 at [13].

33 Ibid at [14].

access applications to be remitted to QUT, "effective on the date of the tribunal's order, for processing under the IP Act."

[130] There followed a hearing on 15 December 2016 in which the parties made submissions about what orders should be made. Mr Morris QC criticised the submissions for the Commissioner, complaining that they were not impartial. He also questioned whether an order could be made, as was proposed by the Commissioner, which would affect the duration of the processing period. Nevertheless, it seems that the appellants did intend at that stage that it would be QUT, not the Commissioner, which would reconsider their applications. Mr Morris QC said that upon the remitter of the matter to QUT, his clients expected that the tribunal would "do its best to decide the matters properly."

[131] The position of QUT remained that it made no suggested orders for the disposition of the appeal.

[132] Sheridan DCJ delivered her judgment on 19 December 2016, ordering as follows:

> "1. The appeal is allowed.
>
> 2. The decisions of the [Commissioner] of 30 August 2016 are set aside.
>
> 3. The decisions of [QUT] of 6 July 2016 are set aside.
>
> 4. The access applications of 14 June 2016 on behalf of each of the appellants be returned to the first respondent to be dealt with according to law.
>
> 5. For the purpose of calculating the processing period, the applications be treated as having been received on 24 November 2016.
>
> 6. Each party is to bear their own costs."

[133] In her reasons, Sheridan DCJ said that the Information Commissioner had been unable to make any submission which justified the dismissal of the appeal.[34] She said that it was appropriate that orders be made to set aside the Commissioner's decision and "remitting the applications to QUT for processing", which would accord with "what is in fact occurring".[35] As to the processing period, she reasoned as follows:

> "[19] In correspondence and in submissions an issue arose as to the effective date of the access applications. Mr Morris QC for the appellants submits the relevant date is the date of the initial applications; albeit the appellants were prepared to exclude a short period while "QUT were labouring under a mistake". The Information Commissioner says it should be the date of the order of the tribunal.
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> [20] If the position asserted by Mr Morris QC was accepted, then as a result of the structure of the IP Act, the time period for the processing of the applications would have already expired. It would be a deemed decision for the purposes of the IP Act and

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34 Ibid at [17].
35 Ibid at [18].

it would be necessary for the decisions to be dealt with by the Information Commissioner through the review process.

[21] Such an approach hardly seems practical. The preferable course must be to enable the original decision-maker to process the applications. The original decision-maker stated on 24 November 2016 that it was doing so. The appropriate course is to treat the access applications as having been made on that day. The powers of the appeal tribunal are sufficiently broad to enable the making of such an order."

[134] Sheridan DCJ declined to make an order, as the appellants had sought, in terms of a declaration that the initial access applications had duly complied with the requirements of the IPA. She noted that this was not conceded by QUT, although it had now said that it was satisfied about the appellants' identities. She noted that ultimately, Mr Morris QC did not press for that order.[36]

[135] Sheridan DCJ then turned to the question of costs. She noted that many of the arguments for the appellants as to costs went to the merits of the appeal so that those arguments could not be persuasive without effectively deciding the appeal.[37] She said that this was neither "desirable nor necessary given the present attitude of QUT …". Her Honour reasoned as follows:

"[30] The starting position of the appellants in relation to the Information Commissioner was that no orders as to costs should be made against the Information Commissioner. However, a number of matters are then listed in the appellants' submissions which would support the making of a costs order. There is no doubt that the approach taken by the Information Commissioner in making the further submissions to the tribunal was unhelpful and in contradiction to earlier submissions made.

[31] On the other hand, even if QUT and the Information Commissioner had responded in a helpful way, it is likely that there would still have been disagreement between all three parties as to the form of orders and costs. In addition, whilst orders will be made consistent with most of the orders sought by the appellants, the tribunal declines to make the orders sought in paragraph 3(b) of their draft orders and has directed that the application be treated as having been made on 24 November 2016, rather than on 14 June 2016.

[32] In all the circumstances, the appropriate order is that each party bear their own costs."

The arguments in this Court

[136] The appellants' argument refers to s 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 as a "possible source of the jurisdiction and power" which the tribunal, in making the order which is challenged, had purported to exercise. Section 146 is as follows:

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36 [2016] QCAT 196 at [22].
37 [2016] QCAT 196 at [26].

"Deciding appeal on question of law only

In deciding an appeal against a decision on a question of law only, the appeal tribunal may –

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision; or

(c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration –

(i) with or without the hearing of additional evidence as directed by the appeal tribunal; and

(ii) with the other directions the appeal tribunal considers appropriate; or

(d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c)."

