SUPREME COURT OF QUEENSLAND

CITATION:	*Johnston v Brisbane City Council & ors* [2019] QSC 130
PARTIES:	**NICOLE JOHNSTON** (applicant) **v** **BRISBANE CITY COUNCIL** (first respondent) and **DAVID GILL** (second respondent) and **GAIL HARTRIDGE** (third respondent) and **GRAHAM MATHEWS** (fourth respondent)
FILE NO:	SC No 4803 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	30 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	14 December 2018 Supplementary written submissions 5 April 2019 and 12 April 2019
JUDGE:	Wilson J
ORDERS:	The orders of the Court are:

1. The Decision and Orders made by the Councillor Conduct Review Panel in its Report dated 16 March 2018:
    a. that the complaint was proven;
    b. that the applicant is found under section 183(1) of the *City of Brisbane Act* 2010 (Qld) to have engaged in "misconduct" within the meaning of section 178(3)(v) of the *City of Brisbane Act* 2010 (Qld);
    c. that the parties to the complaint be advised accordingly
    d. that the applicant pay to the first respondent an amount equal to the monetary value of 50 penalty units;

be declared void and set aside.

2. The question of costs is adjourned to a date to be fixed.

CATCHWORDS: LOCAL GOVERNMENT – REGULATION AND ADMINISTRATION – MEETINGS – PRESERVING ORDER AND EXCLUSION OF COUNCILLOR OR ALDERMAN – where the applicant is a Brisbane City councillor – where the first respondent's Councillor Conduct Review Panel is a body established under and governed by the *City of Brisbane Act* 2010 (Qld) – where the applicant attended a budget meeting of the first respondent – where the Chairperson directed the applicant to leave the meeting – where the Chairperson suspended the applicant from the service of the Chamber – where the applicant refused to comply – where the applicant was subsequently found to have engaged in "misconduct" by the Councillor Conduct Review Panel – where the applicant seeks judicial review of the Councillor Conduct Review Panel's decision, either under the *Judicial Review Act* 1991 (Qld) or the Court's inherent jurisdiction – where the Councillor Conduct Review Panel has jurisdiction only to hear reviews of directions by Chairpersons to councillors to leave meetings – whether there was a valid direction made by the Chairperson pursuant to section 186A(2)(b) of the *City of Brisbane Act* 2010 (Qld) – whether the Councillor Conduct Review Panel had jurisdiction – whether jurisdictional error occurred

Civil Proceedings Act 2011 (Qld) s 10
City of Brisbane Act 2010 (Qld) s 3(2)(f), s 4, s 9, s 10, s 11(1), s 14(3)(c)(i), s 25, s 29, s 178, s 179, s 180(3), s 183(1), s 186A, s 226
Judicial Review Act 1991 (Qld) s 30(1), s 47, s 49(1)
Meetings Local Law 2001 (Brisbane City Council) s 21, s 53
Uniform Civil Procedure Rules 1999 (Qld) r 681(1)

Australian Education Union v Department of Education and Children's Services (2012) 248 CLR 1; [2012] HCA 3, cited
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, cited
Eastman v Director of Public Prosecutions (ACT) (2003) 214 CLR 318; [2003] HCA 28, cited
Johns v Australian Securities Commission (1993) 178 CLR 408; [1993] HCA 56, cited
Johnston v Brisbane City Council & Ors [2014] QSC 268, followed
Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531; [2010] HCA 1, applied
Minister for Immigration v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11, cited

Project Blue Sky & ors v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, applied
Re Mercantile Mutual Life Insurance Co Limited and Roy Moore v Australian Securities Commission & Ors (1993) 40 FCR 409, cited
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57, cited
Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors [2014] QCA 147, applied

COUNSEL: S J Keim S.C. for the applicant
R G Bain QC, with M S Trim, for the respondents

SOLICITORS: Reveal Legal for the applicant
City Legal for the respondents

[1] Nicole Johnston, the applicant, seeks judicial review of the decision of the first respondent's Councillor Conduct Review Panel ("CCRP"). On 16 March 2018, the CCRP found that the applicant had engaged in misconduct within the meaning of section 178(3)(v) of the *City of Brisbane Act* 2010 (Qld) ("*COBA*") and ordered the applicant to pay to the first respondent an amount equal to the monetary value of 50 penalty units ("Decision").[1]

[2] The second, third and fourth respondents comprised the CCRP at the relevant time[2] and submit to the orders of the Court, save as to costs.[3]

Facts

[3] The applicant is the councillor for Tennyson Ward in the Brisbane City Council ("Council").

[4] On 22 June 2017 there was a meeting of the Council[4] where the Chairperson of the Council, Councillor Owen ("Chairperson"), ordered:

> "… you are hereby suspended from the service of the Chamber for a period of eight days. You are to vacate the Chamber.
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> …
>
> Councillor Johnston, this is your final warning …You have been directed to leave this place, this Council Chamber, as you are suspended".[5]

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1 The Decision is contained as exhibit A to Affidavit of Nichole Johnston sworn 3 May 2018.
2 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 7.
3 First respondent's written submissions filed 30 July 2018, p 1, para 4.
4 A transcript of the meeting is contained as exhibit B to Affidavit of Nicole Johnston sworn 3 May 2018. An audio recording of the meeting is exhibit A to Affidavit of Geoffrey John Evans sworn 30 July 2018.
5 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.

[5] The applicant refused to leave the Council chamber.[6] Ultimately, the Chairperson adjourned the meeting and called on the Council representative to remove the applicant from the chamber.[7] Police were called to assist.[8]

[6] On 11 July 2017 a complaint was made by the Chairperson alleging that the applicant had engaged in misconduct contrary to section 178(3)(v) of the *COBA* by refusing to comply with a direction made by the Chairperson to leave a meeting of the Council on 22 June 2017.[9]

[7] The complaint was referred to the CCRP under section 180(3) of the *COBA* and, after an initial assessment by the CCRP, the matter was heard by the CCRP on 22 November 2017.[10]

[8] The Chairperson and the applicant attended at the CCRP hearing on 22 November 2017 and gave evidence. In essence, the applicant submitted three matters before the CCRP:

> "the direction to leave the meeting was unlawful and unreasonable due to processes under the Meetings Local Law 2001 (MLL) not being complied with in respect of the prior motion of suspension passed at the meeting;
>
> Councillor Owen had been unreasonable in her chairing of the meeting prior to the direction to leave being given;
>
> Councillor Johnston had a reasonable excuse for not following the direction of the Council officer and police to leave the meeting (given subsequently to the direction of the Chairperson), as she had advised them that she had been unlawfully and unreasonably expelled."[11]

[9] The Decision[12] determined that the complaint was proven,[13] and that the applicant was found to have engaged in "misconduct" within the meaning of section 178(3)(v) of the *COBA*.

[10] It was determined that to the extent that the applicant's submissions raised issues concerning the lawfulness or unreasonableness of conduct, other than the conduct relevant to the allegation of failure to leave the meeting when directed, such issues were outside the jurisdiction of the CCRP.[14]

[11] After consideration of the applicant's complaint history and disciplinary action previously taken by the CCRP under section 183 of the *COBA*, as disclosed in the

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6 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.
7 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 42.
8 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 6.
9 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 6.
10 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 6.
11 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 6.
12 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 7.
13 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 7 – "complaint" was characterised as "Engaged in misconduct contrary to section 178(3)(v) of the City of Brisbane Act 2010 (CoBA) by refusing to comply with a direction to leave a meeting of Council on 22 June 2017 made by the Chairperson."
14 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 6.

chief executive officer's public record, the CCRP ordered that the applicant pay to the Council an amount of not more than the monetary value of 50 penalty units,[15] which was calculated in a tax invoice at the sum of $6,307.50.[16]

Grounds of the Application

[12] On 3 May 2018, the applicant filed an application for Statutory Order or Review and Review ("Application"). The grounds of the Application are that the Decision was:

> "(a) made without jurisdiction;
> (b) not authorised by the enactment under which it was purported to be made; and/ or;
> (c) otherwise contrary to law,
>
> because:
>
> (1) the Decision exceeded the CCRP's jurisdiction because:
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> i. by virtue of section 178(2) of the *COBA,* Chapter 6 Part 2 Division 6 of the *COBA* does not apply, with the result the CCRP has no jurisdiction, in respect of the conduct of councillors at a meeting of the Council, except for a councillor's failure to comply with a direction to leave made by the Chairperson of the meeting; and,
> ii. a jurisdictional fact, namely that the applicant had failed to comply with a direction of the Chairperson to leave the meeting the subject of the Decision did not exist because the Chairperson's purported direction to leave was not made in accordance with any power of the Chairperson to direct the applicant to leave;
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> (2) further or alternatively, in respect of the Decision, the CCRP failed to exercise its jurisdiction because it failed to inquire into the presence of a jurisdictional fact, namely whether the applicant had failed to comply with a direction of the Chairperson to leave the meeting the subject of the Decision."

Statutory background

[13] The Council is a statutory body corporate created by the *COBA*.[17]

[14] Local government principles underpin the *COBA*,[18] as follows:

> "**4 Local government principles underpin this Act**
> (1) To ensure the system of local government in Brisbane is accountable, effective, efficient and sustainable, Parliament requires—

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15 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 6.
16 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 8.
17 *City of Brisbane Act* 2010 (Qld) s 10.
18 *City of Brisbane Act* 2010 (Qld) s 4.

(a) anyone who is performing a responsibility under this Act to do so in accordance with the local government principles; and
(b) any action that is taken under this Act to be taken in a way that—
(i) is consistent with the local government principles; and
(ii) provides results that are consistent with the local government principles, in as far as the results are within the control of the person who is taking the action.

(2) The ***local government principles*** are—
(a) transparent and effective processes, and decision-making in the public interest; and
(b) sustainable development and management of assets and infrastructure, and delivery of effective services; and
(c) democratic representation, social inclusion and meaningful community engagement; and
(d) good governance of, and by, local government; and
(e) ethical and legal behaviour of councillors and council employees."

