SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hayward* [2019] QCA 91
PARTIES:	**R** **v** **HAYWARD, Jamie Mark** (appellant)
FILE NO/S:	CA No 203 of 2018 DC No 2869 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 1 August 2018 (Everson DCJ)
DELIVERED ON:	21 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2019
JUDGES:	Gotterson and McMurdo JJA and Bradley J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – INDECENT ASSAULT AND RELATED OFFENCES – INDECENT – where the appellant and the complainant were both serving police officers – where the appellant grabbed the complainant's left breast while the appellant walked past the complainant who was in a conversation with her colleagues – where the appellant contended that he thought he was grabbing another male colleague who was standing next to the complainant – where the learned trial judge directed the jury as to mistake of fact under s 24(1) of the *Criminal Code* – where the learned trial judge also directed the jury about the elements of the indecent assault offence, including the meaning of indecency – where neither counsel asked for redirections – where, on appeal, the appellant argued that the learned trial judge should have given a direction to the jury on the meaning of indecency as being indecent if the appellant's intention was to touch the complainant's breast – whether the learned trial judge made an error of law in directing the jury – whether there was a miscarriage of justice in failing to provide the direction proposed by the appellant

Criminal Code (Qld), s 24(1), s 352(1)(a)

R v Jones (2011) 209 A Crim R 379; [2011] QCA 19, considered

COUNSEL: J McInnes for the appellant
C N Marco for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** At a trial over two days in the District Court at Brisbane, the appellant, Jamie Mark Hayward, was, on 1 August 2018, found guilty of an offence against s 352(1)(a) of the *Criminal Code* (Qld). The count in the indictment alleged that on the 21 April 2017 at Hillcrest, the appellant unlawfully and indecently assaulted the complainant.

[2] Following upon the delivery of the verdict, the appellant was convicted and sentenced to imprisonment for three months. The term of imprisonment was suspended forthwith for an operational period of 12 months.

[3] On 6 August 2018, the appellant filed a Form 26 by which he appealed to this Court against the conviction and applied for leave to appeal against sentence.[1] The application for leave was abandoned on 27 February 2019.

Evidence of the circumstances of the alleged offending

[4] **Prosecution case:** The appellant and the complainant were both serving police officers. At the time of the alleged offending, they were both based at the Browns Plains Police Station. The complainant described the relationship between them as being "purely professional".[2]

[5] The complainant gave evidence that she returned to the station just before 4 pm on 21 April 2017. She entered the station through a side entrance and walked through the hallway to the shift supervisor's area. She and other police officers began a conversation in that area.[3]

[6] There was a cell at the station. It backed onto the rear of the shift supervisor's area. According to the complainant, she was "lent up against the cell wall". Senior Constable Luke Konstantinos was to her left "up against the wall". Senior Constable Rebecca Hall was standing in front of the complainant and to her left. Senior Constable Natalie Cole was seated at the shift supervisor's desk and Acting Senior Sergeant Shane Clark was to the complainant's right. The latter three were facing the complainant and Senior Constable Konstantinos.[4]

[7] The complainant testified that as the conversation was progressing, she became aware that the appellant was in the day room which she indicated was to her rear left. The appellant walked from the day room and moved from the complainant's

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1 AB 1 1-3.
2 AB 2 10 Tr1-10 ll19-20.
3 Ibid ll31-46.
4 AB 2 11 Tr1-11 ll1-20; Exhibit 1: AB 2 107.

right to her left through the group of officers in conversation. There was no interaction between the complainant and the appellant.[5]

[8] The conversation continued. Next, the complainant became aware that the appellant was walking back through the group. When he was "directly in front" of her, she saw him reach out with his right hand and grab her left breast with a "pinch" motion. She felt the front part of her breast near the nipple being squeezed.[6]

[9] The complainant said that she was shocked and went red with embarrassment. She stood back against the wall and turned to the appellant. She swore at him. He continued to walk on to the day room. Almost immediately, he said: "I'm sorry… I thought you were Luke."[7]