[137] Section 146 confers the relevant powers upon the tribunal in the exercise of this jurisdiction. But the jurisdiction itself is conferred by s 132 of the IPA which is as follows:

"132 Appeal to Queensland Civil and Administrative Tribunal on question of law

(1) A participant in an external review may appeal to the appeal tribunal against a decision of the information commissioner on the external review.

(2) The appeal may only be on a question of law.

(3) The notice of appeal must, unless the appeal tribunal orders otherwise—

(a) be filed in QCAT's registry within 20 business days after the date of the decision appealed from; and

(b) be served as soon as possible on all participants in the external review.

(4) The appeal tribunal—

(a) has jurisdiction to hear and decide the appeal; and

(b) must be constituted by 1 judicial member.

(5) The appeal may only be by way of a rehearing."

[138] The distinction between jurisdiction and power has been emphasised in many judgments in the High Court.[38] A power given to a court or tribunal may be employed only in order to exercise its jurisdiction and "[t]he power given to the

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[38] See *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at 593-594 [48] and the cases there cited at n 146. See also *CGU Insurance Limited v Blakeley* [2016] HCA 2; 90 ALJR at 272 [120] (Nettle J).

Court [or tribunal] may inform the characterisation of its jurisdiction but does not necessarily define its content."[39]

[139] The appellants argue that the powers under s 146 must be exercised within the boundaries of the tribunal's jurisdiction rather than the powers enlarging that jurisdiction. The argument cites, in particular, *Osland v Secretary to the Department of Justice*,[40] to which I will return. They argue that this order was not one which the Commissioner could have made on an external review by the Commissioner, from which it follows that the appeal tribunal had no power to make it.

[140] For QUT, it is argued that this order was within the powers conferred by s 146. QUT's written submissions seem to rely not only upon paragraph (d) but also paragraph (c) of s 146. But as to (c), it must be kept in mind that the decision under appeal in the tribunal was that of the Information Commissioner, which was the "entity who made the decision" in the terms of the paragraph. Section 146 contained no power to return the matter to QUT.

[141] It is submitted for QUT that the tribunal might have made no order affecting the processing period, in which case the period would have started from the date of its orders (19 December 2016).[41] Instead, it is argued, the order which is now challenged was one which favoured the appellants by having the processing period commence at an earlier date. The submission does not explain the legal basis for the contention that the processing period would have started from the date of the tribunal's orders.

[142] The Information Commissioner submits that the processing period had not commenced, because "the provisions of the IP Act relating to the timeframes for giving a written notice of decision are not enlivened until the agency is satisfied that it has received an access application which meets all the relevant requirements." Therefore, it is submitted, the processing period did not commence until 24 November 2016.[42] Consequently, the order which was challenged merely clarified the true effect of the IPA.[43]

Considerations of the arguments

[143] In *Osland v Secretary, Department of Justice*, the appellant had applied under the *Freedom of Information Act* 1982 (Vic) for certain documents. A delegate of the Secretary had refused the application. That decision was reversed upon her appeal to the Victorian Civil and Administrative Tribunal. The delegate's decision was subsequently reinstated by the Victorian Court of Appeal.[44] Of present relevance is the discussion by French CJ, Gummow and Bell JJ of the jurisdiction and powers of the Court of Appeal in hearing the appeal from the tribunal. Both the relevant jurisdiction and the powers of the court were set out in s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic). So far as presently relevant, it provides, in s 148(1), that a party to a proceeding may appeal, on a question of law,

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39 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at 593-594 [48].

40 (2010) 241 CLR 320.

41 First respondent's outline of submissions at paragraph 13.

42 Second respondent's outline of submissions at paragraphs 6 and 10.

43 Second respondent's outline of submissions at paragraph 13.

44 Which did so twice, the first of its judgments being set aside by the High Court in *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, when it was ordered that the Court of Appeal reconsider the matter.

from an order of the Tribunal to the Court of Appeal. Section 148(7) provides that the Court of Appeal may make any of the following orders:

> "(a) an order affirming, varying or setting aside the order of the Tribunal;
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> (b) an order that the Tribunal could have made in the proceeding;
>
> (c) an order remitting the proceeding to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the court;
>
> (d) any other order the court thinks appropriate."

