SUPREME COURT OF QUEENSLAND

CITATION:	*Central and Northern Queensland Regional Parole Board v Finn* [2018] QCA 47
PARTIES:	**CENTRAL AND NORTHERN QUEENSLAND REGIONAL PAROLE BOARD** (appellant) **v** **JEFFREY MARTIN FINN** (respondent)
FILE NO/S:	Appeal No 10584 of 2016 SC No 273 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns – [2016] QSC 233
DELIVERED ON:	23 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2017
JUDGES:	Fraser and Gotterson JJA and North J
ORDERS:	**1. Allow the appeal.** **2. Set aside so much of the decision in the Supreme Court Trial Division delivered on 23 September 2016 that the decision of the appellant to suspend, for an indefinite period, the Board ordered parole granted to the respondent be set aside.** **3. The order made in the Trial Division that the appellant pay the respondent's costs of the application in the Trial Division is not varied.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXCLUSION OF PROCEDURAL FAIRNESS – PROCEDURES PROVIDED BY STATUTE – where the appellant suspended the respondent's parole order for an indefinite period under s 205(2)(a)(i) *Corrective Services Act* 2006 (Qld) – where the appellant reasonably believed the respondent had failed to comply with the conditions of the parole order by attempting to use a concealed device to provide a false sample – where the appellant had made subsequent decisions under s 208 *Corrective Services Act* 2006 (Qld) not to change its original decision – where s 208 acts as a "review provision" – where the Supreme Court

made an order to set aside the decision of the appellant because the appellant's decision failed to refer to the reason for the decision – whether the trial judge erred in holding that s 205 *Corrective Services Act* 2006 (Qld) did not exclude the right to be provided an information notice and the common law natural justice rules including the right of the prisoner to be provided a reasonable opportunity to be heard when making the decision to suspend or cancel a parole order

Acts Interpretation Act 1954 (Qld), s 27B
Corrective Services Act 2006 (Qld), s 3(2), s 205, s 208

Annetts v McCann (1990) 170 CLR 596; [1990] HCA 57, considered
Finn v Central and Northern Queensland Regional Parole Board [2016] QSC 233, related
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23, considered

COUNSEL: P Dunning QC, with M J Woodford, for the appellant
M Jonsson QC for the respondent

SOLICITORS: Crown Law for the appellant
Philip Bovery & Company Lawyers for the respondent

[1] **FRASER JA:** The respondent, who was serving a sentence of imprisonment, was released to parole on 20 January 2015 under a parole order made by the appellant parole board. The parole order was suspended on 21 July 2015. The prisoner was again released to parole on 26 August 2015. By warrant issued by the Chief Executive dated 10 November 2015, the respondent's parole order was suspended for a period of 28 days from 10 November 2015. The respondent was returned to custody pursuant to that warrant. The decision which led to this appeal was made by the appellant on 17 November 2015. On that date the appellant suspended the respondent's parole order for an indefinite period.

[2] The respondent applied in the Trial Division for a statutory order of review of the appellant's decision. The respondent also sought review of a decision by the appellant to amend the parole order. The application was heard and decided on 23 September 2016. The primary judge made an order that, with effect from 4.00 pm on 26 September 2016, the decisions of the appellant to suspend the parole order for an indefinite period and to amend the parole order be set aside. The appellant has appealed against the order setting aside its decision to suspend the parole order for an indefinite period.

[3] Parole is regulated by Ch 5 of the *Corrective Services Act* 2006 (Qld). The provisions in force at the times relevant in this appeal are contained in the reprint of that Act current as at 5 September 2014. Chapter 5, Pt 1, Div 5 ("Amending, suspending or cancelling, parole") sets out the powers of the Chief Executive and parole boards in subdivision 1 and subdivision 2. The Chief Executive is not empowered to cancel a parole order. The powers of the Chief Executive to amend or suspend a parole order are limited to powers to do so by a written order which has effect for a period of not more than 28 days starting on the day the written order

is given to the prisoner or made: s 201. A parole board is empowered to cancel the Chief Executive's order for amendment or suspension of a parole order and to require the Chief Executive to immediately withdraw a warrant for the prisoner's arrest issued under s 202 if that warrant has not been executed: s 203.

