SUPREME COURT OF QUEENSLAND

CITATION:	*Gilmour v Waddell & Ors* [2019] QSC 170
PARTIES:	**EDWARD GILMOUR** (applicant) **v** **STEVE WADDELL** (first respondent) **LOWRY BOYD** (second respondent) **STEPHANIE YERKOVICH** (third respondent) **GLENN HEDGES** (fourth respondent) **MATTHEW PAINE** (fifth respondent) **JOHN HANNAN** (sixth respondent) **MARK ROCHE** (seventh respondent)
FILE NO:	BS No 1678 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application for a Statutory Order of Review
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	5 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2019
JUDGE:	Ryan J
ORDER:	**1. The application is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – where the applicant's appointment as a volunteer member of the SES was revoked after an investigative and disciplinary process – whether decision lawfully made – whether decision a reprisal – whether the applicant had been afforded natural justice – whether the decision maker's decision was unreasonable *Judicial Review Act* 1991 (Qld) *Ainsworth v Criminal Justice Commission* (1992) 175 CLR

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Attorney General (NSW) v Quin (1990) 170 CLR 1
Kioa v West (1985) 159 CLR 550
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
Wednesbury Corporation v Ministry of Housing and Local Government (No 2) [1966] 3 WLR 956

COUNSEL: The applicant appeared in person
S Anderson for the respondents

SOLICITORS: The applicant appeared in person
Crown Law for the respondents

[1] The applicant's appointment as a volunteer member of the State Emergency Service was terminated after an investigation into allegations about his conduct.

[2] The applicant applied for a statutory order of review of the decision to terminate his appointment. He appeared for himself. Many of his complaints concerned the correctness of the decision and the reasons why his arguments against his termination ought to have been accepted.

[3] As was explained to the applicant, in an application for a statutory order of review, the court is concerned with whether a decision has been lawfully made, not whether a decision maker has made the correct decision. If an administrative decision has been lawfully made, then it is a valid decision – even if the court does not agree with it.

[4] For the reasons which follow, I am of the view that applicant has not made out any of the grounds for review. I therefore dismiss the applicant's application. I will hear the parties as to costs.

Statutory framework for appointment as an SES volunteer

[5] The *State Counter-Disaster Organization Act* 1975 established the State Counter-Disaster Organization and the State Emergency Service (SES).[1]

[6] The *Disaster Management Act* 2003 (DMA) repealed the *State Counter-Disaster Organisation Act* 1975 and "established" the SES.

[7] The *Public Safety Business Agency Act* 2014 (PSBAA) moved provisions relating to the SES from the DMA into the *Fire and Emergency Services Act* 1990 (FESA).[2] The PSBAA was assented to on 21 May 2014, that is, within the period of time which is relevant to this application.[3]

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1 This 1975 Act repealed the *Civil Defence Act of 1939*. The *Civil Defence Act of 1939* was originally entitled the *Air Raid Wardens Act of 1939*. By amendment in 1941 (*Air Raid Wardens Amendment Act of 1941*), it established "civil defence organisations" – the predecessors to the modern SES.

2 It made no changes to those provisions.

3 The PBSAA was designed to implement the recommendations of a review of the Police Service and the Department of Community Safety, which included the Queensland Fire and Rescue Service and Emergency Services Queensland. The review recommended the merging of those two last-mentioned services.

[8] Under section 84(2) of the DMA, the chief executive could; and under section 132(2) of the FESA, the Commission may, appoint persons to be an SES member "only if satisfied the person has the appropriate abilities to be an SES member".

[9] The legislation also included provisions to the following effect:

(a) The local controller's functions include the maintenance of "the operational effectiveness of the unit by ensuring … the unit performs its functions and other activities in a way that is consistent with departmental or local government policies about the performance of the functions and activities".[4]

(b) The Commissioner may issue codes of practice about the conduct or practice of SES members or other matters the Commissioner considers appropriate for the effective performance of the functions of SES members or SES units.[5]

(c) The Commissioner may delegate their function, power or responsibility to an appropriately qualified person.[6]

[10] Under section 25(b)(i) of the *Acts Interpretation Act* 1954 (AIA), a power to appoint a person to an office or position,[7] such as the power to appoint a person to the SES, includes a power to remove or suspend the person appointed to that office or position at any time.

[11] The enactment under which the decision was made to revoke the applicant's membership of the SES was section 132 of the FESA, read with section 25(b)(i) of the AIA.

[12] On 30 May 2014, the Commissioner's power to appoint, remove or suspend the applicant was delegated to Mark Roche via a special instrument of delegation. The delegation was to be exercised "in accordance with relevant policies and procedures of the Queensland Fire and Emergency Services".

Relevant policies and procedures

[13] The Code of Conduct applicable to the applicant was the Code of Conduct for the Queensland Public Service, dated 1 January 2011, made under the *Public Sector Ethics Act* 1994.[8]

[14] The SES has Business Management Directives dealing with misconduct by, and the suspension and discipline of, its volunteer members.

[15] Business Management Directive 10.0 *Disciplinary Processes* sets out the procedure which must be followed if it is suspected that a member of the SES has seriously breached the Code of Conduct.

[16] Under that directive, the Ethical Standards Unit (ESU) of Emergency Management Queensland is to "assess the matter and determine whether the matter should be investigated and if a show cause process is required".

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4 Section 135 FESA.
5 Section 147D FESA.
6 Section 153(1) FESA.
7 "Office" includes "position": Schedule 1 *Acts Interpretation Act* 1954.
8 By section 11 of the *Public Sector Ethics* Act such a code may apply to volunteers as this particular code did.

[17] A show cause process will be undertaken if an SES member has "engaged in proved (either beyond reasonable doubt or on the balance of probabilities) serious misconduct".

[18] The SES member will be given a stated period of time to respond in writing to the Notice to Show Cause. The ESU will make a recommendation to the Regional Director of Emergency Management Queensland as to whether the SES member should have their membership terminated, and the reasons for termination.

[19] Termination and suspension "should be used with care and caution".

[20] Business Management Directive 10.1 *Managing Misconduct Issues* states that SES Executives must ensure that all breaches or suspected breaches of the Code of Conduct are treated seriously and examined and documented as soon as possible. Investigations and management actions must be conducted fairly, impartially and in an unbiased way.

[21] The severity of the incident will determine the appropriate action to be taken. The directive states:

> "In the event of a serious breach of conduct (eg. harassing or bullying behaviours, or careless and reckless disregard for safety), the EMQ Regional Director can suspend the SES member whilst an investigation into the allegations is conducted by the [Department of Community Safety] Ethical Standards Unit … in conjunction with EMQ …"

[22] The directive concerning suspensions (Business Management Directive 26.4 *Suspension of Membership*) explains that suspension may be appropriate for more serious acts of suspected misconduct where suspension is an administrative process and not punishment for proven misconduct. Suspension may be considered where there is a reasonable suspicion that an SES member has engaged in serious misconduct, including but not limited to, a significant failure to comply with DCS, EMA and/or SES Operations Doctrine, policy or procedures.