[15] The Council is the elected body that is "responsible for the good rule and local government of Brisbane",[19] and has the power to do anything that is "necessary or convenient for the good rule and local government of Brisbane".[20]

[16] The applicant is one of the councillors who constitute the Council pursuant to section 13 of the *COBA*. Such councillors have responsibilities set out in section 14 of the *COBA*, which include participating, for the benefit of Brisbane, in meetings of the Council.[21]

[17] Section 25 of the *COBA* provides that the Council must, by resolution, appoint a Chairperson of the Council from its councillors,[22] and that the Chairperson presides at all meetings of the Council and is responsible for ensuring the Council's rules of procedure are observed and enforced.[23] Section 25(2) contains a note that the Chairperson also has powers under section 186A in relation to inappropriate conduct by councillors in meetings of the Council. Section 186A of the *COBA* states:

"**186A Conduct in meetings of the council or its committees**
(1) This section applies to the chairperson of the council or a committee chairperson in addition to any powers they may have under the council's rules of procedure.
(2) If disorderly conduct happens in a meeting of the council or its committees, the chairperson of the meeting may make any 1 or more of the following orders that the chairperson considers appropriate in the circumstances—
(a) an order that the councillor's conduct be noted in the minutes of the meeting;

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19 *City of Brisbane Act* 2010 (Qld) s 9.
20 *City of Brisbane Act* 2010 (Qld) s 11(1).
21 *City of Brisbane Act* 2010 (Qld) s 14(3)(c)(i).
22 *City of Brisbane Act* 2010 (Qld) s 25(1).
23 *City of Brisbane Act* 2010 (Qld) s 25(2).

(b) an order that the councillor leave the place where the meeting is being held (including any area set aside for the public), and stay out of the place for the rest of the meeting;
(c) if the councillor fails to comply with an order under paragraph (b) to leave a place—an order that the councillor be removed from the place.
(3) Disorderly conduct is conduct of a councillor that contravenes the council's rules of procedure.
(4) The rules of procedure are, under a local law, the rules decided by council for the conduct of the participants at meetings of the council or its committees (including rules about challenging decisions of the chairperson relating to observing or enforcing the rules, for example).
(5) A decision under this section by either of the following persons is not subject to appeal other than under the council's rules of procedure—
(a) the chairperson of the council;
(b) a committee chairperson.
Note—
See section 226 for more information."

[18] Section 29 of the *COBA* provides the Council with the power to make and enforce any local law that is necessary or convenient for the good rule and local government of Brisbane.[24] It was not controversial in this Application that the *Meeting Local Law* 2011 (Brisbane City Council) ("*MLL*") is such a law and that it governs the conduct of the meetings of Council as constituted by councillors, including the applicant.

[19] Chapter 6, Part 2 of the *COBA* deals with complaints about the conduct and performance of councillors,[25] and creates the CCRP.[26] The CCRP is responsible for hearing and deciding a complaint of misconduct or inappropriate conduct by a councillor.[27] Alan Wilson J, in *Johnston v Brisbane City Council & Ors* [2014] QSC 268 ("*Johnston*"), provided the following snapshot of the CCRP's responsibilities:

> "[1] Complaints about the conduct of Brisbane City Councillors can be heard and decided by a body set up under the *City of Brisbane Act* 2010 (Qld). The body is called the *Brisbane City Council Councillor Conduct Review Panel*. If the Panel upholds the complaint it can impose various sanctions and penalties – e.g., requiring an apology from the Councillor, or ordering suspension, or imposing a fine".[28]

[20] The interpretation and application of section 178 of the *COBA* is central to the determination of this matter. Section 178 of the *COBA* provides, relevantly:

"**178 What this division is about**
(1) This division is about dealing with complaints about the conduct and performance of councillors, to ensure—
(a) appropriate standards of conduct and performance are maintained; and

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24 *City of Brisbane Act* 2010 (Qld) s 29(1).
25 *City of Brisbane Act* 2010 (Qld) s 178(1).
26 *City of Brisbane Act* 2010 (Qld) s 178(6).
27 *City of Brisbane Act* 2010 (Qld) s 178(6).
28 *Johnston v Brisbane City Council & Ors* [2014] QSC 268, para [1].

(b) a councillor who engages in inappropriate conduct or misconduct is appropriately disciplined.

(2) However, this division does not apply to the conduct of councillors at a meeting of the council or its committees, other than a failure of a councillor to comply with a direction to leave a meeting of the council or its committees made by the chairperson of the meeting.

Note—

The rules of procedure deal with the conduct of participants at meetings of the council or its committees.

(3) ***Misconduct*** is conduct, or a conspiracy or attempt to engage in conduct, of or by a councillor—

(a) that adversely affects, or could adversely affect, (either directly or indirectly) the honest and impartial performance of the councillor's responsibilities or exercise of the councillor's powers; or

(b) that is or involves—

(i) the performance of the councillor's responsibilities, or the exercise of the councillor's powers, in a way that is not honest or is not impartial; or

(ii) a breach of the trust placed in the councillor; or

(iii) a misuse of information or material acquired in or in connection with the performance of the councillor's responsibilities, whether the misuse is for the benefit of the councillor or someone else; or

(iv) a refusal by the councillor to comply with a direction or order of the BCC councillor conduct review panel about the councillor; or

(v) a failure of the councillor to comply with a direction to leave a meeting of the council or its committees made by the chairperson of the meeting; or

(c) that contravenes section 173(3) or 177G(2).

…

(6) The ***BCC councillor conduct review panel*** is a body, created under this Act, that is responsible for hearing and deciding a complaint of misconduct or inappropriate conduct by a councillor.

…

(8) A decision under this division by any of the following persons is not subject to appeal—

(a) the BCC councillor conduct review panel;

(b) the department's chief executive;

(c) the chief executive officer.

Note—

See section 226 for more information."

[21] Pursuant to sections 178(8)(a) and 226 of the *COBA*, decisions made by the CCRP cannot be appealed against, challenged, reviewed, quashed, set aside, or called into question in any way.

[22] Section 179 of the *COBA* provides that if a complaint is made about the conduct or performance of a councillor, it is the subject of a preliminary assessment by the chief

executive officer[29] and then section 180 of the *COBA* provides that if, after this preliminary assessment the complaint is about misconduct or inappropriate conduct, it must be referred to the CCRP.[30]

[23] Chapter 6, Part 3 of the *COBA* provides that the CCRP is constituted by members that the Council chooses from a pool of members appointed, by resolution, by the Council.[31] Section 182 of the *COBA* provides the procedure for the CCRP's hearing of a complaint of misconduct or inappropriate conduct.

[24] If, after hearing a complaint, the CCRP decides that a councillor has engaged in misconduct or inappropriate conduct, then section 183 of the *COBA* sets out the disciplinary action that can be taken:

> "**183 Taking disciplinary action-BCC councillor conduct review panel**
> (1) This section applies if the BCC councillor conduct review panel decides, after hearing a complaint, that a councillor engaged in misconduct or inappropriate conduct.
> (2) The BCC councillor conduct review panel may make any I or more of the following orders or recommendations that it considers appropriate in view of the circumstances relating to the misconduct or inappropriate conduct-
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> (a) an order that the councillor be counselled about the misconduct or inappropriate conduct, and how not to repeat the misconduct or inappropriate conduct;
> (b) an order that the councillor make an admission of error or an apology;
> (c) an order that the councillor participate in mediation with another person;
> (d) a recommendation to the department's chief executive to monitor the councillor or the council for compliance with the local government related laws;
> (e) an order that the councillor reimburse the council;
> (f) a recommendation to the Minister that the councillor be suspended for a stated period;
> (g) a recommendation to the CCC or the police commissioner that the councillor's conduct be further investigated;
> (h) an order that the councillor pay to the council an amount of not more than the monetary value of 50 penalty units.
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> …
> (8) The degree to which the BCC councillor conduct review panel must be satisfied depends on the consequences, that are adverse to the councillor, of finding the allegation to be true."

The direction to leave the meeting

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29 *City of Brisbane Act* 2010 (Qld) s 179(3)(b), s 179(4).
30 *City of Brisbane Act* 2010 (Qld) s 180(3).
31 *City of Brisbane Act* 2010 (Qld) s 187(1).

[25] The applicant was directed to leave the meeting by the Chairperson (on a number of occasions) and the applicant refused to do so (on a number of occasions):[32]

Chairperson:	Councillor JOHNSTON, this is about the funding for the neighbourhood plans and the development assessment—the Future Brisbane program going forward in the new financial year. It is not an opportunity for you to get up and re-hash everything about all of the neighbourhood plans that have taken place in your ward.
Applicant:	So, just to be clear, when Councillor HOWARD mentions Spring Hill, Newstead—
Chairperson:	Councillor JOHNSTON, why do you have to—
Applicant:	I can't mention a current plan—
Chairperson:	—be so argumentative all of the time?
Applicant:	I'm just clarifying your ruling where you've let one Councillor just speak about specific plans—
Chairperson:	Councillor JOHNSTON! Stop answering back!
Applicant:	Stop saying things that make no sense.
Chairperson:	Right, Councillor JOHNSTON, you do not tell me to stop doing anything. I have just about had enough of your belligerence in this place. It is absolutely disgraceful. Every other Councillor here is able to behave with a level of decorum, except for you.
Applicant:	You interrupted me.
Chairperson:	No, Councillor JOHNSTON—
Applicant:	You let her speak about neighbourhood plans, specific plans—
Chairperson:	Councillor JOHNSTON!
Applicant:	—currently under way—
Chairperson:	Councillor JOHNSTON!

[32] A transcript of the meeting is contained as exhibit B to Affidavit of Nicole Johnston sworn 3 May 2018. An audio recording of the meeting is exhibit A to Affidavit of Geoffrey John Evans sworn 30 July 2018.

Applicant: —which is what I was doing—

Chairperson: That is enough! I have heard enough of your insolence. Every other Councillor in this place has been respectful towards each other. You go beyond it. You seriously do. You have to have a very serious think about your behaviour in this place, and your behaviour as a public figure, because it is deplorable.

Applicant: Oh, excuse me. You need to stop right now, because I've done nothing wrong other than—

DEPUTY MAYOR: Point of order, Madam Chairman.

Applicant: —speak in this place.

Chairperson: Point of order, DEPUTY MAYOR.

Applicant: Your comments are outrageous. I demand that they be withdrawn. I demand that they be withdrawn.

DEPUTY MAYOR: Madam Chairman, I move that Councillor JOHNSTON be suspended from the services of this Chamber—

Applicant: It is not appropriate for you to say that.

DEPUTY MAYOR: —for a period of eight days.

Applicant: That is defamatory and outrageous.

Councillor WINES: Seconded.

Chairperson: It has been moved by the DEPUTY MAYOR, and seconded by Councillor WINES, that Councillor JOHNSTON be suspended from the services of the Chamber for a period of eight days.