[4] As to the powers of parole boards, for present purposes, the critical provisions are sections 205(2)-(6) and 208. It is useful to set out those provisions together with some other provisions which provide relevant context:

> "**205**
> (1) A parole board may, by written order, amend a parole order—
> (a) by amending or removing a condition imposed under section 200(2) if the board reasonably believes—
> (i) the condition, as amended, is necessary for a purpose mentioned in the subsection; or
> (ii) the condition is no longer necessary for a purpose mentioned in the subsection; or
> (b) by inserting a condition mentioned in section 200(2) if the board reasonably believes the condition is necessary for a purpose mentioned in the subsection; or
> (c) if the board reasonably believes the prisoner poses a serious risk of harm to himself or herself.
> (2) A parole board may, by written order—
> (a) amend, suspend or cancel a parole order if the board reasonably believes the prisoner subject to the parole order—
> (i) has failed to comply with the parole order; or
> (ii) poses a serious risk of harm to someone else; or
> (iii) poses an unacceptable risk of committing an offence; or
> (iv) is preparing to leave Queensland, other than under a written order granting the prisoner leave to travel interstate or overseas; or
> (b) amend, suspend or cancel a parole order, other than a court ordered parole order, if the board receives information that, had it been received before the parole order was made, would have resulted in the parole board that made the order making a different parole order or not making a parole order; or
> (c) amend or suspend a parole order if the prisoner subject to the parole order is charged with committing an offence.
> (3) If practicable, a parole board must, before amending a prisoner's parole order, give the prisoner an information notice and a reasonable opportunity to be heard on the proposed amendment.
> (4) A parole board is not required to give the prisoner an information notice or a reasonable opportunity to be heard if the parole board suspends or cancels the prisoner's parole order.
> (5) A written order amending, suspending or cancelling a parole order has effect from when it is made by the parole board.
> (6) In this section—

information notice means a notice—

(a) stating the parole board is proposing to amend the parole order; and

(b) advising the reason for the proposed action; and

(c) inviting the prisoner to show cause, by written submissions given to the board within 21 days after the notice is given, why the board should not take the proposed action.

206

(1) If a parole board suspends or cancels a prisoner's parole order—

(a) the board may issue a warrant, signed by a member or the secretary of the board, for the prisoner's arrest; or

(b) a magistrate, on the application of the board or a member of the board, may issue a warrant for the prisoner's arrest.

(2) The warrant may be directed to all police officers.

Note—

See also the *Police Powers and Responsibilities Act 2000*, section 798.

(3) When arrested, the prisoner must be taken to a prison—

(a) if the order was suspended—to be kept there for the suspension period; or

(b) if the order was cancelled—to serve the unexpired portion of the prisoner's period of imprisonment.

207

If a regional parole board cancels a prisoner's court ordered parole order, any application for a subsequent grant of parole during the prisoner's same period of imprisonment must be to a regional parole board.

208

(1) If a parole board makes a written order suspending or cancelling a prisoner's parole order, the board must give the prisoner an information notice on the prisoner's return to prison.

(2) The parole board must consider all properly made submissions and inform the prisoner, by written notice, whether the board has changed its decision and, if so, how.

(3) If the board changes its decision, the changed decision has effect.

(4) In this section—

information notice means a notice—

(a) stating the parole board has decided to suspend or cancel the parole order; and

(b) advising the reason for the decision; and

(c) inviting the prisoner to show cause, by written submissions given to the board within 21 days after the notice is given, why the board should change its decision.

properly made submissions means written submissions given by or for the prisoner to the parole board within 21 days after

> the information notice inviting the prisoner to make the submissions is given."