[23] The directive sets out suspension procedures:

> "**5.2 PROCEDURES FOR SUSPENSION OF MEMBERSHIP**
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> The following procedure applies for suspending an SES member:
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> 1. The SES Local Controller advises the EMQ Area Director of the circumstances surrounding the requested suspension;
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> 2. The EMQ Area Director, on becoming aware of the matter, immediately reports the matter to the EMQ Regional Director;
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> 3. The EMQ Regional Director (or higher authority) will then decide whether the circumstances warrant the SES member being suspended, pending an inquiry or other process to determine findings in relation to the issues or allegations that have been raised. The EMQ Regional Director is to also report the matter to ESU who will provide advice on this matter.
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> 4. The EMQ Regional Director will advise the EMQ Area Director who will advise the SES Local Controller of any decision regarding suspension of an SES member;

5. Where possible, the SES Local Controller is to hand-deliver the letter to the SES member advising that he/she is being suspended, the reasons for the action and the period of suspension.

6. The ESU will conduct inquiries into the matter as required. This process may involve the EMQ Regional Director or an officer designated by ESU;

7. A copy of the suspension letter must be recorded on the SES member's personnel file;

8. EMQ Area Office will record the suspension details on the SES member's personnel file.

The SES Local Controller is to advise the SES member of the suspension only after they have received approval, in writing, detailing the suspension period from the EMQ Regional Director, via the EMQ Area Director. SES Local Controllers cannot delegate this responsibility.

If the outcome of any investigations following an SES member's suspension is to terminate the membership, the EMQ Area Office must ensure that the SES member's personnel file and the State approved volunteer information database is updated to reflect a termination date as at the date the SES member was placed on suspension."

[24] The directive explains that the matter is to be investigated while the member is suspended. Certain restrictions apply to a suspended member and the suspended member "may also be required to refrain from interaction with other SES members".[9]

[25] Periods of suspension may be extended in writing. The directive states that an extension is "only to permit further investigation of the incident/s".[10]

[26] Business Management Directive 26.5 *Cessation of Membership*[11] sets out the process for termination for misconduct:

"**5.3 TERMINATION**

Regional Directors can terminate all types of SES membership.

Termination of SES membership will be considered in the following circumstances:

- There is proven serious misconduct by the SES member, including but not limited to a significant failure to comply with any QFES policy or procedure, and SES Operations Doctrine;
- The SES member has been charged with a criminal offence that is considered by QFES to be relevant to the member's responsibilities in the SES;

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[9] Business Management Directive BMH 26.4 *Suspension of Membership*, paragraph 5.3.
[10] Ibid, paragraph 5.4.
[11] I was provided with version 3 of this directive, dated 24 April 2014.

- The SES member has been convicted of a criminal offence that is considered by QFES to be relevant to the member's responsibilities in the SES; and/or
- The SES member has failed to attend any SES activity or make contact with an SES Executive or Area Office for over seven (7) months (refer section 5.4 below).

The SES Local Controller may recommend an SES member's dismissal by forwarding a comprehensive report to the Regional Director through the Area Office, outlining the reasons for the recommendation …"

Circumstances leading to the investigation

[27] To understand the applicant's arguments, it is necessary to outline in some detail the circumstances which led to the investigation of his conduct and the steps taken during the investigative process.

Background

[28] The applicant joined the SES in March 1978. He trained with the Brisbane Metro Group, and held the rank of Senior Field Officer.

[29] The Metro Group scheduled a training exercise for new recruits on the HMAS Diamantina, a ship in dry dock, to be held on the evening of 20 May 2013.

[30] A few years earlier, in October 2010, the applicant had attended a similar training exercise on the HMAS Diamantina and noticed that certain cladding on the ship looked like asbestos cladding. At the time, he warned his team members about it and passed on his concerns to Deputy Group Leader Glenn Hedges.

[31] On 13 May 2013, a week before the Diamantina exercise, in the course of training new recruits about emergency lighting, the applicant told them to be aware of the asbestos cladding on the ship and not to disturb it. He told the recruits that they should take dust masks to the exercise. One of the recruits, Stephanie Keeley, asked where she might find dust masks. The applicant told her where he had last seen some and Ms Keeley went to look for them.

[32] While looking for the masks, Ms Keeley spoke to Mr Hedges and he became aware of the applicant's asbestos warning to the recruits.

Argument on 13 May 2013

[33] Mr Hedges called the applicant away from his training so that he, Group Leader Stephanie Yerkovich and Deputy Group Leader Matthew Paine could speak to him. The recruits were within hearing distance of their conversation.

[34] The applicant confirmed that he told the recruits about the presence of asbestos on the ship and advised them to obtain dust masks for the exercise. He was criticised by Mr Hedges and Ms Yerkovich for causing alarm to the recruits. Their conversation became heated.

[35] The applicant's version of the conversation is contained in his affidavit material. In essence, he considered himself to have been the victim of an unfair inquisition. He described those present as provocative. He claimed they did not want to listen to him. He alleged that Ms Yerkovich and Mr Hedges wished to hide the fact of the presence of asbestos on the ship. He threatened to report them to the inspectors of Workplace Health and Safety. He asserted that he was delivering a safety message to the recruits. He said he was "traumatised" by the "accusative tone" of the conversation.

Posts on 14 May 2013 and after 15 May 2013

[36] The day after the argument, the applicant posted a caution about the asbestos on the ship on the internal discussion page of the SES volunteer portal.

[37] Lowry Boyd, the Local Controller, called the applicant and directed him to take down his post. There was a dispute about whether the applicant heard the direction because of the poor quality of the phone line. Regardless, the applicant removed the word "asbestos" from his post and replaced it with the phrase "fibrous material".

[38] Mr Lowry posted a statement to the portal (as part of the thread) to the effect that there was no asbestos risk inherent in the exercise.

[39] On 15 March 2013, the applicant received an e-mail from Ms Yerkovich which refused him permission to attend the Diamantina exercise. Her email said, "I can not (sic) trust you to work in a team and to not undermine the exercise and management team by following your own agenda".

[40] A few days later, the applicant posted commentary on the portal which was intended for those participating in the Diamantina exercise. He said he had been suspended from the SES – the "true intention" being to stop him from passing on his safety concerns to other members of the group.

[41] He repeated his warning about asbestos and the need to use masks. He also attached correspondence between himself and Ms Yerkovich and others – some of which related to the 2013 Diamantina exercise and some of which related to the 2010 Diamantina exercise.

Formal complaints

[42] Ms Yerkovich, Mr Hedges and Mr Paine complained to Lowry Boyd about the applicant's conduct.

Stephanie Yerkovich's complaint

[43] In her written complaint, Ms Yerkovich stated that the discussion with the applicant "became heated and somewhat aggressive" and was overheard by new recruits and experienced Metro members.