[10] Evidence was led from the complainant and Senior Constable Konstantinos as to how they differed in physical appearance, including height. The complainant was 165 to 167 centimetres tall.[8] Senior Constable Konstantinos was 172 centimetres tall.[9] Also, CCTV footage depicting the area at the time was tendered.[10]

[11] The other police officers present gave evidence that was largely mutually consistent. Acting Senior Sergeant Clark said that the appellant paused "for a very short second" before he made contact with the complainant.[11] The appellant was looking in his own direction of travel at the time of contact.[12] The complainant's evidence that she protested and that the appellant said that he thought that she was Senior Constable Konstantinos was supported.[13]

[12] In cross examination, Senior Constable Konstantinos said that he had a positive working relationship with the appellant.[14] They enjoyed a joke at work.[15] He "definitely" could not recall physically interacting with the appellant in a jovial sense by grabbing him.[16] Specifically, he denied slapping any of his male colleagues with his hand in the genital region.[17] It would be unusual for one of his male colleagues to poke another male colleague, he said.[18] A pat on the shoulder would be the most contact that would happen.[19]

[13] Acting Senior Sergeant Clark was cross examined. He did not accept a proposition that Senior Constable Konstantinos would play practical jokes on his colleagues. He agreed that male police officers at the station would, at times, get up to some horseplay. It could involve a tap to frighten or a joke.[20]

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5 AB 2 12 Tr1-12 ll29-47.
6 AB 2 13 Tr1-13 ll1-26.
7 Ibid ll25-36; AB 2 15 Tr1-15 ll34-37.
8 AB 2 10 Tr1-10 l10.
9 AB 2 25 Tr1-25 l14.
10 Exhibit 3.
11 AB 2 37 Tr1-37 ll23-24.
12 AB 2 40 Tr1-40 ll30-31.
13 For example, at AB 2 24 Tr1-24 ll22-27 and AB 2 37 Tr1-37 ll31-39.
14 AB 2 26 Tr2-26 ll12-13.
15 Ibid ll15-17.
16 AB 2 28 Tr1-28 ll5-9.
17 AB 2 30 Tr1-30 ll33-37.
18 AB 2 31 Tr1-31 l44.
19 AB 2 32 Tr1-32 ll11-12.
20 AB 2 41 Tr1-41 ll18-28.

[14] **Defence case:** The appellant gave evidence at the trial. He said that on the day in question he was performing counter duties. A person had come in to the counter to sign in for bail. It was his job to breath test her. For that purpose, he went to the shift supervisor's area, retrieved an Alcometer and then returned to the counter to carry out the test. After administering the test, he went back to the shift supervisor's area with the Alcometer. As he did so, he walked past a group of officers in conversation. His head was down. He put the Alcometer back in its place.[21]

[15] Defence counsel asked the appellant what next happened. His reply was:[22]

> "… And, again, I've sort of walked back to my chair, eyes – sort of head down, just because they were in that sort of conversation, sort of their own conversation. And that's when I thought I'd just sort of surprise Lukey and sort of make him jump a bit. When I've done it, [the complainant]'s yelled something out, and then I've turned around and said, "Shit, sorry… I thought you were Lukey." And then I've gone back to my chair."