All those in favour say aye.

Councillors say aye.

Chairperson: All those against say no.

Councillors say no.

Chairperson: The ayes have it.

Councillor JOHNSTON—

Councillor SUTTON: Division, Madam Chair.

Chairperson: —you are hereby suspended from the service of the Chamber for a period of eight days. You are to vacate the Chamber.

Councillor SUTTON: Madam Chair, I called for a Division.

Chairperson: Councillor SUTTON, I was already speaking when you rose.

Applicant: Well, I'm not leaving.

Chairperson: Councillor JOHNSTON—

Applicant: I am not leaving.

Chairperson: Councillor JOHNSTON, you do not direct me to do anything in this Chamber.
You have been suspended from the service of the Council for eight days.

Applicant: I'm not leaving.

Chairperson: Councillor JOHNSTON—

Applicant: You've heard me—

Chairperson: —under the Meetings Local Law, I have given you a direction to leave—

Applicant: Your abuse and vilification has been outrageous today, and I am not leaving.

Chairperson: Councillor JOHNSTON, you do not accuse me of abuse and vilification.

Applicant: That's what you've done.

Chairperson: Councillor JOHNSTON, I am not going to engage in anything more.

Councillor interjecting.

Chairperson: Councillor JOHNSTON!

Applicant: You let them do it. You let them do it.

Chairperson: Councillor JOHNSTON, you have been lawfully directed—

Councillor interjecting.

Chairperson: —by myself as Chairman of this Council—

Councillor interjecting.

Chairperson: —to leave this meeting place, and you have failed to comply repeatedly—

Councillor interjecting.

Applicant: I am not leaving.

Chairperson: —with that direction.

Applicant: I am not leaving.

Chairperson: Councillor JOHNSTON, this is your final warning. You have been directed—

Councillor interjecting.

Chairperson: You have been directed to leave this place, this Council Chamber, as you are suspended.

Applicant: I am not leaving.

Chairperson: Councillor—

Applicant: You allowed Councillor HOWARD to—

Chairperson: Councillor JOHNSTON—

Councillor interjecting.

Chairperson: Councillor JOHNSTON, you have refused to obey my direction to leave this meeting place.

I ask all Councillors please to vacate the Chamber. We are now on adjournment whilst I call on the Council representative to remove Councillor JOHNSTON from the Chamber.

Councillor interjecting.

Chairperson: Councillor SRI, please vacate the Chamber as well.

Councillor interjecting.

The Decision being challenged

[26] The Decision of the CCRP on 16 March 2018 was that the applicant had engaged in "misconduct" within the meaning of section 178(3)(v) of the *COBA*, and that the applicant pay to the first respondent an amount equal to the monetary value of 50 penalty units.[33]

[27] The presumption is that the CCRP acted within jurisdiction and the applicant bears the onus of establishing otherwise.[34]

The applicant's position

[28] The applicant's primary contention is that the CCRP did not have jurisdiction to make the Decision.[35]

[29] The applicant submits that on a proper construction of section 178(2) of the *COBA*, the CCRP cannot have jurisdiction under Chapter 6, Part 2, Division 6 of the *COBA*, unless the Chairperson made such a direction in the due exercise of the Chairperson's powers to make such directions.[36]

[30] In the present case, the applicant submits that jurisdictional error occurred as there was no failure by the applicant to comply with a relevant direction to leave the meeting; therefore the Decision fell outside the scope of the Division 6 Scheme, and hence outside the scope of the CCRP's jurisdiction, by virtue of section 178(2) of the *COBA*.[37]

[31] The applicant submits that as the CCRP entertained a matter of a kind which lies outside the theoretical limits of its functions and powers, it acted in the absence of a jurisdictional fact and disregarded a matter that the *COBA* required be taken into account as a condition of jurisdiction.[38]

[32] The applicant's argument on this primary issue can be summarised as:[39]

a. by virtue of section 178(2) of the *COBA*, the CCRP has no jurisdiction to deal with complaints about the conduct of a councillor at a Council meeting[40] except in respect of a councillor's conduct in failing to comply with a direction to leave the meeting made by the Chairperson of the meeting;

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33 Application for Statutory Order of Review and Review filed 3 May 2018, para 1. The Decision is contained as exhibit A to Affidavit of Nichole Johnston sworn 3 May 2018.

34 See, for example, *Caledonian Collieries Ltd v Australasian Coal and Shale Employees Federation (No 1)* (1930) 42 CLR 527 at 546-548 and *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 671-672.

35 Application for Statutory Order of Review and Review filed 3 May 2018; Submissions of the applicant filed 25 June 2018, p 2, para 5-6; p 13, para 28.

36 Submissions of the applicant filed 25 June 2018, p 4, para 12.

37 Submissions of the applicant filed 25 June 2018, p 12, para 27.

38 Submissions of the applicant filed 25 June 2018, p 12, para 27.

39 Submissions of the applicant filed 25 June 2018, p 2-3, para 6.

40 And in fact a complaint about such conduct is of no effect (*City of Brisbane Act* 2010 (Qld), s 179(6)) and the Council's chief executive officer therefore has no power under section 180(3) to refer the complaint to the CCRP.

b. no lawful direction for the applicant to leave the meeting was ever made by the Chairperson of the meeting in the due exercise of any power (pursuant to sections 21 and 53 of the *MLL* and section 186A of the *COBA*) to make such a direction;

c. the applicant therefore did not (and could not have) failed to comply with a direction made by the Chairperson to leave the meeting; and

d. as the Decision (and the complaint which prompted it) related to the applicant's conduct at a Council meeting (i.e. the meeting), but not a failure by the applicant to comply with a relevant direction to leave, the CCRP did not have jurisdiction to deal with the complaint and has acted beyond its jurisdiction in making the Decision.

[33] The applicant also contends that the *Judicial Review Act* 1991 (Qld) ("*JRA*") applies to the Application. It is noted that the applicant regards this as a secondary issue and it was conceded that ultimately this may have no practical bearing on the outcome of the proceeding, as the Court's inherent jurisdiction and powers enable the Court to make orders having the same practical effect as orders which could be made under the *JRA*. The applicant, however, submits that this issue may affect some aspects of the proceeding, including whether a costs order under section 49 of the *JRA* can be made.[41]

The first respondent's position

[34] The first respondent submits that the Application ought to be dismissed because:

a. the jurisdiction of this Court to review the Decision is limited, by reason of section 226 of the *COBA*, to the Court's inherent supervisory jurisdiction to review for jurisdictional error;[42]

b. the extent of this Court's jurisdiction has already been determined in the previous proceedings brought by the applicant in *Johnston* at [17] and [69];[43]

c. considering that this issue was raised by the applicant in *Johnston* and both the applicant and the first respondent were parties to this previous proceedings, an issue estoppel arises;[44]

d. the CCRP had jurisdiction to make the Decision on 16 March 2018;[45]

e. on the proper construction of section 178(2) of the *COBA*, the CCRP were precluded from inquiring into the validity of any direction to leave the Council meeting and the construction the applicant urges upon the Court would invite the CCRP to inquire into matters which it is expressly precluded from considering;[46] and

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41 Submissions of the applicant filed 25 June 2018, p 3, para 7.
42 First respondent's written submissions filed 30 July 2018, p 1, para 4.
43 First respondent's written submissions filed 30 July 2018, p 1, para 4.
44 First respondent's written submissions filed 30 July 2018, p 8, para 28.
45 First respondent's written submissions filed 30 July 2018, p 1, para 4.
46 First respondent's written submissions filed 30 July 2018, p 1, para 4.

f. in any event, the direction to leave the chamber was a valid one given the power provided to the Chairperson under section 186A of the *COBA*.[47]

Further submissions

[35] On 18 March 2019, parties were requested by the Court to address four further propositions in consideration of this matter:

a. taking into account proper statutory construction and the history of the sections under examination, the reference to "a failure to comply with a direction to leave a meeting of council made by the Chairperson of the meeting" in section 178(2) of the *COBA* is a reference to "a direction" pursuant to section 186A(2)(b);

b. it follows that, before exercising jurisdiction, the CCRP has to be satisfied of the jurisdictional fact that a direction pursuant to section 186A(2)(b) was made. This does not involve the lawfulness of the section, just whether a section 186A(2)(b) order was made;

c. was a section 186A(2)(b) order made? If a section 186A(2)(b) order was made, then the CCRP has jurisdiction;

d. was a section 186A(2)(b) order made? If a section 186A(2)(b) order was not made, then the CCRP does not have jurisdiction. If this is the case, how does this Court resolve this matter, in light of the drafting of the Application? This falls within the Decision being challenged, but not the grounds.

[36] The applicant and first respondent provided further submissions by 5 April 2019, and then submissions in reply to those further submissions on 12 April 2019.

[37] Both the applicant and the respondent were in agreement that the reference to a "direction" in section 178(2) of the *COBA* is a reference to a "direction" pursuant to section 186A(2)(b) but is also a reference to a "direction" made under the Council's local laws (the *MLL*). I accept this interpretation of section 178(2) of the *COBA*.

[38] Both parties also agreed that section 178(2) of the *COBA* does not impose any explicit preconditions upon the exercise of jurisdiction: there is no express requirement that the CCRP need decide any matter in order to have jurisdiction. The CCRP does not have to make any express finding in respect of the jurisdictional fact on which its authority to act was based for that authority to arise. I accept such a position and proceed on this basis.

[39] The first respondent, in further submissions, also sought leave to read and file an affidavit of Mr Geoffrey Evans (the respondent's solicitor)[48] which annexes a complete copy of the Decision that is held as part of the first respondent's records.[49] The applicant objects to the admission into evidence of this affidavit on the basis that the first respondent's case is closed and nothing in the matters raised by the Court for

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47 First respondent's written submissions filed 30 July 2018, p 1, para 4.
48 First respondent's supplementary written submissions, p 5, para 17.
49 Affidavit of Geoffrey John Evans sworn 5 April 2019, exhibit A.

comment justifies a grant for leave to adduce further evidence.[50] The applicant also contests aspects of the CCRP's factual statements.[51]

[40] Notwithstanding the lateness of the material, I will grant leave to read and file this affidavit. The affidavit completes the record and sets out the CCRP's reasoning that underlies the Decision under review. I place no weight on any of the factual statements contained in this newly provided material.

[41] I will now proceed to the substantive consideration of this matter.

Issue 1: Does the *JRA* apply to these proceedings?