[44] She alleged, among other allegations, that the applicant –

- exhibited poor judgment – because while he had a fair and reasonable concern about asbestos, he did not raise it with the exercise co-ordinator, Matt Paine nor

seek out "factual information regarding the exercise" before he acted to warn the recruits;

- did not follow the chain of command, which was "disappointing" because it had been explained to the applicant "following the last grievance in February";
- was "overly aggressive" towards her;
- was disruptive;
- would not calm down;
- threatened to report her to the safety regulators;
- caused her to feel threatened;
- asserted that he did not have to follow the chain of command because it was a safety issue;
- took nothing away from the discussion because on 14 May 2013 he posted his concerns about asbestos and the need for dust masks on the portal;
- had the potential to undermine "our" leadership and the exercise in general; and
- was not a team player.

[45] She did not think it tenable for the applicant to remain as a member of the Metro Group. She referred to the applicant's history of "disruptive behaviour" (see below) and stated her wish for him to be suspended, pending an investigation into the incident, and to show cause why he should remain in the SES.

Glenn Hedges' complaint

[46] Glenn Hedges complained that the applicant had breached the chain of command "which subsequently resulted in aggressive behaviour directed towards Group Leader Stephanie Yerkovich and myself and caused a significant amount of disruption to our training night".

[47] He requested the applicant's immediate suspension from the SES until the incident was investigated. He was in no doubt that the applicant's continued presence in the short term would undermine Metro's leadership structure. He referred to the applicant's "interruptions" which included "yelling and a very uncomfortable degree of aggressiveness".

[48] He stated that the applicant lacked the ability to make sound judgments. That, and the applicant's "argumentative intolerance" to an alternative view, diminished confidence in the applicant's ability to work as a member of the Metro Group team.

Matthew Paine's complaint

[49] Mr Paine said he witnessed "several negative, abusive and threatening behaviours" by the applicant. At times, it was almost impossible to calm down the applicant. He described the applicant as menacing and aggressive. He referred to other behaviour of the applicant (unrelated to the Diamantina) which he considered to be disruptive and argumentative. He recommended the applicant's suspension until the matter was investigated.

The "history" referred to by Ms Yerkovich

[50] The applicant had been spoken to in October 2012 about the way in which his behaviour interrupted the activities of the Metro Group. The behaviour discussed then included his interrupting persons speaking, and sending e-mails or creating posts about SES matters which recipients found disruptive.

[51] Having been spoken to, the applicant agreed to follow all instructions and a certain procedure if he disagreed with the instructions. He also agreed to follow Metro Group's chain of command.

[52] A few months later, on 11 February 2013, Mr Hedges complained that the applicant did not show respect in email correspondence and that his emails were too long and full of unnecessary commentary. In response to that complaint, the applicant agreed to keep his future correspondence short and to the point. Mr Boyd told him that were he to continue to send "long winded" emails, disciplinary actions may be instigated.

The commencement of the investigation into the May 2013 complaints

[53] By letter dated 16 May 2013, the Regional Director of the South Eastern Region of Emergency Management Queensland, Michael Shapland, informed the applicant that complaints about him had been received which included "allegations of aggressive behaviour and failing to follow lawful directions". The applicant was told that the allegations would be investigated and that he would be later advised of the "full details" of the allegations made against him.

[54] He was suspended, upon receipt of the letter, until 18 August 2013.

[55] He was "requested to refrain from interaction with any other SES members" other than those within his immediate family. He was informed that he was bound by a duty of confidentiality and that he should discuss the matter only with a support person or legal representative.

Appointment of an investigator to investigate the complaints made about the applicant

[56] In June 2013, Steve Grant, the Executive Director of Operations (of the Department of Community Safety) appointed John Hannan (Area Director) to investigate, in accordance with the "terms of reference", the following matters:

> "Complaints made by Matthew Paine, Glenn Hedges, and Stephanie Yerkovich that Edward Gilmour behaved inappropriately towards them on 13 May 2013; and
>
> Complaint made by Lowry Boyd that Edward Gilmour failed to follow a reasonable direction given to him by or on around 14 May 2013."

[57] The appointment required Mr Hannan to provide a draft investigation report by 10 August 2013.

[58] Mr Hannan informed the applicant of his appointment by letter dated 5 June 2013. He told the applicant that if the allegations were substantiated, they may amount to breaches of the Code of Conduct. Mr Hannan informed the applicant of the way in

which the investigation would be conducted – referring to the principles of natural justice and procedural fairness. The applicant was again told not to discuss the investigation with any person other than his support person or legal representative. He was reminded not to contact a member of the SES.

The original terms of reference of the investigation

[59] On 29 July 2013, in writing, Mr Hannan framed the complaints against the applicant as follows:

> "You behaved inappropriately towards Stephanie Yerkovich, Glenn Hedges and Matthew Paine on the night of 13 May 2013, in that you spoke to them in an aggressive and disrespectful manner; and
>
> You failed to follow a reasonable direction from Lowry Boyd, Local Controller, Brisbane City SES Unit, in that having been requested to take down a thread on the Volunteer Portal relating to the exercise on the HMAS Diamantina (and having complied with this request) you then continued to put up subsequent threads relating to this matter."

[60] An interview with the applicant for the purposes of the investigation was scheduled. It took place on 12 August 2013.

The applicant's conduct in August 2013

[61] In August 2013, before his interview, having heard that further exercises on the Diamantina were to take place, the applicant visited the ship as a member of the public and took photographs of the asbestos cladding.

[62] The applicant added those photographs to Facebook on 6 August 2013, annotated as follows:

> "Visited HMAS Diamantina at the Maritime museum yesterday, I ran out of camera battery power taking photos but the whole ship is coated in Friable Asbestos which has been panted (sic) over. You can see for yourself how well that is working. I don't recall seeing any labelling during the 2010 ses exercise. The reason I visited was to find out what they were trying to hide by suspending me from the SES following my advice to members to wear a face mask and not to disturb any pipe or cladding with a material coating. I feel sorry for the volunteers. Interesting Visit but don't do it if your (sic) younger than 50."

Expansion of the terms of reference of the investigation

[63] On 10 August 2013, Mr Hannan wrote to the applicant informing him that the terms of reference of his investigation had been amended to include further allegations "as a result of" the applicant's actions since the initial complaints were made. The revised terms of reference were as follows:

> "1 The complaints made by Matthew Paine, Glenn Hedges, and Stephanie Yerkovich that Edward Gilmour behaved inappropriately towards them on 13 May 2013;

2 The complaint made by Lowry Boyd that Edward Gilmour failed to follow a reasonable direction given to him by on or around 14 May 2013;

3 Mr Gilmour posted items on the SES Volunteer Portal that were of a confidential nature, undermined the authority of the Group Leader and Local Controller in a public forum, and compromised the privacy of certain members of the Metro SES Group;

4 Mr Gilmour failed to follow the chain of command, despite being counselled to do so on two previous occasions;

5 Mr Gilmour discussed elements of the investigation into complaints against him with others not involved in the investigation, despite written directions from the Regional Director and Investigating Officer not to do so."