[16] The appellant explained that he wanted to grab Senior Constable Konstantinos in the ribs and make him jump while he was in conversation.[23] It was part of the culture at the station to make people jump.[24]

[17] The appellant said that after he put the Alcometer down, he spun around and was looking down. He saw just "shoes and blue pants". He thought that if he was looking down, it would shock Senior Constable Konstantinos more than if he was looking at him and walked up to him.[25]

[18] According to the appellant's evidence, he was trying to grab Senior Constable Konstantinos in the ribs. He did pinch somebody but had not looked up before he did so. He believed he was pinching Senior Constable Konstantinos whose voice he had heard "over in that section".[26] The complainant protested. As soon as he realised that it was the complainant whom he was pinching, he apologised to her and said that he thought she was Senior Constable Konstantinos. He was very embarrassed.[27]

[19] Further, the appellant said that there was a culture at the station of colleagues pinching and poking each other to get reactions.[28] He said that Detective Constable Konstantinos had flicked him in the genital area a couple of years earlier when he was working on a nightshift. It was done as a joke.[29]

[20] In cross examination, the appellant accepted that he observed all five police officers in conversation as he approached the group to return the Alcometer to its place.[30] He accepted that when he squeezed the complainant's breast he realised that it was

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21 AB 2 52 Tr1-52 l39 – AB 2 53 Tr 1-53 l12.
22 AB 2 53 Tr1-53 ll14-19.
23 Ibid ll46-47.
24 AB 2 54 Tr1-54 ll1-2.
25 AB 2 54 Tr1-54 ll4-28.
26 AB 2 54 Tr1-54 l30 – AB 2 55 Tr1-55 l23.
27 AB 2 55 Tr1-55 ll25-37.
28 AB 2 56 Tr2-56 ll15-20.
29 Ibid ll22-38.
30 AB 2 57 Tr1-57 ll23-38.

a breast that he was holding, and not ribs.[31] He did not accept that despite that realisation, he continued walking and did not apologise until challenged by the complainant. He said that it was all "instantaneous". He stopped and turned around to apologise "straightaway".[32] The appellant rejected a suggestion that he knew exactly what he was doing when he grabbed the complainant on the breast and to whom he was doing it.[33]

[21] As well, the appellant accepted that he was taller than the complainant; that the area was well lit;[34] and that none of the officers changed positions.[35] He thought that the complainant and Senior Constable Konstantinos were "almost identical" in height.[36] He accepted that they had different skin complexions and that their forearms were visible at the time. He also accepted that Senior Constable Konstantinos had short, dark hair at the time.[37]

The directions given to the jury

[22] In the course of his summing up, the learned trial judge directed the jury with respect to criminal liability where there is a mistake of fact in terms of s 24(1) of the *Code*. His Honour told them:[38]

> "A person who does an act under an honest and reasonable – so there are two elements that have to be satisfied – but mistaken belief in the existence of any state of things is not criminally responsible for that act to any greater extent than if the real state of things had been such as the person believed to exist. That is pretty wordy. I might say it again; and think very carefully about those words because they are very important to your consideration in this case.
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> A person who does an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist. So if the defendant grabbed the complainant's breast under an honest and reasonable but mistaken belief that he was grabbing Senior Constable Konstantinos in the ribs, he is not criminally responsible to any greater extent than if the real state of things had been such as he believed to exist.
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> It is not submitted to you that the real state of things was other than the defendant grabbed the complainant's breast, but if you conclude that the defendant honestly and reasonably believed that he was grabbing Senior Constable Konstantinos in the ribs, he will not be criminally responsible to any greater extent than if this was the case. That would mean that the defendant should be found not guilty of sexual assault, but as I pointed out earlier, a mere mistake is not enough. The mistaken belief must have been both honest and reasonable."

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31 AB 2 58 Tr1-58 ll22-25 and AB 2 59 Tr1-59 ll1-4.
32 AB 2 59 Tr1-59 ll8-16.
33 AB 2 62 Tr1-62 ll24-26.
34 AB 2 59 Tr1-59 ll43-46.
35 AB 2 61 Tr1-61 ll34-36.
36 AB 2 62 Tr1-62 ll17-19.
37 Ibid ll7-15.
38 AB 1 44 ll1-22.

[23] Next, the learned primary judge explained what an honest belief was and what was required for it to be reasonable. He instructed the jury that it was for the prosecution to establish beyond reasonable doubt that there was no operative mistake of fact.[39] No objection is taken on appeal to the accuracy or adequacy of those directions.