[144] French CJ, Gummow and Bell JJ said of the court's jurisdiction and powers:

> "[18] Section 148 confers "judicial power to examine for legal error what has been done in an administrative tribunal". Despite the description of proceedings under the section as an "appeal", it confers original not appellate jurisdiction; the proceedings are "in the nature of judicial review".
>
> [19] The jurisdiction conferred by s 148(1) is confined to appeals on questions of law. Section 148(7) does not enlarge that jurisdiction. It confers powers on the court in aid of its exercise. That feature of s 148 resembles s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the Commonwealth AAT Act), which defines the analogous jurisdiction of the Federal Court to hear appeals on questions of law against decisions of the Administrative Appeals Tribunal (AAT). Under s 44(4) of the Commonwealth AAT Act, the Federal Court, in determining an appeal, may "make such order as it thinks appropriate by reason of its decision". But wide as that power may be, the Court "should not usurp the fact-finding function of the AAT". Those observations turn upon the text of s 44. They do not depend upon the separation of judicial and executive powers, which limits the functions that can be conferred upon federal courts. They have application to the jurisdiction conferred upon the Court of Appeal by s 148 of the VCAT Act, which is, in concept and in terms, modelled on, although not identical to, s 44.
>
> [20] The Court of Appeal, in the exercise of its jurisdiction under s 148 of the VCAT Act, may make substitutive orders where only one conclusion is open on the correct application of the law to the facts found by the Tribunal. Such a case arises when no other conclusion could reasonably be entertained. In that event, the Court can make the order that the Tribunal should have made. The language of s 148(7) is also wide enough to allow the Court of Appeal to make substitutive orders in other circumstances. But its powers must, as with the equivalent powers of the Federal Court in relation to the AAT, be exercised having regard to the limited nature of the appeal."
>
> (Footnotes omitted.)

[145] Section 132 of the IPA, in conferring the relevant jurisdiction upon QCAT, is in relevantly identical terms to the provision considered in *Osland*. The jurisdiction which is conferred by s 132 is confined to appeals on questions of law. The broadly stated powers, here expressed in s 146 of the QCAT Act, do not enlarge that jurisdiction.

[146] As was discussed in *Osland*, the provision which was there under consideration resembled s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) (the AAT Act) which defines the analogous jurisdiction of Federal Court to hear appeals on questions of law against decisions of the AAT. In *Minister for Immigration and Ethnic Affairs v Gungor*[45] Sheppard J said:

> "It is, in my opinion, not correct to say that this Court is by these provisions given wide powers to make such order as it thinks fit. Implicit in its powers are a number of restrictions. The appeal is expressly limited to error of law, which alleged error is the sole matter before this Court and is the only subject matter of any order made consequent on the appeal. The order which this Court can make after hearing the appeal is also similarly restricted to an order which is appropriate by reason of its decision. It follows that the only order which can be properly made is one the propriety of which is circumscribed by and necessary to reflect this Court's view on the alleged or found error of law. To go further I would see as amounting to exceeding the jurisdiction of this Court under this section."[46]

[147] Although s 132(5) of the IPA provides that the appeal to the tribunal is to be "by way of a rehearing", it is sufficiently clear that the tribunal's jurisdiction is confined to a review of the Commissioner's decision on a question of law. The decision of the Commissioner is to be varied or set aside only if it resulted from an error of law. The Tribunal's power to return the matter to the Commissioner for reconsideration, with directions which the tribunal considers appropriate,[47] is restricted to directions which have the purpose of ensuring that there is, upon reconsideration, a decision made which is according to law. Similarly, the power under s 146(d) is restricted to the correction of a legal error and its consequences.

[148] Many legal errors were complained of in the appellants' submissions to the tribunal. No legal error was conceded in or found by the tribunal. Whether, in those circumstances, the tribunal was empowered to make any order other than dismissing the appeal, is not raised in the arguments here. But it fairly appears that the orders were made by the tribunal upon the unproven premise that the Commissioner erred in law in concluding that the access applications had not complied with the requirements of s 43(3) of the IPA. Had the Commissioner found that they were duly made applications, what could and should the Commissioner have done? As already discussed, the Commissioner's powers were limited to those set out in s 123(1) of the IPA. The Commissioner would have been required to set aside QUT's decision in the case of each appellant. Upon doing so the Commissioner would have been required to make a decision in substitution for QUT's decision. The

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45 (1982) 63 FLR 441, 454.

46 See also *Director General of Social Services v Hangan* (1980) 45 ALR 23 at 34 – 35 (Toohey J), *Director-General of Social Services v Hales* (1983) 47 ALR 281 at 309 – 310 (Lockhart J) and *Minister for Superannuation v Miller* (1985) 63 ALR 237 at 250 (Pincus J).

47 s 146(c)(ii).

Commissioner would have had no power to return the matter to QUT for its further decision.