Applicant's requests for a copy of the written complaints

[64] On 11 August 2013, the applicant asked Mr Hannan (the applicant says for the thirteenth time) for a copy of the original complaints. He suggested that the complaints were "part of a pre-planned exercise in bullying" and that the failure to hand over the complaints was part of a cover up. In effect, he asked for particulars of the words spoken by him said to be disrespectful or aggressive.

The applicant's interview

[65] On 12 August 2013, Mr Hannan interviewed the applicant. Paul Kelly was present as an independent witness. The meeting was recorded and a copy of the recording was tendered.

[66] I note the following about the meeting:

- The applicant was told that the interview was confidential and that he was not to discuss matters raised in it with anyone other than his support person or legal representative.
- The interviewer told the applicant early in the interview that it concerned his "alleged inappropriate behaviour on 13 May" and his "failure to follow a reasonable direction the following day by a Mr Lowy Boyd".
- The applicant was asked to outline "his recollections of 13 May".
- It was apparent from his response that the applicant understood that the complaint about his behaviour was a complaint about his warning the recruits about asbestos and his "heated" conversation[12] with those senior to him about it.
- It was also apparent from his response that he was aware that the direction concerned his being asked by Mr Boyd to remove his post which used the words "friable asbestos".

[12] He described the conversation as "a little vague and heated".

- After the applicant outlined his recollection of 13 May 2013 and related events, the interviewer told him that he would go through the allegations made against him.
- The allegations put to the applicant included that he had –
  - behaved aggressively;
  - taken a step towards Ms Yerkovich;
  - refused to listen;
  - refused to accept the explanations of the executive members of the group;
  - not followed the chain of command (as he had been previously advised to do) and put his concerns on the portal;
  - received a direction from Mr Boyd to take "the thread" down;
  - placed confidential emails between himself and Ms Yerkovich on the portal, which were sent to a large number of people;
  - having been directed not to discuss the investigation with anyone other than a support person or legal representative –
    - sent an email to Shane Bunning making specific references to the investigation;
    - discussed matters relating to the investigation on Facebook in correspondence with "Julie";
    - discussed the matter by way of posting photos of the Diamantina on Facebook and referring to his suspension from SES duties.

[67] The applicant was asked whether, after the conversation on 13 May 2013, he considered using the chain of command and referring the matter to the Local Controller. He replied that it was a safety message and did not need "approval". He said, in effect, that the group leader lacked objectivity – so he decided to take his concern to "somebody independent", namely Workplace Health and Safety.

[68] He said he did not consider himself to have been aggressive on 13 May 2013, but he was certainly "intense" in saying that he would report the issue if the recruits were not told about the asbestos on the ship.

[69] The applicant told Mr Hannan that he did not have a copy of the original complaints. Mr Hannan told him that he gathered together statements and interview summaries into an investigator's report which would be sent to the decision maker (the Director-General). Then, the applicant would be provided with a copy of the report which would attach the original complaints and other evidence gathered in the process and asked for his response.

Request for copy of the complaints and extension of applicant's suspension: August 2013

[70] On the evening of 12 August 2013, that is, after the interview, by email to Mr Hannan, the applicant asked (he says for the fourteenth time) for a copy of the original complaints made against him. He asserted in that email that his disclosure about

asbestos was a public interest disclosure under the *Public Interest Disclosure Act* 2010 and suggested that the investigation was a reprisal for his complaint.

[71] On 16 August 2013, the applicant's suspension was extended (by letter) until 18 October 2013, on the ground that the investigation had not been finalised.

Posts and correspondence: September 2013

[72] On 1 September 2013, in a post addressed to "Folks", the applicant offered a safety suggestion about a "rumoured pending exercise". He said in the post that there was asbestos in several forms "everywhere" on the Diamantina. He asserted that it had been painted in an attempt to bond it but "you can see from the 60 plus photos on my Facebook page how well that is working". He complained in that post that his original safety message had been censored.

[73] On 1 September 2013, the applicant sent what he claimed was a Public Interest Disclosure to Mr Anderson (the Director General), members of Parliament and other SES volunteers, complaining that the Diamantina exercise was to be re-run and referring to the asbestos-related risk.

[74] On 3 September 2013, Steve Waddell (Regional Director EMQ) e-mailed the applicant and instructed him not to communicate with members about asbestos on the ship.

The findings of the investigation report

[75] Mr Hannan's findings were set out in the Investigation Report dated 3 September 2013.

[76] Mr Hannan did not find evidence to substantiate all of the allegations made against the applicant. However he did find evidence which, if accepted by the decision-maker, would substantiate the allegations that the applicant –

- behaved inappropriately towards Stephanie Yerkovich, Glenn Hedges and Matthew Paine on 13 May 2013;
- posted items of a confidential nature on the SES Volunteer Portal which undermined the authority of the Group Leader and Local Controller in a public forum;
- failed to follow the change of command; and
- discussed elements of the investigation with those not involved in it, despite being directed not to do so.

[77] In Mr Hannan's opinion, that conduct would constitute breaches of the Code of Conduct applicable to the applicant. He recommended that the decision-maker give consideration to what further action, if any, ought to be taken against the applicant.

September 2013 – October 2013: Status of the investigation report

[78] On 17 September 2013, the applicant met with Steve Waddell and Steve Grant (Executive Director of Operations EMQ, as Mr Waddell's manager). Brett Eichmann was present as an independent witness. Their conversation was recorded.

[79] Mr Grant told the applicant that –

- he wished to "resolve issues, put a line in the sand and move forward for the betterment of the SES and … everyone involved";
- the investigation report found that, "from a technical perspective", the applicant had engaged in the behaviour complained of;
- normally, the applicant would be given an opportunity to respond and the Director General would then determine "punishment";
- he had reviewed the investigation report but wanted to "pull back" from it to see whether he (and the applicant) could "work through a different course of action";
- in his assessment, there had been an opportunity to "resolve this through informal resolution as opposed to a formal investigation" – but that had not occurred;
- events escalated;
- he had been briefed about previous issues involving the applicant which "potentially [had] flavoured the decision to move to a formal complaint against [the applicant] for that one incident with the discussion about the dust mask";
- he had to advise the Director-General and did not think that it was appropriate to "move forward" with the investigative process;
- he had asked the Local Controller to consider providing the applicant with an opportunity to move to another group – because of the state of the relationship between the applicant and the executive of his current group;
- inquiries had been made with other Brisbane groups but they would not take the applicant – they were "gun shy";
- it had been recommended that the applicant could move to a group at Redlands or Moreton Bay.

[80] The applicant found the suggestion that he join a group outside Brisbane to be "unreasonable". He was "quite definite" that he wanted to return to Metro. He said: "The individual executive problem within Metro is their personality problem and they need to grow up and deal with it".