[24] The learned primary judge then turned to the elements of the offence charged. He explained the consent element first. Turning to the element of indecency, his Honour said:[40]

> "The next element is that it must be proved that the assault was indecent. "Indecent" bears its ordinary every day meaning. It is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in light of time, place and circumstances. Now, the alleged indecent assault consists of the defendant grabbing the complainant on the left breast as he walked past her in the shift supervisor's area of the Browns Plains Police Station."

[25] His Honour then summarised the rival contentions. His summary addressed contentions relevant to honest and reasonable mistake.[41]

[26] Neither counsel took up his Honour's invitation for any redirections.[42] After about one and half hours deliberation, the jury indicated that they wished "to review the prosecutor's cross-examination of the defendant".[43] The judge's associate read the cross examination to them.[44] The jury resumed deliberations and delivered a guilty verdict about 15 minutes later.[45]

The ground of appeal

[27] By the time the appeal was heard, the single ground of appeal against conviction stated in the Form 26 had been abandoned. Counsel for the appellant, who had not been defence counsel, was granted leave to file an amended Form 26 which contained the following ground of appeal:

> "The learned trial judge erred in failing to provide the jury adequate instruction on the meaning of the indecency element".

[28] At the hearing of the appeal, counsel for the appellant presented arguments which, in effect, encapsulated two grounds concerning the instruction on indecency. One was error of law on the part of the learned trial judge as to the content of the direction on indecency. The other was that inadequacy in the direction on indecency occasioned a miscarriage of justice. Each triggered the application of s 668E(1) of the *Code*, it was submitted. Counsel for the respondent informed the Court that there was no objection to the appellant's reliance on both grounds.[46]

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39 Ibid ll24-42.
40 AB 1 45 ll13-19.
41 AB 1 45 l21 – AB 1 46 l6.
42 AB 1 46 ll29-33.
43 AB 1 47 ll10-11.
44 AB 1 48 l26 – AB 1 62 l17.
45 AB 2 84 ll15-17.
46 Appeal Transcript ("AT") 1-5 ll9-45.

[29] An appreciation of how the error of law grounds arose can be gained from a review of discussions between the learned trial judge and counsel before final addresses began. It is convenient to refer to it and also to the direction that the appellant contends should have been given, before considering the merits of the grounds of appeal.

Discussion concerning indecency direction

[30] Before final addresses and in the absence of the jury, the learned trial judge told counsel that he would give a mistake of fact direction and a direction with respect to the elements of the indecent assault offence charged. His Honour enquired whether any other directions were required. Defence counsel said that he did not have any such request.[47]

[31] At that point, the prosecutor raised the possibility that the jury might conclude that there was an honest mistake but that it was unreasonable. She explained that she had been considering the case of *R v Jones*[48] in which this Court had held that while intentional touching of the genital area may be unequivocally sexual, it may be explained by motive in the context of a medical professional conducting an examination with consent and within the ambit of accepted medical practice. However, no form of additional direction was suggested by the prosecutor.

[32] The learned trial judge expressed the view that that kind of issue did not arise in this case.[49] Defence counsel agreed.[50] His Honour adjourned to consider *Jones*. When the trial resumed, he referred to paragraph 32 in the reasons of White JA (de Jersey CJ and Fraser JA agreeing) in that case, noting that the quality of "indecency" is pre-eminently a question for the jury. His Honour regarded the following extract from that paragraph as important:[51]

> "… and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision."