[42] The question about whether the *JRA* applies to the Application only arises because of the relief sought by the applicant.

[43] The applicant seeks:

a. an order quashing or setting aside the Decision with effect from the day it was made, pursuant to section 30(1)(a) of the *JRA* and/or section 47 of the *JRA* and/or the Court's inherent jurisdiction;

b. further or alternatively, a declaration the Decision is void *ab initio*, pursuant to section 30(1)(c) of the *JRA* and/or section 47 of the *JRA* and/or section 10 of the *Civil Proceedings Act* 2011 (Qld) ("*CPA*") and/or the Court's inherent jurisdiction;

c. further or alternatively, an order permanently restraining the respondents taking any steps to enforce the Decision, pursuant to the Court's inherent jurisdiction; and

d. an order that:

    i. the respondents indemnify the applicant in relation to the costs properly incurred in this proceeding by the applicant, pursuant to section 49(1)(d) of the *JRA*;

    ii. alternatively, an order the applicant is to bear only her own costs of the proceeding regardless of the outcome, pursuant to section 49(1)(e) of the *JRA*;

    iii. further or alternatively, an order the respondents pay the applicant's costs of the proceeding; and

e. such other order as the Court deems appropriate.[52]

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50 Applicant's reply submissions to the first respondent's additional submissions, p 1, para 1.

51 Applicant's reply submissions to the first respondent's additional submissions, p 1, para 3.

52 Application for Statutory Order of Review and Review filed 3 May 2018. The applicant also claimed orders by way of interlocutory relief which are not relevant to the ultimate determination of this matter.

[44] The issue of whether the *JRA* applies to the Application is of little relevance. Counsel for the applicant states that whether this Court has jurisdiction pursuant to its inherent jurisdiction, or pursuant to the *JRA,* is only relevant to the special costs order pursuant to section 49 of the *JRA,* and then only if the applicant loses.[53]

[45] Once the applicant raised this issue, the first respondent, understandably, went to considerable lengths to respond in their written submissions.[54] The applicant and first respondent both provided written submissions on this issue, and a significant amount of time was spent dealing with this issue at the hearing. The applicant describes this issue as a secondary issue,[55] and it is. Especially so, since I find ultimately in favour of the applicant.

[46] Ultimately, this issue is of no relevance to the determination of this matter. However, for convenience, I will deal briefly with this matter at the outset.

[47] Despite sections 178(8) and 226(1) of the *COBA*, the applicant contends that the *JRA* applies to the determination of the Application.

[48] The applicant submits[56] that while sections 178(8) and 226(1) of the *COBA* bar the applicant from seeking review of the Decision on its merits, the Supreme Court retains its inherent jurisdiction to review decisions under the *COBA* for jurisdictional error.[57]

[49] The issue, as the applicant submits, is whether the jurisdiction exists pursuant to the *JRA*, or only in the Court's inherent jurisdiction unaffected by the *JRA*.[58] The issue of this Court's jurisdiction to review decisions of the CCRP has already been determined in *Johnston.*[59]

[50] In *Johnston*, the applicant challenged the validity of a (differently constituted) CCRP's determination that she had engaged in misconduct by failing to make an apology. In that case there had been a Council meeting on 26 February 2013. A complaint was subsequently made that the applicant had failed to comply with a direction to leave that meeting and the CCRP had upheld that complaint, found misconduct, and ordered the payment of a fine and the making of an apology in certain terms at the next meeting. There was a second Council meeting on 30 July 2013. The applicant did not deliver the apology at that meeting. There was another complaint and another CCRP again held that the applicant had engaged in misconduct, and ordered payment of another fine and the making of an apology in certain terms.[60] The applicant, in *Johnston*, sought judicial review of the second of the two decisions under both the *JRA* and the Court's inherent jurisdiction.[61]

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53 Transcript of hearing on 14 December 2018, p 25, line 40 to p 26, line 10; p 30, line 13-16.
54 First respondent's written submissions filed 30 July 2018, p 11
55 Submissions of the applicant filed 25 June 2018, p 3, para 7.
56 Submissions of the applicant filed 25 June 2018, p 13, para 31.
57 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [12]-[17].
58 Submissions of the applicant filed 25 June 2018, p 13, para 31.
59 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [12]-[17].
60 As to the matters set out in this paragraph, see *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [3]-[7].
61 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [10].

[51] It is noted that in *Johnston*, the Court expressly engaged with the issue of this Court's jurisdiction to review decisions of the CCRP,[62] and noted that section 226(1)(a) of the *COBA* speaks in clear terms to exclude appeals of any kind against decisions including, specifically, review under the *JRA*.[63]

[52] *Johnston* determined that the only source of review for jurisdictional error can be under the Court's inherent supervisory provisions or statutory provisions like section 10 of the *CPA*.[64] Accordingly, orders pursuant to section 30, Part 3 of the *JRA* are not available. Neither are orders under Part 5 of the *JRA*, which includes the orders the applicant seeks pursuant to sections 41 and 47 of the *JRA*.

[53] The applicant, despite agreeing in *Johnston* that the only source of review for jurisdictional error can be under the Court's inherent supervisory jurisdiction or statutory provisions like section 10 of the *CPA*,[65] now submits that this concession was wrongly made[66] and Alan Wilson J's decision is wrong.[67]

[54] The applicant submits the following in relation to Alan Wilson J's decision:[68]

> "… we ask your Honour to not regard yourself as bound by him, either pursuant to issue estoppel or pursuant to normal laws of precedent is that he is mistaken … by excluding any access to the Judicial Review Act except in the case of jurisdictional error".

[55] The first respondent submits that this Court ought to follow its previous ruling[69] as it is not clearly wrong and the applicant's submissions do not demonstrate that it is clearly wrong.

[56] The first respondent also contended that as the applicant and the Council were both parties in *Johnston* an issue estoppel arises; the issue having been raised and decided in the earlier proceeding the applicant cannot raise it again in this proceeding.[70]

[57] The more efficient way to deal with this secondary issue raised about this Court's jurisdiction to review decisions of the CCRP is to consider whether *Johnston* is, as the applicant contended, wrong. It is not.

[58] Counsel for the applicant refers to *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 ("*Kirk*"), and submits that sections 178(8) and 226 of the *COBA* need to be read down by adding the words "except where there is

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62 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [12]-[17].

63 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [16] citing *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [6] per McMurdo P, at [27] per Chesterman JA, at [67]-[74] per White JA.

64 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [17] citing *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [9].

65 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [17].

66 Transcript of hearing on 14 December 2018, p 34, line 25.

67 Transcript of hearing on 14 December 2018, p 33, line 31.

68 Transcript of hearing on 14 December 2018, p 28, lines 1-9.

69 First respondent's written submissions filed 30 July 2018, p 9, para 29, citing *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-9 and *Green v R; Quinn v R* (20 11) 283 ALR 1 at [83]-[87] per Heydon J.

70 First respondent's written submissions filed 30 July 2018, p 8, para 28, citing *Blair v Curran* [1939) 62 CLR 646 at 531-523, *Kuligowski v Metrobus* (2004) 220 CLR 363 at [21] and *Mitchell v Pacific Dawn Pty Ltd* [2006] QSC 198 at [35].

jurisdictional error".[71] The applicant submits that *Kirk* is authority for having to read down the statute because it is not within power of the legislature of the State of Queensland to exclude appeals to this Court for jurisdictional error. Accordingly, the additional words need to be read into the *COBA* provisions.[72]

[59] It is noted that sections 178(8) and 226 of the *COBA* would literally prevent any review of the CCRP's decisions by this Court. However, in *Kirk*, French CJ (as his Honour then was), Gummow, Hayne, Crennan, Kiefel and Bell JJ held that (footnotes omitted):

> "[99] There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of "distorted positions". And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.
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> [100] This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power".[73]

[60] The first respondent refers to the last two sentences in paragraph 100 of *Kirk,* and submits:

> "I said that is fine as a statement but it's no basis at all on which to start speaking in the language of implicitly reading down, reading up and so on. Now - and can I put the submission this way - what happens when you have a Kirk problem is that there has been state legislation, usually, which has effected a certain outcome. But it's not a matter of reading down, it's the

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71 Transcript of hearing on 14 December 2018, p 26-27.
72 Transcript of hearing on 14 December 2018, p 33, line 1-5; p 42, line 45 to p 43, line 5.
73 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [99]-[100].

> superiority of the courts - all the courts, including the state courts - inherent jurisdiction".[74]

[61] As *Johnston* determined, neither sections 178(8) or 226 of the *COBA* will prevent the Court reviewing the Decision if it was affected by jurisdictional error.[75] To support this proposition, Alan Wilson J referred to *Kirk* and the last two sentences at paragraph 100, and further noted:

> "Where legislation purports to exclude all forms of review in that way, the supervisory jurisdiction of the Supreme Court to rectify jurisdictional error remains alive and, the High Court has said in *Kirk*, may be exercised through the grant of prerogative writs. The proper relief to be granted in Queensland in that event is, however, a little uncertain – as the decision of the Court of Appeal in *Northbuild Construction*, also mentioned earlier, shows".[76]

[62] Due to sections 178(8) and 226 of the *COBA*, the *JRA* does not apply to decisions from the CRRP and orders which the applicant seeks pursuant to sections 30, 47 and 49 are not available.

[63] As agreed by the applicant in *Johnston* and so determined, the only source of review for jurisdictional error can be under the Court's inherent supervisory jurisdiction or statutory provisions like section 10 of the *CPA*.

The principles governing review for jurisdictional error

[64] The High Court in *Kirk* summarised three examples, previously mentioned in *Craig v South Australia* (1995) 184 CLR 163, of occasions where inferior courts fall into jurisdictional error "by entertaining a matter outside the limits of the inferior court's functions or powers":

a. the absence of a jurisdictional fact;

b. disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and

c. misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.[77]

[65] The High Court subsequently held:

> "… The three examples given in further explanation of the ambit of jurisdictional error by an inferior court are just that examples. They are not to be taken as marking the boundaries of the relevant field. So much is

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74 Transcript of hearing on 14 December 2018, p 90, lines 13-18.
75 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [14].
76 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [70], footnotes omitted.
77 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [72].