[81] Mr Grant attempted to explain to the applicant that there was "no appetite" for his return to the Metro Group or any other Brisbane group and the hope was to find a "space" for the applicant which allowed him to "contribute" to the SES.

[82] The applicant informed Mr Grant that he was likely to escalate matters through QCAT or judicial review. Mr Grant said he was trying to take a different tack to facilitate an outcome that gave the applicant an SES future. The applicant informed Mr Grant that he had lodged complaints with the CMC and Workplace Health and Safety.

[83] The applicant was given a copy of the investigation report at the end of the meeting.

[84] On 9 October 2013, the applicant met again with Steve Waddell and Steve Grant. Paul Kelly was present as an independent witness.

[85] Mr Grant confirmed that the applicant was not welcome at the Metro Group or any other Brisbane group. The groups felt that he could not be managed effectively: he challenged authority, argued every point and they could not work with him. The

applicant suggested that he was being punished in a de facto sense by his suspension from the SES without a resolution of the issues. He suggested that Mr Grant was supporting a bullying culture.

[86] Ultimately the applicant said that he was prepared to travel to Arana Hills and Mr Grant said he would see whether the Arana Hills controller was willing to work with the applicant.

Attempts to transfer the applicant to another SES Group

[87] Inquiries were made about the applicant's transfer to the Arana Hills Group. However the applicant would not agree to the conditions for his transfer to that group.

[88] With the applicant's consent, his transfer to the Goodna Group was explored.

[89] On 11 October 2013, Mr Waddell wrote to the applicant advising him that his suspension was extended until 31 December 2013, pending his placement elsewhere.

Decision to extend the applicant's suspension from the SES until 31 December 2014

[90] On 16 December 2013, Mr Waddell informed the applicant that he was considering extending his suspension until 31 December 2014, explaining that the purpose of temporary suspension was "to temporarily remove an SES Member from active service whilst there remains a risk that the proper and effective management of the SES may be prejudiced if that SES member were to remain in that role".

[91] Mr Waddell informed the applicant that he had been seeking an alternative placement for him since 11 October 2013. None was available. Mr Waddell sought submissions from the applicant about his proposed suspension from the SES until 31 December 2014.

[92] Ultimately, the applicant's suspension was extended until 31 December 2014 by letter from Mr Waddell dated 21 January 2014. The applicant was informed that Queensland Fire and Emergency Services would continue to seek a suitable placement for him elsewhere.

February 2014: The applicant filed an application for a statutory order of review of the decision to extend his suspension

[93] On 21 February 2014 the applicant filed an application for a statutory order of review of Mr Waddell's decision to extend his suspension until 31 December 2014.

March 2014: The applicant's conduct

[94] On 10 March 2014, the applicant posted to "Folks" (SES volunteers) his critical comments about three surveys being conducted by the SES. In making the post, he observed that his last communication from Mr Waddell did not restrict his communicating with other SES volunteers and explained that he had decided to run "a low volume email blog of issues (safety or conduct) you tell me about where you fear some reprisal for raising them".

[95] On 11 March 2014, Mr Waddell contacted the applicant about that post. He said SES volunteers questioned how the applicant obtained their email addresses. In reply, the applicant said that he sent the email to about 790 SES members. He asserted that the general instruction not to contact SES members (which he had received from Mr Waddell on 11 March 2014) was "insufficient" if not unlawful.

Investigation report "reinstated"

[96] On 27 June 2014, Mark Roche, the Acting Deputy Commissioner, Operations and Emergency Management, Queensland Fire and Emergency Services, wrote to the applicant. Mr Roche informed him that he was reinstating the investigation report because the applicant sent the bulk email to 790 SES members on 10 March 2014, despite having been directed not to send group emails without approval.

[97] Mr Roche set out the allegations made against the applicant and the findings of the investigator:

> **"Allegation 1** You behaved inappropriately towards Matthew Paine, Glenn Hedges, and Stephanie Yerkovich on 13 May 2013. It is alleged that on 13 May 2013, you acted in an aggressive manner towards Matthew Paine, Glenn Hedges and Stephanie Yerkovich, raising your voice in loud argument and not willing to listen to what was being said. Not only was your tone disrespectful towards these executive members, but you also threatened and sought to intimidate one of them.
>
> **Allegation 2** You failed to follow a reasonable direction given to you by Lowry Boyd on or around 14 May 2013 by undermining the authority of the Local Controller. It is alleged that Mr Boyd directed you to take down a thread relating to the exercise, you had posted on the SES volunteer portal, without any authorisation. You took down the thread but then posted other threads about the exercise, thereby undermining Mr Boyd's authority.
>
> **Allegation 3** On 13 May 2013, you posted items on the SES volunteer portal that were of a confidential nature; undermined the authority of the Group Leader and Local Controller in a public forum; and compromised the privacy of certain members of the Metro SES Group. You inappropriately accessed personal information of individual SES members which was their names and email addresses, and used it for unauthorised purposes, that is, you were not given permission to access the personal information. This was a breach of individual members' privacy and disregard for their privacy in order to advance your own purposes. You posted a message on the SES volunteer portal which disclosed individual members' names and email details. You also posted a thread on the SES volunteer portal challenging the Local Controller and thereby undermining his position in a public forum, before his peers. Your actions in this regard

were unauthorised and solely motivated for your own purposes.

Allegation 4 You failed to follow the chain of command, despite being counselled to do so on two previous occasions. On 13 May 2013, you took it upon yourself to give a direction to another SES member to get herself a dust mask because there was asbestos at the upcoming exercise site. You had no authority to give such direction. You were not involved in any of the organisation of the exercise and you were not authorised by the organiser or anyone else who had the authority, to do so. Even though you were well aware that the SES has a rank structure and who are those with the executive ranks, you deliberately chose to disregard the chain of command, despite you have been counselled on that same issue on previous occasions.

Allegation 5 You discussed elements of the investigation into complaints against you with others not involved in the investigation, despite written directions from the Regional Director and Investigating Officer not to do so. In correspondence dated 16 May 2013, you were requested to refrain from interacting with other SES members outside your immediate family. By letter dated 5 June 2013, you were also advised by Mr John Hannan the investigating officer, that the investigation was confidential and for you not to discuss with other persons apart from your support person or legal representative. Despite this, you:-

i) sent emails to an SES member discussing the investigation and your suspension;

ii) you corresponded via Facebook with another SES member discussing the investigation; and

iii) on or about 6 June 2013, you posted over 60 photographs on Facebook of the HMAS Diamantina making a disparaging statement about the SES along the lines of "*the reason I visited was to find out what they were trying to hid (sic) in suspending me from the SES following my advice to members to wear a face mask and not to knock or disturb any pipe or cladding with a material coating*".

The investigation report found on the balance of probabilities that:

- Allegation One can be substantiated.
- Allegation Two cannot be substantiated.
- Allegation Three, specifically wherein posting of items on SES Volunteer Portal that were of a confidential nature, and which undermined the authority of the Group Leader and Local Controller in a public forum, can be substantiated.
- Allegation Four can be substantiated.