[33] His Honour continued:[52]

> "There is no evidence in this trial casting doubt upon the sexual quality of the alleged assault because it's a deliberate grab of the breast in the presence of other people. The question for the jury is whether that grabbing of the breast was an honest and reasonable mistake of fact context, as in, he meant to grab the male officer in the ribs and he mistook who was who. If that's the case, there's – you haven't negatived honest and reasonable mistake of fact but it's not a case where there's some contact with the breast but no one is sure about the quality of the contact. It was always on the evidence of both the defendant and the other witnesses a deliberate and intentional act. He says it was a deliberate intentional but honest and reasonably mistaken act, that – it's not like putting electrodes near the lady's nipple and whether he was doing that to get a legit ECG or

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47 AB 2 63 ll30-40.
48 [2011] QCA 19; (2011) 209 A Crim R 397.
49 AB 2 67 Tr1-67 ll26-29.
50 AB 2 73 Tr1-73 ll5-12.
51 AB 2 73 Tr1-73 ll34-43.
52 AB 2 73 Tr1-73 l45 – AB 2 74 l9.

> whether he's doing it to look at her breasts, you know – that's a very different scenario."

The prosecutor said she agreed with what his Honour had just said.[53]

The direction the appellant contends should have been given

[34] In oral submissions, counsel for the appellant addressed the form of direction that, on the appellant's case, should have been given. He suggested that it would have been along the following lines:[54]

> "An assault by touching the breast of a woman is indecent if the intention is to touch her breast. In this case, the defendant has sworn that he intended to touch a male colleague on the torso. If you either accept that or cannot exclude it beyond reasonable doubt then you would not be satisfied of the indecency element."

Ground 1 – error of law

[35] This ground of appeal is advanced on a footing that the learned trial judge made an error of law with respect to the content of the direction that he should give to the jury. In my view, this ground may be disposed of without determining whether the direction for which the appellant contends, ought to have been given or not.

[36] The learned trial judge was not presented with a question of law for determination by him as to the content of the direction. The prosecutor referred to the decision in *Jones* as arguably having a bearing on the directions with respect to the indecency element. She did not formulate a direction which she submitted accommodated that decision and ought to have given. Nor did defence counsel.

[37] Thus, his Honour was not called upon to adjudicate between arguments for and against a direction which one party was proposing and the other party was opposing. In those circumstances, there was no adjudicative decision made by the learned trial judge which is capable of being examined in order to determine its correctness at law.

Ground 2 – failure to direct the jury adequately

[38] The appellant, of course, submits that the direction he proposes should have been given. That it was not sought by defence counsel was not a hurdle. It was the duty of the learned trial judge to give adequate directions about the elements of the offence.[55]

[39] Resolution of the issue whether the proposed direction was required to be given must begin with a consideration of the meaning of the word "indecently" in s 352(1)(a) of the *Code* which provides that any person who unlawfully and indecently assaults another person is guilty of a crime.

[40] Neither the word "indecently" nor other grammatical forms of it are defined for the purposes of the *Code*. The approach taken in *Jones* was to assign to it its ordinary meaning according to prevailing community standards.

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53 AB 2 74 Tr1-74 l11.
54 AT 1-2 ll34-37.
55 *R v Robinson* [2009] QCA 250.

[41] In *Jones*, White JA referred to the decision of the New South Wales Court of Criminal Appeal in *R v Harkin*[56] in which the meaning of the expression "indecent assault" in s 61E(1) of the *Crimes Act* 1900 (NSW) was considered. In that case, Lee CJ at CL (with whom Wood and Mathews JJ agreed) said:[57]

> "It is in my view clear that if there be an indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are the relevant areas. Thus, if the appellant intentionally touched the breast of the girl Elizabeth, it is my view that if there is nothing more, and there is not, that in itself is sufficient to give to the assault the necessary sexual connotation and to render it capable of being held to be indecent, and it is then for the jury to determine whether in the case of a mature man of 38 and a girl of 11 years and nine months that should or should not be regarded as conduct offending against the standards of decency in our community. The purpose or motive of the appellant in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury. But if the assault alleged is one which objectively does not unequivocally offer a sexual connotation, then in order to be an indecent assault it must be accompanied by some intention on the part of the assailant to obtain sexual gratification."