> apparent from the reference in *Craig* to the difficulties that are encountered in cases of the kind described in the third example".[78]

[66] Alan Wilson J in *Johnston* noted the following with reference to the CCRP's functions or powers:

> "[20] Administrative tribunals will also commit jurisdictional error where they identify a wrong issue, ask themselves a wrong question, ignore or rely upon an irrelevant fact, or in some other way reach an erroneous or mistaken conclusion. Those additional considerations, identified in Craig, apply to the Panel – it is a statutory body which exercises solely administrative powers, prescribed by the Act, rather than a mixture of judicial and administrative functions like inferior courts".[79]

[67] The first respondent submits that it is clear that not all errors made by decision makers will be "jurisdictional" ones.[80] In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Hayne J observed:

> "The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not".[81]

[68] The first respondent further submits that the question of which errors are authorised, and which ones are not, is answered by the process of statutory construction. In *Project Blue Sky Inc & ors v Australian Broadcasting Authority* (1998) 194 CLR 355, the High Court set out the preferred test:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no

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78 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [73].

79 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [20].

80 First respondent's written submissions filed 30 July 2018, p 10, para 38.

81 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [162]. Approved in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [66].

decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue".[82]

[69] Ultimately, the first respondent submits that the questions that arise in the Application fall largely to be determined by a process of statutory construction which engages two separate and successive enquiries: the identification of the conditions regulating the exercise of the CCRP's power and, then, the identification of the consequences of any non-compliance with those conditions.[83]

The jurisdictional issue – a lawful or valid direction?

The CCRP

[70] The CCRP determined that to the extent that the applicant's submissions raised issues concerning the lawfulness or unreasonableness of conduct, other than the conduct relevant to the allegation of failure to leave the meeting when directed, such issues were outside the jurisdiction of the CCRP.[84]

The applicant's position

[71] The applicant submits that reference to a "direction to leave a meeting" in section 178(2) and 3(v) must mean a lawful or valid direction; there cannot be a failure of a councillor to comply with a direction to leave, and hence the CCRP cannot have jurisdiction under the Part 2, Division 6 Scheme, unless the Chairperson made such a direction in the due exercise of the Chairperson's powers to make such directions.[85]

[72] At the hearing, the applicant summarised its argument as:

a. the result of the Chairperson's failure to comply with the preconditions which gave rise to lawful authority to make a direction is that the direction given by the Chairperson was no direction at all and therefore no breach of section 178(3)(v) of the *COBA*. Therefore, the CCRP erred in finding that it had no jurisdiction to decide whether it had jurisdiction; and

b. the CCRP proceeded as if it had jurisdiction.[86]

[73] The applicant does not submit that the CCRP had to make any express finding in respect of the existence of the jurisdictional fact on which its authority to act was based for that authority to arise.

[74] The applicant does submit that the CCRP exceeded its jurisdiction, *inter alia*, because it refused to consider whether the basis of its jurisdiction existed:

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82 *Project Blue Sky & ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91] (citations omitted).
83 First respondent's written submissions filed 30 July 2018, p 11, para 40.
84 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit A, p 6.
85 Submissions of the applicant filed 25 June 2018, p 4, para 12.
86 Transcript of hearing on 14 December 2018, p 22-23.

> "… Indeed, the CCRP proffered the nonsensical proposition that it had no jurisdiction to consider whether an element of its jurisdiction, the existence of a valid direction, existed. That is, it considered that it had no jurisdiction to consider whether it had jurisdiction".[87]

The first respondent's position

[75] The first respondent submits that the CCRP correctly determined that it did not have jurisdiction to review any matters which occurred in the chamber other than the failure to leave the meeting as directed.[88]

[76] The first respondent submits that there is evident legislative intention to restrict the CCRP's jurisdiction to a very minor and limited aspect of what occurs at Council meetings[89] and to import the requirement of a lawful or duly made direction in to section 178 of the *COBA* is an erroneous construction of the section. There is no such limitation or restriction and words of such limitation cannot be and should not be imported.[90]

[77] The proper construction of the section does not require any determination of the validity of any direction at all. The first respondent submits that such a construction is consistent with the evident statutory restriction on the jurisdiction of the CCRP. Were it otherwise, the CCRP would be potentially required to review conduct which had occurred in the chamber to determine whether the Chairperson had the jurisdiction or power to issue the direction; to do so invites the very thing it is forbidden from reviewing.

[78] The first respondent submits that the clear intention of the Act is to make the conduct of the Council meetings the prerogative of the Chairperson; this is understandable in the circumstances where there is the potential for the CCRP and the Court to be involved in numerous potentially time consuming, delaying and expensive applications seeking to review many detailed aspects of the purported compliance or otherwise with the procedural rules of the *MLL* or the *COBA*. Accordingly, the first respondent submits, the Parliament's evident will to discourage such CCRP or court action is a logical and sensible one. Essentially, the conduct of the Councillors is left as between the councillors themselves as elected officials under the stewardship of the Chairperson without seeking to have the CCRP or the Court involved except in the most limited of circumstances.[91]

Discussion

[79] The questions that arise in this case fall largely to be determined by a process of statutory construction which engages two separate and successive enquiries: the identification of the conditions regulating the exercise of the CCRP's power and, then, the identification of the consequences of any non-compliance with those conditions.

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87 Applicant's reply submissions to the first respondent's additional submissions, p 2, para 7.
88 First respondent's written submissions filed 30 July 2018, p 12, para 47.
89 First respondent's written submissions filed 30 July 2018, p 14, para 56.
90 First respondent's written submissions filed 30 July 2018, p 13, para 51.
91 First respondent's written submissions filed 30 July 2018, p 16, para 66.

[80] The correct approach to statutory construction must begin and end with the text itself,[92] whilst also not forgetting that the "modern approach to statutory construction … insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise".[93]

[81] The CCRP's role and jurisdiction is prescribed by Chapter 6, Part 2, Division 6 of the *COBA*, headed "Conduct and performance of councillors".

[82] Under section 178(2) of *COBA*, Division 6 does not apply to "the conduct of councillors at a meeting of the council or its committees, other than a failure of a councillor to comply with a direction to leave a meeting of the Council or its committees made by the Chairperson in the meeting."

[83] Thus the *COBA*:

a. generally excludes from the Division 6 Scheme and hence from the jurisdiction of the CCRP the policing of conduct at meetings of the Council and its committees; but

b. specifically places within the jurisdiction of the Division 6 Scheme a single aspect of conduct at a meeting, namely "failure of a councillor to comply with a direction to leave a meeting of the council … made by the Chairperson."

[84] Section 178(6) states that the CCRP is responsible for hearing and deciding a complaint of "misconduct" or "inappropriate conduct"[94] by a councillor.

[85] Misconduct is defined pursuant to section 178(3) of the *COBA*. It is noted that misconduct is defined widely and includes conduct, or a conspiracy or attempt to engage in conduct, of or by a councillor.

[86] It was alleged that the applicant engaged in misconduct pursuant to section 178(3)(v) of the *COBA* by refusing to comply with a direction to leave a Council meeting.

[87] The legislature only intended to confer a very narrow jurisdiction on the CCRP, insofar as the Council meetings are concerned. Pursuant to section 178(2) of the *COBA* the CCRP has no jurisdiction to hear or decide a complaint about a councillor's conduct at a meeting, other than a failure of a councillor to comply with a direction to leave a meeting of the Council made by the Chairperson of the meeting. As the first respondent submits, the plain text of the section strongly shows that the proper construction is that it is only necessary that there was a direction.[95] The requirement of a direction made by the Chairperson to leave the meeting anchors the jurisdiction of section 178(2) of the *COBA*.

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92 *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147 at [55].

93 *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147 at [55] citing *CIC Insurances Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. See also *Fearnley v Finlay* [2014] QCA 155 at [17].

94 Less serious conduct by a councillor can also be sanctioned by the CCRP if it meets the standard of "inappropriate conduct", i.e. conduct which is not appropriate conduct for a representative of the Council, but is not misconduct: *City of Brisbane Act 2010* (Qld) s 178(4).

95 First respondent's written submissions filed 30 July 2018, p 13, para 51.

[88] A councillor only commits misconduct pursuant to section 178(3)(v) of the *COBA* if he or she fails to comply with a direction to leave a meeting (or engages in a conspiracy or an attempt to engage in such conduct) made by the Chairperson. If no direction to leave a meeting was made by the Chairperson then the CRRP has no jurisdiction to review the councillor's conduct.[96]

[89] The question arises: does it have to be a duly made or valid direction to invoke the jurisdiction of section 178 of the *COBA*, or can something less suffice?

[90] The first respondent highlights that the legislature did not choose to insert the words "duly made" or anything comparable; it would have been relatively easy, had that been the legislative intention, for the words "duly made" or "valid", or some similar term to have been inserted.[97] However, it is also noted that the legislature did not include a definition of the term "direction". The terms and context of the statute need to examined to determine what "a direction to leave a meeting of the Council … made by the Chairperson of the meeting" means in the context of section 178 of *COBA*.

[91] To ensure the system of local government in Brisbane is accountable, efficient and sustainable, the legislature requires that any person performing a responsibility under the *COBA* must do so in accordance with the local government principles, which are:[98]

> "(2) The ***local government principles*** are—
> (a) transparent and effective processes, and decision-making in the public interest; and
> (b) sustainable development and management of assets and infrastructure, and delivery of effective services; and
> (c) democratic representation, social inclusion and meaningful community engagement; and
> (d) good governance of, and by, local government; and
> (e) ethical and legal behaviour of councillors and council employees."

[92] The Council may make and enforce any local law that is necessary or convenient for the good rule and local government of Brisbane.[99] The Chairperson presides at all meetings of the Council and is responsible for ensuring its rules and procedures are enforced.[100] It is not controversial that the *MLL* is such a law and governs the conduct of the meetings of the Council. The Chairperson also has powers under section 186A of the *COBA* in relation to inappropriate conduct by councillors in Council meetings. Section 186A applies to the Chairperson in addition to any powers they may have under the *MLL*.[101]

[93] The first respondent highlights that the clear intention of the Act is to make the conduct of the Council meetings the prerogative of the Chairperson and essentially the conduct of the councillors is left as between themselves as elected officials under the stewardship of the Chairperson without seeking to have the CCRP or the Court

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96 *City of Brisbane Act 2010* (Qld) s 178(2).
97 First respondent's written submissions filed 30 July 2018, p 13, para 50.
98 *City of Brisbane Act 2010* (Qld) s 4.
99 *City of Brisbane Act 2010* (Qld) s 29.
100 *City of Brisbane Act 2010* (Qld) s 3(2)(f); s 25(2).
101 *City of Brisbane Act 2010* (Qld) s 186A(1).

involved except in the most limited of circumstances.[102] Such a submission is uncontroversial. However, the prerogative of the Chairperson cannot be boundless; such power must be exercised in accordance with the statutory boundaries placed on the Chairperson by the legislature in the *COBA* and the *MLL*.