[149] The tribunal's powers were limited to correcting an error of law and, more specifically in this case, to ensuring that the access applications were considered in accordance with the IPA. Had the Commissioner decided that the applications were duly made, the Commissioner would have erred in law in returning them to QUT. The tribunal's jurisdiction to correct a legal error did not empower the tribunal to order another treatment of the access applications which was inconsistent with the IPA. Consequently, the order which was made for the return of the access applications to QUT was beyond the tribunal's power.

[150] For the same reasons, the order which purported to affect the calculation of the processing period was beyond the tribunal's power. It should be noted that the Information Commissioner has a power, in a particular circumstance, to extend the processing period.

[151] By s 106 of the IPA, the Commissioner may allow the agency further time to deal with an access application in circumstances where an application has been made to the Commissioner for an external review of a "deemed decision" and the agency asks the Commissioner for further time. The term "deemed decision" in this context relevantly means a deemed refusal of the access application by the expiry of the processing period.[48] In the present case, the applications made to the Commissioner were for a review not of a deemed decision, but instead QUT's decision to refuse to deal with the application under s 53. Further, there was no request by QUT to the Commissioner to allow QUT further time to deal with the applications. Apart from s 106, the Commissioner had no power to extend the processing period. The tribunal's power was limited to orders which corrected a legal error and which, to the extent possible consistently with the IPA, remedied the consequence of that legal error.

[152] The Commissioner's submission that the processing period does not begin until an agency is satisfied that it has received a duly made application, cannot be accepted. Section 22 relevantly defines the processing period as a period of 25 business days from the day the application is received by the agency. It does not distinguish between a duly made application and an application having some formal defect. And that distinction would be problematic, because according to s 43(3), evidence of identity need not be provided with the application but could be provided within a further 10 business days. Nor does the definition of the processing period distinguish between the receipt of an application which the agency considers to be compliant and that of an application which it believes, rightly or wrongly, to be non-compliant. A non-compliant application is not in this context a nullity: it still requires the action of the agency, under s 53, to dispose of it by a reviewable decision of the agency.

[153] Nor can QUT's submission about the processing period be accepted. The submission reveals no basis in the IPA for the contention that the processing period, notwithstanding its definition by s 22, restarted at the date of the tribunal's orders.

[154] Consequently, orders 4 and 5 ought not to have been made.

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48 IPA s 66 and definition of "deemed decision" in schedule 5.

[155] Each of those orders is a nullity because it was made by the tribunal, which is not a court of general jurisdiction, in excess of its (limited) jurisdiction.[49] Therefore the orders have no effect, even absent an order by this Court to set them aside.[50]

[156] The appeal to this Court was against order 5, that which purported to affect the processing period. Although that order is a nullity, it is susceptible to an appeal in which this Court can determine whether the order was made in excess of the tribunal's jurisdiction and set it aside upon that basis. This was explained by Lord Millett, sitting as a member of the Court of Final Appeal of Hong Kong, in *Hip Hing Timber Co Ltd v Tang Man Kit & Anor*,[51] a judgment which has been applied in the Privy Council[52] and the New South Wales Court of Appeal.[53] In that case, the (intermediate) Court of Appeal of Hong Kong, constituted by two judges, allowed an appeal. In the circumstances of that case, the court was able to be constituted by two judges, rather than by three, only if the judgment under appeal was interlocutory rather than final. Because the judgment was final, the court was improperly constituted and the order allowing the appeal was made without jurisdiction. It was a nullity. There was then a question of what could and should be done by the Court of Final Appeal.

[157] Lord Millett NPJ said:

> "[34] …An order of the Court of Appeal, if not properly constituted, is a nullity. It is, of course, a proper ground of appeal that the court from which the appeal is brought had no jurisdiction to make the order in question; but if that is found to be the case the court hearing the appeal has no jurisdiction to determine the appeal on its merits but is bound to confirm the position by setting aside the order below as a nullity.
>
> [35] The parties cannot confer on us by consent a jurisdiction which we do not possess, and since the issue goes to our own jurisdiction then … we are bound to inquire into it whether the parties raise it or not."

[158] In the present case, the appeal against order 5 is brought solely upon the basis that it was made in excess of jurisdiction. That order being a nullity, upon that reasoning of Lord Millett, this Court would be bound to set it aside. For the present purposes, let it be assumed that this Court has a discretion to dismiss the appeal although the ground of the appeal is established. Nevertheless, in my view the order should be set aside, because it is irregular and conducive to misunderstanding if the order publicly made and recorded is allowed to stand as if it had some effect.