[5] The appellant's decision to suspend the parole order indefinitely was made under s 205(2)(a)(i) of the Act. The appellant gave the respondent an information notice dated 26 November 2015 in which it notified the respondent that on 17 November 2015 it had suspended the parole order for an indefinite period. The information notice gave a reason for the decision and invited the respondent to show cause by written submissions with 21 days of receipt of the notice why the appellant should change its decision. The reason for the decision was that the appellant reasonably believed that the respondent had failed to comply with conditions of the parole order that the respondent give a test sample as directed by a Corrective Services officer and not take preparatory steps to breach, or otherwise evidence an intention to breach, the parole order.

[6] One ground of the respondent's application to review the appellant's decision to suspend the parole order was that the decision was not authorised by s 205(2)(a)(i) because the appellant did not reasonably believe that the respondent had failed to comply with the identified conditions of the parole order. The primary judge referred to evidence that when the appellant made the decision it had information from the officers who had administered the test (a urine test) to the effect that the respondent had attempted to use a concealed device to provide a false sample. The respondent did not press the contention, and the primary judge did not find, that the appellant did not hold the reasonable belief required by s 205(2)(a)(i).

[7] The appellant gave the respondent the information notice under s 208(1) of the Act. Section 27B of the *Acts Interpretation Act* 1954 (Qld) provides:

> "If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression "reasons", "grounds" or another expression is used) the instrument giving the reasons must also –
>
> (a) set out the findings on material questions of fact; and
>
> (b) refer to the evidence or other material on which those findings were based."

[8] The primary judge held that: s 27B applied to an "information notice" under s 208(1) and (4) of the Act; the information from the officers who had administered the test to the effect that the respondent had attempted to use a device to provide a false sample was critical evidence or material giving rise to the appellant's finding that there had been a failure to provide a valid test sample or an attempt to provide a false sample; and the result was that the appellant had failed to afford the respondent "the natural justice requirements entrenched in the *Corrective Services Act*".[1] The primary judge considered that on an issue as fundamental as liberty, the respondent was entitled to be afforded the due process afforded to him by the rules of natural justice and the Act; he was entitled to be told the appellant's reasons and in turn, to attempt to provide a properly made submission for the purposes of s 208 and within the stipulated timeframe. The primary judge's reference to the stipulated timeframe invoked the requirement in s 208(1) that a prisoner whose parole order has been suspended or cancelled must be given an information notice "on the prisoner's return to prison".

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1 *Finn v Central and Northern Queensland Regional Parole Board* [2016] QSC 233.

[9] In summary, the primary judge's reason for setting aside the appellant's decision to cancel the respondent's parole order was that the information notice given by the appellant to the respondent upon the respondent's return to prison did not advise the respondent of "the reason for the decision", in terms of the definition of "information notice" in s 208(4), because it did not refer to the evidence in the appellant's possession upon which the appellant based its finding that the respondent had failed to comply with the parole order.

[10] Following the appellant's decision of 17 November 2015, the appellant made three decisions under s 208(2) of the Act. On each of 12 January, 9 February and 5 April 2016 the appellant considered further information (including submissions from the respondent's lawyers) and decided not to change its decision of 17 November 2015 to suspend the respondent's parole order under s 205(2)(a)(i).

The parties' arguments

[11] The appellant conceded that the decisions made under s 208(2) in January, February and April 2016 were tainted with the error found by the primary judge but the appellant argued that the primary judge did not identify any error in the decision of 17 November 2015. The latter decision was made under s 205(2)(a)(i), not under s 208(2). The Act does not express as a requirement of a decision under s 205(2) to cancel or suspend a parole order that the appellant must give the prisoner an information notice or a reasonable opportunity to be heard about whether the parole order should be suspended. The appellant argued that an implication to that effect would be inconsistent with provisions in the relevant division of the Act. Section 205(3) requires a parole board, where practicable, to give a prisoner an information notice and a reasonable opportunity to be heard on a proposed amendment to a parole order, whereas no provision in the Act imposes any similar requirement when a parole board suspends or cancels a parole order. Section 205(4) expressly dispenses with any requirement that a parole board give a prisoner an information notice or a reasonable opportunity to be heard if the parole board suspends or cancels the prisoner's parole order. The requirement imposed by s 208(1) that a parole board give the prisoner an information notice on the prisoner's return to prison if a parole board makes a written order suspending or cancelling the parole order is imposed, not in relation to the decision by a parole board under s 205 to suspend or cancel a prisoner's parole order, but only in relation to a decision by the parole board under s 208 whether it should change its earlier decision under s 205. A decision suspending or cancelling a prisoner's parole order under s 205(2) is not attended by any process for natural justice. The Act instead provides a process for review by the parole board under s 208 of a decision by it suspending or cancelling a parole order under s 205. That process is attended by a natural justice regime regulated by s 208. Non-compliance with that process might have consequences for a review decision under s 208(2) but it could have no consequence for the initial decision to suspend or cancel parole under s 205(2).