- Allegation Five can be substantiated."

Applicant invited to show cause as to why he should not be disciplined

[98] Mr Roche informed the applicant that he considered the evidence presented in the investigation report about allegations 1, 3, 4 and 5 sufficient to require the applicant to show cause why disciplinary action should not be taken against him.

[99] Mr Roche invited the applicant to respond to the allegations and to further allegations that he had harassed and bullied EMQ staff.

Revocation of the applicant's appointment

[100] On 8 August 2014, having received and considered the applicant's response to the invitation to show cause as to why disciplinary action ought not to be taken against him, Mr Roche advised the applicant that he was considering revoking the applicant's appointment as a member of the SES. He invited the applicant to make submissions as to why his appointment should not be revoked. The applicant did so on 15 August 2014.

[101] On 21 August 2014, Mr Roche advised the applicant that he had decided to revoke the applicant's appointment as a member of the SES.

The amended application for judicial review

[102] On 25 August 2014, McMurdo J (as his Honour then was) ordered the applicant to file and serve an amended application for judicial review, to include all aspects of the decision of Mr Roche to revoke the applicant's appointment as a volunteer member of the SES.

[103] That applicant filed such an application on 19 September 2014 and that is the application which I heard.

[104] The application was expressed in the following terms:

> "Application to review the decision of Mark Roche that on (sic) 21 August 2014 to revoke the appointment of the Applicant Edward Gilmour as an SES member which was made according to Mr Roche under the current Queensland *Fire and Emergency Services Act* 1990 section 132.
>
> This portion is made under 'section 20 of the *Judicial Review Act* 1991'.
>
> Previous application to review the decision of (Steve Waddell) that he with a letter sent in January 2014 … without just reason and without observance of lawful procedures and without authorisation of an Act and involving an improper exercise of power and involving several and successive errors of law and in bad faith with a course of conduct that was or is likely to be fraudulent and unlawful; extended Edward Gilmour's suspension as an SES volunteer from the Queensland SES from January 2014 until 31st December 2014.
>
> OR

> Application to review the conduct pursuant to 'section 21 of the *Judicial Review Act* 1991' of Mark Roche under which (sic)"

[105] The applicant accepted at the hearing that Mr Roche's decision to revoke his membership overtook the decision to suspend him and it was appropriate for the court to consider only his complaints about the decision to revoke his membership.[13]

[106] The application is difficult to follow. The applicant's grounds appear to be these (all references to legislation are references to the *Judicial Review Act* 1991):

(a) there was no evidence or other material to justify the making of the decision (section 20(2)(h));

(b) there was no evidence or other material to justify the making of the proposed decision (section 21(2)(h));

(c) there was a breach of the rules of natural justice in relation to the conduct (section 21(2)(a));

(d) there was a breach of the rules of natural justice in relation to the decision (section 20(2)(a));

(e) the procedures which were required by law to be observed in relation to the conduct were not observed (section 21(2)(b));

(f) the making of the proposed decision would be an improper exercise of the power conferred by the enactment under which the decision is proposed to be made (section 21(2)(e));

(g) the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made (section 20(2)(e));

(h) an error of law was committed in the course of the conduct (section 21(2)(f)).

[107] The applicant's main complaints seem to be that Mr Roche could not have been satisfied that the applicant lacked the appropriate ability to be a member of the SES; that the applicant was a victim of reprisals; and that various persons had acted in bad faith in many ways.

[108] The applicant made further complaints about Mr Roche, including that he –

- made his decision "with prejudice", "without recognising the facts";
- acted "in excess" of section 23A of the *Public Sector Ethics Act* 1994 because volunteers were not subject to the disciplinary processes of that Act;
- acted "in excess" of sections 28, 29, 104 and 106(h) of the *Work Health and Safety Act* 2011;
- made his decision after an excessive period of time;
- amended the allegations in bad faith; and
- improperly exercised his power in re-opening the investigation.

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[13] Transcript 1 – 11, l 44 – 1 – 12, l 5; 1 – 17, l 23.

[109] The applicant also complained that his suspensions were *ultra vires* punishments and "vindictive" reprisals. He asserted that the offer to place him elsewhere was an improper exercise of discretionary power.

[110] At this stage, I will not attempt to link any of the applicant's complaints to the available grounds of review.

Relief sought by the applicant

[111] The applicant seeks relief in 22 forms including an order setting aside the decision to revoke his appointment (relief paragraph 1) and a variety of declarations including, for example, a declaration that his concerns about asbestos were reasonable.[14]

[112] The respondent submitted that this court should only concern itself with the relief sought in paragraph 1 of the application and costs.

[113] The respondent argued that the balance of the relief sought is inconsistent with the scope and purpose of judicial review.

[114] The respondent relied upon Brennan J's judgment in *Attorney General (NSW) v Quin,*[15] which makes the point that the court is concerned with the lawfulness of the exercise of administrative power – not with the correctness of its outcome:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.
>
> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise …"

[115] In this matter, it is simplest to leave the question of appropriate relief until the end of my decision on the application.

Consideration of the applicant's arguments

[116] Sifting through the applicant's arguments as framed in his application document, his outline of argument and oral submissions, and allowing the applicant considerable latitude, I have identified the applicant's arguments about the following as matters of *potential* relevance to the *lawfulness* of the decision:

- whether Mr Roche acted in excess of Part 5 of the *Public Sector Ethics Act* 1994 (error of law?);
- whether Mr Roche had committed an offence by terminating his appointment, having regard to sections 28, 29 104 and 106(h) of the *Work Health and Safety Act* 2011 applied (contrary to law?);
- whether the complaints made about the applicant, his suspension or his removal from the SES the were reprisals for a Public Interest Disclosure (contrary to law?);

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[14] The court is no longer concerned with the decisions suspending the applicant and will not refer to the relief sought in "relief" paragraphs 2, 3 and 4 of the application, which relate to the decisions to suspend the applicant.

[15] (1990) 170 CLR 1 at 35 – 36.

- the failure to provide the applicant with an opportunity, during his interview, to respond to the complaints as they were actually expressed by the complainants (breach of the rules of natural justice?);
- the adequacy of the particulars of the allegations (breach of the rules of natural justice?);
- the time taken to investigate the complaints and reach a disciplinary outcome (breach of the rules of natural justice?);
- whether the applicant was denied procedural fairness because the decision to revoke his appointment was made while his application for a statutory order of review of the decision to suspend him was pending (breach of the rules of natural justice?);
- whether the applicant was denied procedural fairness because the details of the "repeated requests of the Local Controller to terminate his membership" were not disclosed to the applicant (breach of the rules of natural justice?);
- the reasonableness of the decision to revoke the applicant's appointment (improper exercise of power because unreasonable?);
- whether it was relevant for the decision maker to take into account that senior members of the SES would leave the Metro Group were the applicant to return to it;
- whether it was relevant for the decision maker to take into account that the applicant had refused to accept the conditions of his transfer to another group (improper exercise of power because irrelevant consideration taken into account?);
- the significance of Mr Grant's opinion about the weakness of the allegations (improper exercise of power because unreasonable?).