[94] A Chairperson in a meeting cannot have unfettered powers to direct councillors. The term "direction" in sections 178(2) and (3)(v) must have a statutory source; otherwise a Chairperson's whim or gesture may amount to a direction which a failure to comply with may amount to misconduct and consequential disciplinary action. The term "direction" in section 178 cannot be so wide. It needs scope and definition; such definition can only come from the rules of procedure and the powers given under the *MLL* or the *COBA*.

[95] A Chairperson can only act in accordance with rules of procedure and the powers given under the *MLL* or the *COBA*. Anything less than a duly made direction or valid direction could be capricious and inconsistent with democratic representation and not be necessary or convenient for the good rule and local government of Brisbane[103] or to provide for the orderly and proper conduct of Council and committee proceedings.[104]

[96] A purported direction is not a "direction".[105] The Chairperson's direction must be made pursuant to the rules of procedure (the *MLL*) or powers they may have under the *MLL* or the *COBA*. Otherwise, the statutory duty imposed on the Chairperson to ensure a meetings rules or procedure are observed or enforced is of no consequence.

[97] The first respondent submits that to look at the lawfulness of the direction the CCRP would be potentially required to review the conduct which had occurred in the chamber to determine whether the Chairperson had the jurisdiction or power to issue the direction and this would invite the CCRP to review the very thing it is forbidden from reviewing.[106] This is not the case.

[98] I accept that by requiring that a direction be a "duly made" or "valid" direction does not require the CCRP to exercise its jurisdiction to pass judgment on conduct in a meeting. It merely requires they consider conduct in determining if a jurisdictional fact exists, when relevant. There is no injunction on the CCRP doing so.

[99] In determining whether a councillor complied with a direction of the Chairperson to leave the meeting, it is not the Chairperson's conduct under review pursuant to section 178(2) and (3)(v) of the *COBA*. Rather, the CCRP is reviewing whether the councillor, not anyone else, engaged in misconduct for failing to comply with the Chairperson's direction to leave the meeting.

[100] Pursuant to sections 186A(5) and 226 of the *COBA* a decision made under section 186A cannot be appealed against, challenged, reviewed, quashed, set aside, or called

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102 First respondent's written submissions filed 30 July 2018, p 16, para 66.

103 *City of Brisbane Act 2010* (Qld) s 11(1).

104 *Meetings Local Law* 2001 (Brisbane City Council) s 2.

105 Compare "decision" and "purported decision" in section 304 of the *Migration Act* 1958 (Cth) in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 [6], per Gleeson CJ, [41] and [76], per Gaudron, McHugh, Kirby and Hayne JJ and [162], per Callinan J.

106 First respondent's written submissions filed 30 July 2018, p 13, para 51.

into question in any way.[107] The first respondent submits that as a decision by the Chairperson under section 186A is not to be subject to an appeal other than under the Council's rules of procedure, this evinces an express intention that the Chairperson's decision about a direction to leave the chamber not be subject to review.[108] Accordingly, the first respondent submits that the applicant's position suggests that the Chairperson should be subject to a review by the CCRP and/or this Court which is a frank offence to the clear legislature structure.[109]

[101] The sections 178(2) and (3)(v) requirement of a duly made or valid direction does not pierce the legislative protection provided by sections 186A(5) or 226. The CCRP is not examining the Chairperson's decision to make the order. There needs to be a valid direction under section 186A, otherwise it could not be said that there was a decision under that section. To obtain immunity from review or appeal the Chairperson's decision needs to be made under section 186A. Any direction made by the Chairperson directing a councillor to leave a meeting cannot be badged with section 186A of the *COBA* and obtain legislative immunity to even examine whether such a direction was made at all. In the circumstance of this case, the Chairperson didn't even purport to make the direction pursuant to section 186A of the *COBA*.

[102] Whilst the legislature did not include the term "duly made" or "valid" direction in sections 178(2) and 3(v), the words of these sections and the context of the statute make it clear that it must be a direction made in accordance with the rules and procedures prescribed in the *COBA* or the *MLL*.

[103] There cannot be a failure to comply with a direction to leave unless the Chairperson made such a direction in the due exercise of the Chairperson's powers to make such directions.

[104] Accordingly, I find that the reference to a direction to leave a meeting pursuant to sections 178(2) and (3)(v) of the *COBA* means a duly made or valid direction pursuant to *MLL* or the *COBA*.

[105] That construction provides for a harmonious interpretation of the *COBA* and produces a reasonable and sensible result. It does not create any conflict with the surrounding provisions, nor does it produce a result which is absurd and cannot reasonably be supposed to have been the legislature's intention.

Jurisdictional issue – no valid direction to leave

[106] The transcript of the meeting does not suggest that any order was made under any particular statutory provision at all.[110]

[107] It is clear that the Chairperson referred to the *MLL* in the context of directing the applicant to leave the chamber. The Chairperson did not refer to any specific power that she was acting under when so directing the applicant. The failure to refer to a specific power is not fatal. An act purporting to be done under one statutory power may be supported under another statutory power. Even a mistaken assertion of the

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107 *City of Brisbane Act 2010* (Qld) s 186A(5); s 226.
108 First respondent's written submissions filed 30 July 2018, p 15, para 58.
109 First respondent's written submissions filed 30 July 2018, p 15, para 62.
110 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B.

source of a relevant power or an incorrect assumption about that source does not necessarily invalidate an administrative decision.

[108] The relevant principles can be summarised as follows:

a. There is no statutory obligation to specify the source of the power under which an administrative decision maker was acting and there is no consequence attached to the specification of a source of power that did not in fact exist.[111]

b. The question is not one of intention but of power, from whatever source derived. When a power is exercised, a mistake in the source of the power works no invalidity. Validity depends simply on whether a relevant power existed.[112]

c. There are, however, limits to the general principle that an act purporting to be done under one statutory power may be supported under another statutory power. The suggested other source of power may, for example, be seen to be unavailable because its exercise depends upon the fulfilment of some condition precedent peculiar to it and that event has not yet occurred.[113] Another source of power cannot be relied upon to support the decision if the decision maker is bound to have regard to matters that differ materially from the matters relevant to the exercise of the assumed source of power.[114] Where the effect of the exercise of the power upon third parties may differ according to the source of the power, the exercise of the power may not be supportable as a valid exercise of power derived from another source.[115]

d. If the maker of an administrative decision purports to act under one head of power which does not exist, but there is another head of power available and all conditions antecedent to its valid exercise have been satisfied, the decision is valid despite purported reliance on the unavailable head of power.[116]

[109] A mistake by an administrative decision maker as to the source of his or her power to make a decision does not necessarily invalidate the decision if it is able to be supported by another source of power.[117] Whether it can be supported by the other source of power will depend upon whether that power is subject to requirements which the decision maker has failed to meet because of his or her belief as to the source of the power or for some other reason.[118]

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111 *Re Mercantile Mutual Life Insurance Co Limited and Roy Moore v Australian Securities Commission & Ors* (1993) 40 FCR 409 at 412.

112 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 4.

113 *Re Mercantile Mutual Life Insurance Co Limited and Roy Moore v Australian Securities Commission & Ors* (1993) 40 FCR 409 at 412-413.

114 *Re Mercantile Mutual Life Insurance Co Limited and Roy Moore v Australian Securities Commission & Ors* (1993) 40 FCR 409 at 412- 413.

115 *Re Mercantile Mutual Life Insurance Co Limited and Roy Moore v Australian Securities Commission & Ors* (1993) 40 FCR 409 at 412-413.

116 *Eastman v Director of Public Prosecutions (ACT)* (2003) CLR 214 318 at 362.

117 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 16.

118 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 16-17.

[110] Accordingly, in relation to the Chairperson directing the applicant to leave the meeting, there are three possible powers to be considered:

a. Section 21 of the *MLL*;

b. Section 53 of the *MLL*; and

c. Section 186A of the *COBA*.

Section 21 of the MLL

[111] Section 21 of the *MLL* provides:

> "**21 Acts of disorder by councillors**
> (1) A councillor commits an act of disorder at a meeting of council or a committee if the councillor
> (a) obstructs or interrupts the proper conduct of the meeting; or
> (b) uses indecent or offensive language; or
> (c) makes a statement reflecting adversely on the character or motives of a councillor, a council officer, a member of the public or any committee of council; or
> (d) fails to comply with a direction given by the chairman; or
> (e) raises or calls repeated points of order ruled invalid by the chairman; or
> (f) raises or calls excessive points of order as set out in section 53; or
> (g) repeats a point of order that has already been dealt with by the chairman; or
> (h) challenges the rulings of the chairman except by way of a motion of dissent or a motion to leave the chair.
> (2) If a councillor has, in the chairman's opinion, committed an act of disorder, the chairman may —
> (a) direct the councillor to cease the act of disorder; or
> (b) direct the councillor to make a retraction; or
> (c) caution the councillor against making further acts of disorder or he or she will be formally warned under subsection (3); or
> (d) warn the councillor under subsection (3).
> (3) If the chairman elects to warn the councillor, then the chairman must warn the councillor that a further act of disorder may lead to the suspension of the councillor for up to 8 days.
> (4) If, subsequent to a warning given under subsection (3), the chairman determines that the councillor warned has committed a further act of disorder, the chairman may–
> (a) move; or
> (b) call upon another councillor to move;
> that the councillor be suspended.
> (5) The period of suspension may be for a period of up to 8 days
> (6) If a suspension motion is moved the motion must be put to the vote without debate.
> (7) If the suspension motion is passed, the councillor must immediately leave the meeting place and must remain away from all meeting places for the period of the suspension.

> (8) If a councillor contravenes subsection (7), the chairman's representative may, at the request of the chairman, direct the councillor to leave and keep away from the meeting place, and subsequently remove the councillor from the meeting place if that direction is not complied with.
> (9) Either the chairman or the chairman's representative may ask officers from the Queensland Police Service to assist if a councillor obstructs the chairman or chairman's representative by failing to comply with a direction to leave a meeting place made under this section."

[112] Section 21 of the *MLL* mandates a series of steps in the process under which a councillor may be suspended and directed to leave a meeting.