[12] The appellant argued that explanatory notes for the *Corrective Services Bill* 2006 are consistent with the construction that a decision to cancel or suspend parole under s 205(2) of the Act was not attended by an obligation to afford the prisoner natural justice. (The explanatory notes referring to cl 205 give examples of cases in which the Board may suspend or cancel a parole order. Otherwise the notes about cl 205 mention that procedural fairness is provided for through cl 205(2) "which provides that a parole board must, before amending a prisoner's parole order, give

the prisoner an information notice and a reasonable opportunity to be heard on the proposed amendment." In relation to cl 208 the explanatory notes paraphrase the provisions now found in s 208.) The appellant referred also to other explanatory notes described as "Explanatory Notes for Amendments to be moved during consideration in detail by the Hon Judy Spence MP". Those notes refer to amendments agreed to during consideration of the Bill. One amendment, referring to the addition of (3A) to cl 205, amended the Bill in the terms now reflected in s 205(4) of the Act. The explanatory notes for that amendment state that it is "to remove any doubt", "it makes clear that a parole board is not required to give the prisoner an information notice or reasonable opportunity to be heard if the parole board suspends or cancels the prisoner's parole order", and "[i]n practice, it is not usually possible to give a prisoner an opportunity to be heard in relation to a suspension or cancellation of a parole order" because such an order "can be made when a prisoner fails to report to a corrective services officer as required, absconds or is preparing to abscond, because the prisoner poses a serious risk of harm to someone or an unacceptable risk of committing an offence." The notes refer to cl 208 as a "review provision" and give a brief summary of that clause. The appellant submitted that this note conveyed that the intended effect of s 205 was that an information notice or a reasonable opportunity to be heard was not required to be given to the prisoner before the Board cancelled or suspended a parole order.

[13] The respondent argued that upon the proper construction of the Act a decision to suspend or cancel a parole order is required to be attended by natural justice in the manner provided for in s 208 of the Act. Sections 205 and 208 are complementary and do not exclude presumptions that otherwise arise under the general law. The respondent relied upon the following passage in *Saeed v Minister for Immigration and Citizenship*[2]:

> "[11] In *Annetts v McCann* it was said that it could now be taken as settled that when a statute confers power to destroy or prejudice a person's rights or interests, principles of natural justice regulate the exercise of that power. Brennan J in *Kioa v West* explained that all statutes are construed against a background of common law notions of justice and fairness. His Honour said:
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> > '[W]hen the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that "the justice of the common law will supply the omission of the legislature". The true intention of the legislation is thus ascertained.'
>
> [12] The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power of the kind referred to in *Annetts v McCann*.
>
> [13] Observance of the principles of natural justice is a condition attached to such a statutory power and governs its exercise, as

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2 (2010) 241 CLR 252 at 258 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). I have omitted internal citations.