[117] The balance of the applicant's arguments were complaints about the merits of the decision to revoke his appointment or unsubstantiated allegations of bad faith.

[118] I will deal with the applicant's potentially relevant issues/arguments one by one in the order in which I have listed them above and reframed by reference to an appropriate ground under the *Judicial Review Act*.

Was the applicant's termination unlawful because it was "in excess" of the *Public Sector Ethics Act* 1994 to the applicant's discipline?

[119] The applicant asserted that Mr Roche acted "in excess" of section 23A of the *Public Sector Ethics Act* 1994 (PSEA) and in that sense, acted unlawfully.

[120] As permitted by the PSEA, the Code of Conduct for the Queensland Public Service, dated 1 January 2011, applied to members of the SES as public sector volunteers.

[121] Part 5 of *Public Sector Ethics Act* 1994 (PSEA), "Disciplinary Action", did not: section 23A PSEA.

[122] However, Mr Roche did not purport to discipline the applicant under the PSEA. He did not therefore act in excess of the PSEA or otherwise apply the PSEA unlawfully in deciding to revoke the applicant's appointment to the SES.

Was the applicant's termination an offence under the *Work Health and Safety Act* 2011 and therefore unlawful?

[123] The applicant asserted that the revocation of his appointment to the SES was unlawful under the *Work Health and Safety Act* 2011 (WHSA). He relied upon sections 28, 29, 104 and 106(h) of the WHSA.

[124] "Workers" are defined in the WHSA to include volunteers.

[125] Sections 28 and 29 set out the duties of workers:

> "**28 Duties of workers**
>
> While at work, a worker must –
>
> (a) take reasonable care for his or her own health and safety; and
>
> (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
>
> (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and
>
> (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.
>
> **29 Duties of other persons at the workplace**
>
> A person at a workplace, whether or not the person has another duty under this part, must –
>
> (a) take reasonable care for his or her own health and safety; and
>
> (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
>
> (c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with this Act."

[126] Sections 104 and 106(h) of the WHSA are within Division 1 of Part 6 of the Act, entitled "Prohibition of discriminatory, coercive or misleading conduct".

[127] The effect of that Part, insofar as it is relevant to the applicant's argument, is that it is an offence for a person to dismiss or terminate a "worker" because the worker –

> "…

(h) raises or has raised or proposes to raise an issue or concern about work, health and safety with –

(i) the person conducting a business or undertaking; or

…

(vi) another worker; or

(vii) any other person who has a duty under this Act in relation to the matter; or

(viii) any other person exercising a power or performing a function under this Act."

[128] The applicant argued, in effect, that –

- the revocation of his appointment as a volunteer was because he had raised a safety issue (that is, the asbestos risk) with the other volunteers or with those conducting the business or undertaking; and
- the revocation was therefore unlawful under the WHSA.

[129] The applicant seemed to argue that raising the issue fell within his duties as a worker/volunteer.

[130] The respondent did not suggest that the WHSA did not apply to the applicant. Rather, acknowledging that it applied, and the duties it imposed, the respondent submitted that the applicant was not part of the "organisation"[16] of the exercise on the Diamantina.

[131] The respondent referred to the opening words of section 7 which state: "A person is a ***worker*** if the person carries out work in any capacity [including as a volunteer] for a person conducting a business or undertaking …" and argued –

- the duties only arose if the worker/volunteer was carrying out work for a person conducting a business or undertaking;
- the relevant "business or undertaking" was confined to the exercise on the Diamantina;
- the applicant was conducting training in relation to emergency lighting on 13 May 2013 – he had no specific role in the Diamantina exercise;
- he was therefore under no statutory duty in respect of it.

[132] I consider the respondent's argument to involve an unduly confined view of "carrying out work" and "business or undertaking".

[133] However, assuming that the WHSA has some relevance to the present matter, the difficulty faced by the applicant is that he must persuade the court that the reason his appointment to the SES was revoked was *because* he had raised concerns about asbestos.

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[16] Transcript 1 – 63, l 10.

[134] I am not so persuaded. It was not the fact that the applicant raised those concerns but the way in which he engaged with his superiors about his concerns which was at the heart of the complaints made against him.

[135] I acknowledge that the original complaints included a complaint that the applicant's concerns were, in effect, invalid. But in substance, the complaints were about his conduct towards those senior to him and that is how the allegations which formed the basis of the decision to terminate him were framed.

[136] I do not doubt that the applicant had some genuine (even if invalid) concerns about the asbestos risk associated with the exercise which *triggered* his conduct on 13 May 2013 and everything that flowed thereafter, including his ultimate removal from the SES. But that is not to say that the applicant's appointment was revoked *because* he raised an issue about safety. Nothing in Mr Roche's statement of reasons suggests that his appointment was terminated because he raised an issue about safety, nor was such an inference available on the evidence before me.

[137] The applicant also argues, as I understand him, that his posting an asbestos warning on the portal was in accordance with his obligations under the WHSA and that his appointment could not be revoked for doing so. The fact that the applicant posted an asbestos warning on the portal was not the subject of a substantiated allegation.[17] I therefore do not need to consider this argument further.

Was the applicant's termination a reprisal for a public interest disclosure and therefore unlawful?

[138] One of the main objects of the *Public Interest Disclosure Act* 2010 (PIDA) is to "afford protection from reprisals to persons making public interest disclosures".[18]

[139] The applicant asserted that his warning to the recruits about asbestos on the Diamantina was a public interest disclosure. He argued that the complaints made about him, his suspension and the revocation of his appointment were reprisals against which he was protected by the PIDA.[19]

[140] On the assumption that the applicant is a "public officer" under the PIDA,[20] the protection of the PIDA would apply to him were he to disclose information about –

- "a substantial and specific danger to public health or safety";[21]
- *in accordance with* section 17 of the PIDA.

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[17] Allegation 2, which concerned the applicant's posting a warning about asbestos without authorisation, was not substantiated. And the focus of allegation 3 was on the challenge to Lowry Body, and undermining Mr Boyd's authority, not on the warning *per se*.

[18] Section 4(d) PIDA.

[19] See Chapter 4 Protection.
This discussion concerns the applicant's statements about asbestos to the recruits on 13 May 2013 and his posts about it the next day. The applicant had already been suspended by the time he sent his e-mail, also about asbestos, on 1 September 2013. I note that the 1 September 2013 e-mail was sent to the Director General and members of the Legislative Assembly, as well as to SES volunteers, in an effort to comply with section 17 of the PIDA.

[20] A "public officer" is an employee, member or officer of a public sector entity. The information which may be disclosed under the PIDA by "any person" is dealt with in section 12.