[113] The applicant submits that it is apparent from the transcript of the meeting that two essential prerequisites to the suspension of the applicant and the making of a direction that she leave under the section 21 procedure were not met:[119]

a. the Chairperson did not warn the applicant that a further act of disorder may lead to the applicant's suspension for up to eight days;[120] and

b. the Chairperson did not move a motion, or call upon another councillor to move a motion, to suspend the applicant after the Chairperson had given such a warning (and decided the councillor has committed a further act of disorder).[121]

[114] It is clear that the Chairperson was purporting to act under the *MLL* in giving the applicant a direction to leave.[122] The Chairperson stated that under the *MLL* she had given the applicant a direction to leave, although the Chairperson did not state under which provision of the *MLL* the direction to leave was made under.[123]

[115] The preconditions of section 21 of the *MLL* were not complied with. Crucially, the applicant was not warned that a further act of disorder may lead to the suspension of the applicant for up to eight days.[124]

[116] The applicant was given a "final warning" but this was after the applicant had been suspended for a period of eight days and told to vacate the chamber and then directed to leave by the Chairperson.[125] The applicant was not given a warning in accordance with section 21.

[117] The Chairperson stated the applicant had been "lawfully directed" by herself as "Chairman of this Council" to leave the meeting place and that the applicant had failed to comply with that direction.[126]

[118] Section 21 of the *MLL* was not properly invoked when suspending the applicant for eight days. All conditions antecedent to its valid exercise were not satisfied.

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119 Submissions of the applicant filed 25 June 2018, p 10-11, para 22.
120 *Meetings Local Law* 2001 (Brisbane City Council) s 21(3).
121 *Meetings Local Law* 2001 (Brisbane City Council) s 21(4).
122 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.
123 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.
124 *Meetings Local Law* 2001 (Brisbane City Council) s 21(3).
125 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.
126 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.

[119] Section 21 of the *MLL* did not authorise the moving of a motion to suspend the applicant. The purported motion to suspend and hence the applicant's purported suspension was therefore invalid. Any purported direction to the applicant to leave the meeting as a result of the purported suspension was similarly invalid.

[120] Accordingly no duly made or valid direction, pursuant to section 21 of the *MLL*, was given to the applicant to leave the meeting.

Section 186A of the COBA

[121] The first respondent submits that section 186A of the *COBA* clearly gave the Chairperson the power to make the direction she did in the factual circumstances here, especially the applicant's persistent acts of disorder.[127]

[122] Section 186A of the *COBA* provides:

> "**186A Conduct in meetings of the council or its committees**
> (1) This section applies to the chairperson of the council or a committee chairperson in addition to any powers they may have under the council's rules of procedure.
> (2) If disorderly conduct happens in a meeting of the council or its committees, the chairperson of the meeting may make any 1 or more of the following orders that the chairperson considers appropriate in the circumstances—
> (a) an order that the councillor's conduct be noted in the minutes of the meeting;
> (b) an order that the councillor leave the place where the meeting is being held (including any area set aside for the public), and stay out of the place for the rest of the meeting;
> (c) if the councillor fails to comply with an order under paragraph (b) to leave a place—an order that the councillor be removed from the place.
> (3) Disorderly conduct is conduct of a councillor that contravenes the council's rules of procedure.
> (4) The rules of procedure are, under a local law, the rules decided by council for the conduct of the participants at meetings of the council or its committees (including rules about challenging decisions of the chairperson relating to observing or enforcing the rules, for example).
> (5) A decision under this section by either of the following persons is not subject to appeal other than under the council's rules of procedure—
> (a) the chairperson of the council;
> (b) a committee chairperson.
> *Note—*
> See section 226 for more information."

[123] The Chairperson made no reference to section 186A of the *COBA* when directing the applicant to leave the meeting. However, there was no need, under section 186A of

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127 The first respondent states at the first respondent's written submissions filed 30 July 2018 p 17, para 71 that "Acts of disorder include those set out in section 21(1) of the MLL. That includes the obstruction or interruption of the proper conduct of the meeting, the making of a statement that reflects adversely on the character or motives of a Councillor or the challenge of the rulings of the Chairperson except by way of a motion of dissent or a motion to leave the chair".

the *COBA* or otherwise, for the Chairperson to declare that the direction she gave was pursuant to that section or, indeed, pursuant to any section.

[124] The first respondent submits that on any sensible reading of the transcript and after listening to the audio, there has been "disorderly conduct" within the meaning of section 186A.[128] Acts of disorder include those set out in section 21(1) of the *MLL*. That includes the obstruction or interruption of the proper conduct of the meeting, the making of a statement that reflects adversely on the character or motives of a councillor or the challenge of the rulings of the Chairperson except by way of a motion of dissent or a motion to leave the chair.[129]

[125] The first respondent submits that the evidence clearly shows that the applicant committed at least "an act", but on the proper interpretation multiple acts, of disorder within the meaning of section 21 of the *MLL* and therefore within section 186A(2) of the *COBA*.[130] The first respondent submits that the applicant, prior to the Chairperson directing her to leave the chamber, had been engaged in conduct which was in direct disobedience to the Chairperson's statements and comments and by reference to the audio, was raising her voice and shouting during the entire exchange. The first respondent submits that such behaviour is clearly conduct which is within the meaning of "disorderly conduct" within section 186A of the *COBA*.[131]

[126] The first respondent states that given section 186A of the *COBA* was specifically referred by the Chairperson on numerous occasions earlier in the meeting, there are grounds to consider that the section was or could be relied upon in that context.[132]

[127] The Chairperson was frustrated with the applicant's conduct throughout the meeting. An air of exasperation pervades the Chairperson's response to the applicant's conduct.

[128] It is noted that the Chairperson earlier in the meeting stated that the applicant's "continued conduct and answering back and disrespect for this place is disorderly conduct. One more incident and it will be noted in the Minutes under section 186A".[133]

[129] Later, but before the direction in question, the Chairperson did require that the applicant's conduct be noted in the minutes under section 186A. This was due to applicant stating that the Chairperson needs to be clear when she was going to be biased or not.[134] At that time the Chairperson stated:

> "You do not sit in this place and because you don't like a ruling show total disrespect and disregard for the Chamber and the Meetings Local Law and the rulings that I have given and clearly explained to you multiple times when you're raising the same point of order repetitively".[135]

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128 First respondent's additional submissions, p 10, para 31.
129 First respondent's written submissions filed 30 July 2018, p 17, para 71.
130 First respondent's additional submissions, p 9, para 30(a).
131 First respondent's written submissions filed 30 July 2018, p 17-18, para 75.
132 First respondent's written submissions filed 30 July 2018, p 17, para 69.
133 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 9.
134 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 26.
135 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 26.

[130] There is no doubt that the Chairperson, during the meeting, was aware of her powers pursuant to section 186A of the *COBA*.

[131] However, when the Chairperson directed the applicant to vacate the chamber she did so without reference to section 186A of the *COBA,* but in the following terms:

> "… you are hereby suspended from the service of the chamber for a period of eight days. You are to vacate the Chamber".[136]

[132] It is clear that the Chairperson directed the applicant to leave the meeting, she did not believe that she was sourcing her power to do so from section 186A of the *COBA*. That is obvious from her reference to the *MLL* in the context of directing the applicant to leave:

Chairperson:	Councillor Johnston –
Applicant:	You've heard me –
Chairperson:	– under the Meetings Local Law. I have given you a direction to leave.[137]

[133] The Chairperson also refers to giving the applicant a final warning and the applicant being directed to "leave this place" as she was suspended.[138] Warnings and suspension are not part of section 186A of the *COBA* but rather form part of the process of suspending a councillor pursuant to section 21 of the *MLL*.

[134] It is apparent that the Chairperson regarded that she gave a lawful direction to leave the chamber which the applicant repeatedly failed to comply with; however, that direction to leave the chamber was predicated on the basis that the applicant had been suspended for eight days:

> "Chairperson: You have been directed to leave this place, the Council Chambers, as you are suspended".[139]

[135] The applicant was not ordered to leave the place where the meeting was being held and stay out of the place for the rest of the meeting.[140] Rather, the applicant was suspended from the service of the Chamber for a period of eight days, then directed to leave the chamber. In relation to this issue the first respondent submits:

> "33. The evidence also reveals that the direction was clearly to remain out of the chamber. *Inter alia* at about line 4 on page 41 of the transcript (page 55 of the exhibits), the Chair states that the Councillor is suspended from the service of the Chamber for a period of eight days. That is repeated on a number of occasions. That can only be sensibly taken to be a direction that the Councillor remain out of the chamber for the remainder of that meeting

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136 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.
137 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.
138 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.
139 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 41.
140 *City of Brisbane Act 2010* (Qld) s 186(2)(b).

> (which is all that is required) and also for longer (which is irrelevant for present purposes).
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> 34.However, and in any event, the Council also submits that a direction was given by the Chair for the Councillor to be removed from the place under s. 186A(2)(c) (at the top of page 42 of the relevant transcript, page 56 of the exhibits)."

[136] I do not accept the first respondent's analysis.

[137] The direction of the Chairperson was that the applicant was suspended for eight days. The subsequent direction to vacate was dependant and corollary to this. In determining whether a valid section 186A direction was given, the entirety of subsection (2)(b) must be considered:

> "(b) an order that the councillor leave the place where the meeting is being held (including any area set aside for the public), and stay out of the place for the rest of the day."

[138] Section 186A provides the Chairperson the power to order/direct the applicant to leave the meeting. However, the Chairperson can only order/direct the applicant to stay out of the meeting place for the rest of the day, and not suspend the applicant from the service of the chamber for a period of eight days and to vacate the chamber.

[139] There is no power pursuant to section 186A of the *COBA* to suspend the applicant from the chamber for eight days. I do not accept that the Chairperson's reference to a suspension of eight days can only be sensibly be taken to be a direction that the applicant was to remain out of the chamber for the remainder of the meeting. Further, it is not irrelevant that the order included a suspension for eight days. It is important that a suspension for eight days of a democratically elected councillor needs to be done in accordance with a statutory power.

[140] At no time did the Chairperson cap the time that the applicant had to stay away from the meeting until the end of the day.

[141] Accordingly, no valid direction was made pursuant to section 186A(2)(b) of the *COBA* by the Chairperson. It was not contemplated by the Chairperson to make such an order and the preconditions of the order was not made.