> Brennan J further explained in *Kioa v West*. A failure to fulfil that condition means that the exercise of the power is inefficacious. A decision arrived at without fulfilling the condition cannot be said to be authorised by the statute and for that reason is invalid.
>
> [14] In *Annetts v McCann* Mason CJ, Deane and McHugh JJ said that the principles of natural justice could be excluded only by 'plain words of necessary intendment'. And in *Commissioner of Police v Tanos* Dixon CJ and Webb J said that an intention to exclude was not to be assumed or spelled out from 'indirect references, uncertain inferences or equivocal considerations.' Their Honours in *Annetts v McCann* added that such an intention was not to be inferred from the mere presence in the statute of rights consistent with some natural justice principles.
>
> [15] The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality which, as Gleeson CJ observed in *Electrolux Home Products Pty Ltd v Australian Workers' Union*, 'governs the relations between Parliament, the executive and the courts'. His Honour said:
>
> > 'The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.'"

[14] The respondent argued that, in terms of [11] in that quoted passage, the decision which prejudiced the respondent was the decision to suspend the parole order under s 205(2) of the Act. The subsequent decisions were not operative in that same sense. The Act does not exclude the presumption that observance of the principles of natural justice is a condition attached to the statutory power to suspend or cancel a parole order under s 205(2). It followed in the respondent's submission that the decision under s 205(2) is invalid on account of the appellant's failure to comply with the provisions for natural justice implicit in the Act as regulated by s 208.

[15] The respondent made the following further points in support of his primary arguments. Sections 205 and 208 do not purport to exclude the requirement for procedural fairness but merely regulate the manner in which procedural fairness is to be afforded. In that context s 205(4) should be construed as only excluding a reasonable opportunity to be heard before the suspension or cancellation. Section 3(2) of the Act is consistent with the absence of an exclusion of natural justice in relation to a decision to cancel or suspend parole. (Section 3(2) provides that the Act "recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.")

[16] The current form of s 208 resulted from an amendment made by the *Corrective Services and Other Legislation Amendment Act* 2009 (Qld). The respondent argued

that explanatory notes for the Bill for that Act are consistent with s 208 requiring the appellant to give the prisoner an information notice on the prisoner's return to prison as a condition of the validity of a suspension or cancellation of a parole order made under s 205(2). In relation to cl 28, which was said to amend s 208 "in relation to reconsidering a decision to suspend or cancel parole", the notes state that s 208 "sets out the process by which prisoners are afforded natural justice for decisions to suspend or cancel a parole order" and that the amendment was designed "to clarify how subsection 208(2) should operate."

[17] The respondent also argued that nothing within s 208 necessarily abrogated or displaced "the *Saeed* presumption", particularly when s 208 is read together with s 205. If the appellant's construction were correct the exercise of the power under s 205(2) would be immunised from judicial review and the requirement for procedural fairness would be deprived of its intended protective and beneficial effect. If it had been intended to render the *Saeed* presumption ineffectual one would expect that the Act would have said as much in the clearest of terms.

[18] In the course of oral argument, the respondent relied upon the alternative argument that a failure to comply with s 208(2) renders a cancellation or suspension of a parole order under s 205(2) inefficacious only from the time of the failure to comply with s 208(2). This was submitted to counter the possible difficulty that the requirements imposed upon a Board by s 208(2) apply only at a time after a valid decision is made under s 205(2) and the suspension or cancellation of a parole order under s 205(2) invalidated retrospectively might falsify the expectations of persons who acted upon the suspension or cancellation.

Consideration

[19] *Annetts v McCann*[3] concerned a decision made under the *Coroner's Act* 1920 (WA). Mason CJ, Deane and McHugh JJ identified the issue in that appeal as being whether the terms of the statute "display a legislative intention to exclude the rules of natural justice and in particular the common law right of the appellants to be heard in opposition to any potential finding that would prejudice their interests". As that way of expressing the common law right illustrates, an incident of the common law right is a right to be heard **before** the prejudicial exercise of the statutory power. Consistently with that incident of the right, a second incident is that the failure to afford the right to a person who is prejudiced by the subsequent decision renders that decision inefficacious. Both incidents of the common law right to be heard are reflected in the reasons of French CJ, Gummow, Hayne, Crennan and Kiefel JJ in *Saeed*, at [11] and [13].