[42] White JA noted that Lee CJ at CL then referred to the analysis of indecent assault by the House of Lords in *R v Court*[58] and distinguished the facts of that case from those under consideration in *Harkin*. The Chief Judge at Common Law said:[59]

> "Their Lordships in that case, however, were dealing with a case of the spanking of a little girl by a man of 26 years of age and they expressed a view, which I would summarise in this way, that where the alleged assault is one which is equivocal, in the sense that it may have a sexual import or it may not, then before the assailant can be convicted it must be shown that he intended it to have a sexual connotation, that is to obtain sexual gratification from it."

[43] White JA also referred to the decision of the Court of Criminal Appeal of Western Australia in *R v Drago*[60] in which it was made clear that it is essential in this context not to confuse motivation as a factor in characterising an assault as indecent on the one hand, and, on the other, motive which is rendered immaterial to criminal responsibility under s 352(1)(a) of the operation of s 23(3) of the *Code.* Her Honour cited the following observations of Murray J in *Drago* with apparent approval:[61]

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56 (1989) 38 A Crim R 296.
57 At 301-302, cited by White JA at [27].
58 (1988) 87 Cr App R 144 per Lord Ackner at 155.
59 At 302, cited by White JA at [27].
60 (1992) 8 WAR 488; (1992) 63 A Crim R 59.
61 A Crim R at 74, cited by White JA at [30].

> "But where the act in question was capable of being regarded as indecent, but was not necessarily to be so regarded in itself, the motivation of the actor might operate in one of two ways. It might of course confer the quality of indecency upon an act which might, differently explained, be held not to be so. On the other hand, the motive of the actor might render innocent an act which otherwise, without explanation, might be regarded as indecent."

[44] White JA concluded her reasons in *Jones* with the following:[62]

> "The quality of "indecency" is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision. That did not occur here and the appellant has lost a real chance of acquittal. In that circumstance the conviction below should be set aside and a re-trial ordered."

[45] In the present case, the appellant intended to assault by pinching.[63] The place where he administered his intended assault was upon the complainant's breast. That it was the breast that was pinched gave the assault the necessary sexual connotation for indecency. To use the language of Lee CJ at CL, the sexual connotation derived directly from the area of the complainant's body that was assaulted.

[46] The assault here may be contrasted with an alleged assault which objectively does not unequivocally have a sexual connotation. In *Jones*, for example, equivocation as to whether the touching, in that case of a female patient's breast area, had such a connotation arose from the circumstances that the accused was an ambulance officer; that he had a genuine interest in ECG testing and results; and that he discussed the patient's odd results with a doctor.

[47] However, in the present case, there was no evidence of circumstances that might have given rise to equivocation in the sexual connotation arising directly from the pinching by the appellant of the complainant's breast area. Hence, in my view, an additional direction concerning motivation relevant to sexual connotation was not required.

[48] I hasten to say that the appellant's case in terms of s 24(1) of the *Code* that he honestly and reasonably believed that he was pinching Detective Constable Konstantinos on the ribs was put to the jury. Those directions adequately accommodated the mistake on which the appellant relied at trial. Further, there was no evidence of any other possible operative mistake of fact requiring a direction. Neither the evidence of the appellant or any other witness suggested that he mistakenly thought that he was pinching some other part of the complainant's body.

[49] For these reasons, I am unpersuaded that the direction proposed by the appellant was required or that any miscarriage of justice arose from its not having been given.

[50] In my view, this ground of appeal has not been made out.

Disposition

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62 At [32].

63 Defence counsel accepted that it was an intentional act: AB 2 64 Tr1-64 l47 – AB 2 65 Tr1-65 l1.

[51] As neither ground of appeal has succeeded, this appeal must be dismissed.

Order

[52] I would propose the following order:

1. Appeal dismissed.

[53] **McMURDO JA:** I agree with Gotterson JA.

[54] **BRADLEY J:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.