Section 53 of the MLL

[142] The first respondent submits that this section 53 of the *MLL* clearly gave the Deputy Mayor the ability to raise a point of order exactly in the fashion that was done and request a ruling.[141]

[143] Section 53 of the *MLL* provides:

> "(1) A councillor who—
> (a) considers that the chairman or a councillor has breached the requirements of any Act, council policy or this local law; or

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141 Affidavit of Nicole Johnston sworn 3 May 2018, exhibit B, p 40.

(b) considers that the chairman or a councillor has committed an act of disorder; or

(c) desires a ruling by the chairman in relation to a matter upon which the chairman is required or entitled to make a ruling under any Act, this local law or Standing Rules; may, subject to subsection (2), at any time interrupt the debate and direct the attention of the chairman to it by stating the matter complained of ("point of order") and request a ruling thereon by the chairman.

(2) If the chairman is speaking, a councillor who wishes to raise a point of order shall wait until the chairman has finished speaking.

(3) If a point of order raised under subsection (1) is accepted by the chairman, then-

(a) the councillor who was speaking at the time shall immediately cease the debate; and

(b) both the councillor who was speaking at the time and the councillor who raised the point of order shall be seated.

(4) Only 1 point of order shall be placed by a councillor before the meeting at any one time.

(5) No debate is to occur on a point of order.

(6) Once a point of order is properly disposed of, a further point of order may be raised, provided it is not the same or a repetition of a point of order already disposed of earlier in the meeting (an "improperly raised point of order").

(7) Once the point or points of order have been disposed of, the chairman shall determine how the debate shall be resumed.

(8) It is not a valid point of order for a councillor to object to an answer merely because that answer is not to that councillor's satisfaction.

(9) If the chairman forms the view that a councillor is obstructing the meeting by making excessive points of order during another councillor's speech, then the chairman may rule that no further points of order be made by the offending councillor during the remainder of the other councillor's speech."

[144] The Chairperson never referred to section 53 of the MLL when directing the applicant to leave the meeting. However, as stated earlier, a reference to the source of power is not required.

[145] The first respondent acknowledges that the *MLL* is silent as to the Chairperson's ruling and powers, however, submits that it clearly provides that the Chairperson has complete discretion as to what shall occur as a consequence of such a request for a ruling. Further, given the terms of section 186A of the *COBA*, the first respondent submits that it clearly gives the Chairperson the discretion to direct a member to leave in the event of an act of disorder.[142]

[146] The first respondent compares the terms of section 53 of the MLL with section 21 of the MLL and section 186A of the *COBA* and submits the fact that section 53 is the relevant section is also highlighted by the fact that section 21 speaks of a power of the

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142 First respondent's written submissions filed 30 July 2018, p 19, para 79.

Chairperson's representative to direct a councillor to leave: whereas sections 186A and 53 speak of the Chairperson's powers.[143]

[147] Section 53 is a provision about points of order and how they are to be raised by a councillor. Section 53 does not give the Chairperson complete discretion as to what shall occur as a consequence of a request for a ruling on a point of order, or the making of a ruling.

[148] Section 53 alone does not give the Chairperson the power to direct a councillor to leave a meeting of the Council. It cannot be read into section 53 any power, much less an unlimited power, for the Chairperson to take action consequential on a point of order.

[149] The source of power for any consequential action can and must be found otherwise:

a. a point of order is the question or complaint on which a ruling is requested;[144]

b. the references in section 53 of the *MLL* to disposing of a point of order refers to the Chairperson ruling on the point of order;

c. sections 53(7) and 53(9) of the *MLL* provide the Chairperson with certain powers consequential on a point or points of order being raised (powers not extending to directing a councillor to leave a meeting);

d. the text of section 53 does not otherwise provide any power (to the Chairperson or anyone else) to take consequential action;

e. section 53 must be read in the context of the *MLL* as a whole which includes:

i. section 54 (headed "Points of order – how dealt with"), which provides certain rules for dealing with points of order raised under section 53.

ii. section 54 has a footnote referring specifically to section 21 of the *MLL*; and

iii. the specific powers given by section 21 of the *MLL* whereby a councillor can be suspended up to eight days upon committing an act of disorder and also directed to leave.

[150] Further the *MLL* derives its validity from the *COBA*, and also provides "rules of procedure" for the purposes of the *COBA*. The *COBA* includes an express power in the Chairperson under the section 186A to deal with "disorderly conduct" and order that a councillor leave the place where the meeting is being held and stay out of the place for the rest of the day.

[151] There is nothing in the text of section 53 of the *MLL* to warrant reading into this section any power to take action consequential on a point of order; nor is that necessary or justified when section 53 is read in its context.

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143 First respondent's written submissions filed 30 July 2018, p 19, para 80.

144 See, for example, *City of Brisbane Act* 2010 (Qld) ss 53(1), 53(4) and 53(9).

[152] Even if section 53 was relevant to the present case, then section 21 of the *MLL* or potentially section 186A of the *COBA* would need to be engaged; these are the provisions that expressly provide powers for a councillor to be directed to leave a meeting.

[153] Section 53 of the *MLL* did not provide the Chairperson the power to direct the applicant to leave the meeting.

Summary

[154] The jurisdiction of the CCRP is dependent upon the existence of a lawful or valid direction made by a Chairperson to leave a meeting.

[155] The Chairperson did not make a lawful or valid direction for the applicant to leave a meeting of the Council.

[156] There cannot be a failure of a councillor to comply with a direction to leave, and hence the CCRP cannot have jurisdiction under the Part 6 Scheme, unless the Chairperson made such a direction in the due exercise of the Chairperson's powers to make such directions.

[157] Once the Chairperson exceeded her jurisdiction, the direction was, in law, not a direction at all.[145] Accordingly, the CCRP had no jurisdiction to make its finding.

[158] As there was no failure by the applicant to comply with a relevant direction to leave the meeting, the Decision fell outside the scope of the Division 6 Scheme of the *COBA* and hence, by virtue of section 178(2), outside the scope of the CCRP's jurisdiction.

[159] I find that, as per the applicant's application:

a. the Decision exceeded the CCRP's jurisdiction because:

    i. by virtue of section 178(2) of the *COBA*, Chapter 6, Part 2, Division 6 of the *COBA* does not apply, with the result the CCRP has no jurisdiction in respect of the conduct of councillors at a meeting of the first respondent except for a councillor's failure to comply with a direction to leave made by the Chairperson of the meeting; and

    ii. a jurisdictional fact, namely that the applicant had failed to comply with a direction of the Chairperson to leave the meeting the subject of the Decision did not exist because the Chairperson's purported direction to leave was not made in accordance with any power of the Chairperson to direct the applicant to leave;

b. further, in respect of the Decision, the CCRP failed to exercise its jurisdiction because it failed to inquire into the presence of a jurisdictional fact, namely whether the applicant had failed to comply with a direction of the Chairperson to leave the meeting the subject of the Decision.

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145 *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at [53].

[160] I accept the applicant's submission that the CCRP has entertained a matter of a kind which lies outside the theoretical limits of its functions and powers; it has acted in the absence of a jurisdictional fact and it has disregarded a matter that the *COBA* required be taken into account as a condition of jurisdiction.[146] Accordingly, the CCRP did not have jurisdiction to make the Decision. Jurisdictional error has occurred.

[161] The applicant seeks orders of relief pursuant to the *JRA* and/or section 10 of the *CPA* and/or the Court's inherent jurisdiction.

[162] As noted earlier, the *JRA* does not apply; orders pursuant to the *JRA* are not available.

[163] In *Johnston*, the applicant also sought a declaration pursuant to section 10 of the *CPA* and/or the Court's inherent jurisdiction. Alan Wilson J discussed what the proper form of relief should be:

> "[70] Where legislation purports to exclude all forms of review in that way, the supervisory jurisdiction of the Supreme Court to rectify jurisdictional error remains alive and, the High Court has said in Kirk, may be exercised through the grant of prerogative writs. The proper relief to be granted in Queensland in that event is, however, a little uncertain – as the decision of the Court of Appeal in *Northbuild Construction*, also mentioned earlier, shows.
>
> [71] As discussed by all three members of the Court of Appeal, s 41 provides that prerogative writs are no longer to be issued by the Court. Chesterman JA
> suggested in passing, however, that the effect of s 41 is not to abolish the Court's inherent power to grant prerogative relief in situations, as here, that fall within the ambit of Kirk. In other words, where the *JR Act*'s application is excluded by the relevant Act, s 41 cannot apply, but the Court's inherent power to grant prerogative writs remains intact. McMurdo P favoured relief under s 10 of the *Civil Proceedings Act*. White JA appeared to favour a similar kind of relief, albeit under s 119 of the *Supreme Court of Queensland Act* 1991.
>
> [72] Councillor Johnston has sought a declaration that the decision is void, either in the Court's inherent jurisdiction or pursuant to s 10 of the *Civil Proceedings Act* 2011 (Qld). That legislative provision for the making of declaratory orders applies where the applicant seeks declaratory relief only, rather than in addition to other relief, which is not the case here; but declaratory relief is not precluded as a remedy where prerogative relief is available,29 and the Court's discretion to make a declaration is extremely wide and only limited by its discretion.
>
> [73] The nature of the proper form of relief is, it seems to me, of technical concern but not to a degree which should confound the Court and prevent

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146 Submissions of the applicant filed 25 June 2018, p 12, para 27 with reference to *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394 Muir JA (with whom Holmes JA and Ann Lyons J agreed) at [33] and [34] where *Craig v South Australia* (1995) 184 CLR 163 was discussed.

> the fashioning of appropriate orders. Declaratory relief, to the effect that the offending orders are void and will be set aside, meets the exigencies of the matter".[147]

[164] Like in *Johnston*, declaratory relief, to the extent that the offending order is void and set aside, meets the exigencies of this matter.

[165] The Decision is void and set aside.

Costs

[166] As the first respondent submits, the usual rules as to costs under the *Uniform Civil Procedure Rules* 1991 (Qld) apply,[148] that is, that costs follow the event.[149]

[167] I will give the parties an opportunity to consider these reasons before they are required to file and serve short written submissions on the question of costs. I encourage the parties to agree on a timetable for the exchange of written submissions and, if it is appropriate, then I will deal with the question of costs on the papers, unless either party requests a hearing. In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

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147 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [70]-[73].
148 First respondent's written submissions filed 30 July 2018, p 19, para 81.
149 *Uniform Civil Procedure Rules* 1999 (Qld) r 681(1).