[20] It clearly appears that provisions of subdivision 2 of Ch 5, Pt 1, Div 5 of the *Corrective Services Act* 2006 (Qld) exclude any such right in relation to a decision to suspend or cancel a prisoner's parole order under s 205(2) of that Act. Four interrelated aspects of those provisions are of particular significance in this respect. First, inconsistently with the first incident of the common law right I have mentioned, and unlike the statutory right in relation to a decision to amend a parole order, a prisoner has no right to be heard before a decision is made under s 205(2) to cancel or suspend the prisoner's parole order: see ss 205(3) and (4), which must be understood in the context of s 208. Secondly, inconsistently with the second incident of the common law right, immediately upon the making of a decision to

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3 (1990) 170 CLR 596 at 598 – 599.

suspend or cancel a parole order under s 205(2) that decision operates to the prejudice of the prisoner although the prisoner will not have been afforded an opportunity to be heard in opposition to the decision; and that decision will continue in effect according to its tenor (see s 205(5) and s 206(1) – (3)), subject only to a different decision subsequently being made under s 208(2). Thirdly, s 208(2) does not confer upon a prisoner a right to challenge the decision made under s 205(2). Instead, it entitles the prisoner to make a submission that the parole board should in the circumstances prevailing at a subsequent time make a different decision: see in particular s 208(1) and subsection (c) of the definition of "information notice" in s 208(4), and s 208(2). Fourthly, if and to the extent that the decision under s 208(2) differs from the earlier decision under s 205(2), the subsequent decision will commence to have effect under the enactment from the time of that subsequent decision, leaving intact the legal effect of the decision under s 205(2) at all times before the making of the subsequent decision: see s 208, which must be understood in the context of ss 205(5) and 206.

[21] In deference to the parties' arguments I will elaborate upon that analysis.

[22] So far as amendment of a parole order is concerned, any applicable common law requirements of natural justice are modified by s 205(3), both by the statutory obligation to give the prisoner an information notice and by the qualification that both obligations are to apply only where that is "practicable". So far as suspension or cancellation is concerned, s 205(4) is evidently designed to achieve two objects: first, to dispense with any common law requirement that the parole board give the prisoner a reasonable opportunity to be heard before the parole board suspends or cancels the prisoner's parole order and, secondly, to preclude any argument that a cancellation or suspension amounts to an amendment which attracts the statutory right in s 205(3). The statement in s 205(4) that the Board is not required to give the prisoner "an information notice" might be thought to incorporate the definition of "information notice" in s 205(6), which concerns only a notice stating that the parole board "is proposing to amend the parole order". One might have expected that s 205(4) instead would dispense with the requirement to give the prisoner an information notice stating that the parole board proposes to suspend or cancel the parole order. Even so, it seems clear enough that the legislative purpose includes the preclusion of a construction that an information notice is required before a decision is made to suspend or cancel a parole order. It is true that s 205(4) does not in terms refer to a dispensation of the requirement to give the prisoner either an information notice or a reasonable opportunity to be heard before the parole board suspends or cancels the prisoner's parole. (In that respect the text differs from s 205(3), which imposes an obligation "before" the Board amends a parole order.) But there is in any event no statutory right to an information notice before a suspension or cancellation and, notwithstanding the various oddities in the drafting, when s 205(4) is read together with s 208 it appears with irresistible clarity that a parole board is not required to give the prisoner an information notice or a reasonable opportunity to be heard before a parole board decides to suspend or cancel a prisoner's parole order under s 205(2). The respondent acknowledged as much in the course of argument.

[23] The requirement to give an information notice as defined in s 205(6) is a creature of statute. No such requirement is imposed upon a parole board as a condition of the efficacy of a decision suspending or cancelling a parole order. The rights of a prisoner in this respect are confined to the requirements imposed by s 208 that the

parole board give the prisoner an information notice when the prisoner returns to prison, that the parole board consider any "properly made submissions" (as defined in s 208(4)), and that the parole board make a decision whether or not to change the decision previously made under s 205(2) to suspend or cancel a parole order. Thus any common law obligation to afford natural justice as a condition of the efficacy of a decision prejudicial to a person affected by the decision is in this statute replaced by a provision for subsequent review under s 208(2) of an order under s 205(2) cancelling or suspending a parole order. The purpose of the requirement in s 208(1) that the parole order give the prisoner an information notice on the prisoner's return to prison is explained in s 208(4). The prisoner is given a right to show cause, by written submissions given to the parole board why it should change its decision. Those submissions are not to be directed to the question whether the original decision suspending or cancelling parole was correctly made. Rather, the subject of this limited statutory opportunity to be heard is whether at a time subsequent to the original decision the board should make a different decision.