[159] There is no appeal against order 4. But it should be set aside for two reasons. The first is that, as I have discussed, its jurisdictional defect is revealed by the same reasoning by which the defect in order 5 is established. The fact that the appellant has not challenged order 4 does not mean that this Court should overlook it. Again, to allow order 4 to stand would allow the record of QCAT to misrepresent the true legal position. Further, if QCAT had had the power to order a reconsideration by

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49 See *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 370 [11], [12] and the cases there cited.
50 See eg *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 445-446 [27], [28].
51 (2004) 7 HKCFAR 212.
52 *Strachan v The Gleaner Co Ltd* [2005] 1 WLR 3204 at 3213 [31].
53 *Deveigne & Anor v Askar* (2007) 69 NSWLR 327 at 347 [95].

QUT, still the order could not stand because it would oblige QUT to do what it cannot do under the IPA: the processing period had expired and could not be extended.

Costs

[160] The appellants seek their costs of the proceeding in the tribunal. They argue that the merits of their appeal to the tribunal ought to have been apparent. It is said that it "was perfectly clear that … QUT made a decision which was plainly wrong in law" that QUT had sought to support its decision on the external review and only abandoned that decision after the case had progressed in the tribunal. It is submitted that Sheridan DCJ should have considered whether the appellants had reasonable grounds for complaint about QUT's refusal of their applications and an arguable case to support their appeal in the tribunal up to the time when QUT agreed to deal with the applications.

[161] In this respect, the appeal to this Court is, of course, a challenge to the exercise of a discretion and it is well recognised that the discretion as to the cost of a proceeding is a broad one. However, because of the errors in the making of the orders numbered 4 and 5, the discretion must be exercised by this Court. In my view, the position should remain that there be no order for the costs of any party in the proceeding in the tribunal. My reasons can be shortly stated.

[162] The starting point is that by s 100 of the QCAT Act, each party to a proceeding in QCAT must bear the party's own costs, other than as provided under that Act or an enabling act. By s 102(1) of the QCAT Act, the tribunal may order a party to pay costs if it considers the interests of justice require it to do so. By section 102(3), that question is to be decided having regard to the matters there set out. They include the "relevant strengths of the claims made by each of the parties to the proceeding". But they include also "anything else the tribunal considers relevant". Like Sheridan DCJ, I consider that it would be undesirable to reach at least a concluded view about the merits of the decision under appeal in the tribunal. This Court was not given any detailed argument about the merits of the Commissioner's decisions which addressed the Commissioner's reasons. In particular, the Commissioner's view that any proof of identity should include an element of verification by a person other than the applicant is not the subject of argument here. I express no view as to that proposition, except to say that it is not so obviously wrong that without the benefit of argument, it can be concluded now that it was wrong and the Commissioner erred in law.

[163] Another relevant consideration for costs of the proceeding in the tribunal is whether, in all the circumstances, the appellants' course in seeking an external review and then appealing to the tribunal was disproportionate. It is not explained why they did not take another course which would have saved them and others considerable time and expense, such as providing a copy of a driver's licence or a similar form of identification which is an everyday requirement in different contexts.

[164] Further, the grounds of appeal were extensive and made allegations of misconduct which are not conceded or established here. It would be wrong to award the appellants the costs of prosecuting that case without any finding about its merit.

[165] There is the further consideration that both in the filed application in the tribunal and throughout that proceeding, the appellants sought an order either that QUT provide access to the documents or that the applications be returned to QUT for its

decision. As I have concluded, that is not an outcome which could result from an order properly made in the appeal before the tribunal.

[166] Therefore, I would not make any order for costs in the tribunal.

Conclusion

[167] The proceeding in this Court was commenced by an application for leave to appeal. In my view, leave is not required on the question of jurisdiction. By s 149(2) a party to a proceeding in QCAT may appeal to this Court against a decision of the tribunal if a judicial member constituted the tribunal. Such an appeal requires this Court's leave if it is on question of fact, or a question of mixed law and fact. The appellants' challenge to order number 5 was on a question of law only. The appeal against that order does not require leave. The challenge to the costs order involves a question of mixed law and fact, and thereby requires leave to appeal. I would grant leave but dismiss the appeal.

[168] I would order as follows:

1. To the extent required, leave to appeal granted.
2. Appeal allowed.
3. Set aside the orders in paragraphs 4 and 5 of the decision of the Queensland Civil and Administrative Tribunal made on 19 December 2016.
4. Appeal otherwise dismissed.
5. The parties are to file any written submissions as to the costs of the appeal, not to exceed four pages, within 14 days of the date of this judgment.

[169] As to the costs of this appeal, the parties should be allowed to consider the reasons for judgment, before making any submission. Relevant to that consideration would be what I have said about the lack of utility of this appeal.