[24] The statutory purpose in s 3(2) of the Act upon what the respondent relied is expressed at too high a level of generality to assist in the construction exercise. The explanatory notes for the *Corrective Services and Other Legislation Amendment Bill (No 2)* 2008 also supply no assistance. As enacted, s 208(2) required a parole board to consider all written submissions given to it by the prisoner within the 21 days mentioned in the information notice and to inform the prisoner, by written notice, whether the board has changed its decision, and if so, how. The effect of the amendment to the text of s 208(2), together with the introduction of the definition of "properly made submission" in s 208(4), is to preclude a construction under which the board is obliged to make a decision under s 208(2) within 21 days after giving an information notice to the prisoner. The amendment to which the explanatory notes refer concerns only the time by which a board is required to make a decision upon a submission made by a prisoner that the board should change its initial decision to suspend or cancel a parole order; and that explanatory note was made two years after the enactment of s 208, the underlying policy of which was not affected by the amendment. Furthermore, the statement that the section "sets out the process by which prisoners are afforded natural justice for decisions to suspend or cancel a parole order" does not answer the question whether a non-compliance with s 208 invalidates a decision made under s 205(2) to suspend or cancel a parole order. That statement may be regarded as a reasonable precis of the effect of s 208 even though a non-compliance with that provision does not affect the validity of the original decision under s 205(2).

[25] Whether or not a decision under s 208(2) resulted in there being no change to a previous decision under s 205(2) to suspend or cancel a parole order so that the previous decision remained in force, the subsequent decision under s 208(2) would itself amount to an administrative decision under an enactment which would be amenable to judicial review under the *Judicial Review Act* 1991 (Qld) in appropriate circumstances.[4] The powers of the court in relation to such matters are sufficiently broad to ensure that any non-compliance by a parole board with a requirement of s 208 that results in an injustice between the parties is remedied: see *Judicial Review Act* 1991 (Qld) s 30(1)(c) and (d). In the event of a non-compliance by a parole board with s 208, a decision under s 208(2) that a decision under s 205(2)

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4 See *Judicial Review Act* 1991 (Qld) s 4(a) and *Griffith University v Tang* (2005) 221 CLR 99 at 130 – 131 [89] (particularly the third sentence) (Gummow, Callinan and Heydon JJ).

suspending or cancelling a parole order should be changed might be delayed, but it is an overstatement to say that the original decision would be immunised or quarantined from review. The circumstance that a non-compliance by the parole board with its obligations under s 208 might result in avoidable delay in the resolution of a challenge to an order suspending or cancelling parole is by no means an insignificant consideration, but for the reasons I have given that possibility is an insufficient basis to justify the non-literal construction for which the respondent contended.

Orders

[26] I would allow the appeal and set aside so much of the decision in the Trial Division as ordered that the decision of the appellant to suspend, for an indefinite period, the Board ordered parole granted to the respondent be set aside.

[27] The notice of appeal sought an order that the respondent pay the appellant's costs of and incidental to the appeal. I do not consider that it is appropriate to make that order because the appeal is in the nature of a test case; senior counsel for the appellant made it clear that the substantive purpose of the appeal is to clarify the proper construction of the relevant statutory provisions. The notice of appeal does not include any challenge to the order made in the Trial Division that the appellant pay the respondent's costs of the application in that division and the orders sought in the notice of appeal do not include any order about those costs. I would not vary the order made in the Trial Division that the appellant pay the respondent's costs of the application.

[28] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[29] **NORTH J:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.