[21] Section 13(1)(c) and 13(2) PIDA.

[141] A relevant disclosure is made only if the public officer –[22]

- "honestly believes on reasonable grounds" that the information is about a substantial and specific danger to public health or safety; or
- the information "tends to show" a substantial and specific danger to public health or safety.

[142] I acknowledge that there are issues around whether the applicant's "information" tended to show a substantial and specific danger to public health or safety or whether the applicant had reasonable grounds for such a belief. However, for the purposes of this argument I have assumed that there is no issue about those matters.

[143] Section 17 sets out how a public interest disclosure may be made:

> "**17 How disclosure to be made**
>
> (1) A person may make a disclosure to a proper authority in any way, including anonymously.
>
> (2) However, if a proper authority has a reasonable procedure for making a public interest disclosure to the proper authority, the person must use the procedure.
>
> (3) Despite subsection (2), if the proper authority is a public sector entity, the person may make the disclosure to –
>
> (a) its chief executive officer; or
>
> (b) for a public sector entity that is a department – the Minister responsible for its administration; or
>
> (c) if the proper authority that is a public sector entity has a governing body – a member of its governing body; or
>
> (d) if the person is an officer of the entity—another person who, directly or indirectly, supervises or manages the person; or
>
> (e) an officer of the entity who has the function of receiving or taking action on the type of information being disclosed.
>
> *Examples of officers for paragraph (e) –*
>
> …
>
> (4) This Act does not affect a procedure required under another Act for disclosing the type of information being disclosed.
>
> (5) If a public interest disclosure is properly made to a proper authority, the proper authority is taken to have received the disclosure for the purposes of this Act.

[144] The respondent submitted that a communication to *other volunteers* was not a public interest disclosure under the PIDA; and even if I were to find that the communication

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[22] Section 13(3) PIDA.

was a public interest disclosure, nothing in the reasons for the decision, or elsewhere in the evidence, provided a sound basis for a conclusion that the applicant's appointment as a member of the SES was revoked by way of reprisal for his disclosure.

[145] It is at least arguable that the SES had a reasonable procedure for making a public interest disclosure, namely disclosing the relevant information to the person assigned to do a safety assessment of an exercise, or via the chain of command and, under section 17(2), the applicant was required to use it.

[146] I note that in addition to warning the recruits about asbestos on 13 May 2013, the applicant told another SES member, Anita Condon, about his concerns. Ms Condon had, on 13 May 2013, apparent responsibility for the safety of the exercise.

[147] While the applicant may have complied with the SES's procedure for making a public interest disclosure in informing Anita Condon about his asbestos concerns, his warning (or direction or suggestion) to the recruits about asbestos was not in accordance with those relevant procedures. Nor was it a disclosure within section 17(3) PIDA because the recruits did not fall within the categories of persons listed in that sub-section.

[148] Accordingly, even if the applicant's warning to the recruits was a public interest disclosure in a general sense, the protection of the PIDA did not apply to him. Nor did the evidence suggest that the applicant's termination was a reprisal for the fact of his warning the recruits about asbestos. As discussed above, his warning the recruits may have triggered everything which followed but that is not to say that his warning the recruits was the reason for the termination of his appointment.

Was there a breach of the rules of natural justice?

[149] Several of the applicant's complaints which warrant consideration in this application allege a breach of the rules of natural justice.

[150] The rules of natural justice are concerned with procedural fairness.

[151] Natural justice requires a fair hearing, not a fair outcome (as judged by a person in the applicant's position). The focus is on the process not the actual decision.[23]

[152] Natural justice requires someone in the applicant's position to be informed of the accusations made against them and to be given an opportunity to state their case. It also requires the decision maker to be free from bias.

[153] The demands of natural justice depend on all of the relevant circumstances, including the nature of the process and its likely consequences. The expected standard of fairness rises as issues become more serious.[24]

Applicable procedure

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[23] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 160.
[24] *Kioa v West* (1985) 159 CLR 550 at 584 – 585.

[154] The procedures for the investigation and determination of complaints about SES volunteers are outlined above.[25]

[155] The application of the procedures involved (among other things):

- the appointment of an investigator (Mr Hannan);
- the investigation of the complaints during which the investigator obtained relevant evidence;
- the preparation of the investigation report, which included the evidence gathered by the investigator and the investigator's opinion about whether the evidence was *sufficient* to substantiate an allegation of a breach of the Code of Conduct;
- the consideration of the investigation report by the disciplinary decision maker (Mr Roche);
- the decision maker's *determination* of the substantiated allegations and whether the Code of Conduct had been breached;
- the decision maker framing formal allegations in accordance with his determination and by reference to the Code of Conduct;
- the decision maker's preliminary decision that the substantiated allegations were of such a nature as to warrant disciplinary action;
- the decision maker calling upon the applicant (who had a copy of the investigation report) to show cause as to why disciplinary action ought not to be taken against him;
- the decision maker's preliminary decision that the applicant's appointment to the SES ought to be revoked;
- the decision maker calling upon the applicant to show cause as to why his appointment ought not to be revoked.

The applicant was not given a copy of the complainants' written complaints before his interview with Mr Hannan: Was the applicant provided with a fair opportunity to respond to the complainants' written complaints?

[156] The applicant was not provided with the complainants' written complaints before or during his interview with Mr Hannan. Instead, as set out above, the interviewer put to the applicant for his comment an outline of the complaints which had been made against him. Although the investigator could have put the complaints in more detail, in my view, the complaints were put in sufficient detail as to enable the applicant to understand that which was alleged against him.

[157] In a related argument, the applicant complained that the allegations "changed" over time and that he was not permitted to respond to the allegations ultimately put to him (as framed by Mr Roche) during his interview with Mr Hannan.

[158] The "change" in the complaints was a consequence of the process outlined above.

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[25] The document appointing Mr Hannan as the investigator in the present case stated: "The investigation must be undertaken in accordance with the department's Human Resource Procedure – *Workplace Investigations"* and "The investigation should be undertaken having regard to the departmental publication *Workplace Investigations – A guide for investigators."* Those *Workplace Investigation* documents were not in evidence.

[159] The initial complaints were investigated and the investigator formed an opinion about them.

[160] On the basis of the investigation report, Mr Roche made a final decision about the evidence he accepted and the serious misconduct which it revealed. His decisions about those matters were reflected in the allegations in their final form. These were the allegations to which the applicant was invited to respond, to show cause as to why disciplinary action should not be taken against him.

[161] At the time he was invited to show cause, the applicant had been provided with the investigation report[26] which included the complainants' original statements and summaries of their interviews. He was therefore, at the show cause stage, provided with an opportunity to respond to the complaints as they had been written.

[162] The respondent invited me to consider the whole of the investigative process to determine whether the requirements of natural justice had been met in this context, relying on *Ainsworth v Criminal Justice Commission,* in which it was said:[27]

> "It is not in doubt that, where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if 'the decision-making process' viewed in its entirety, entails procedural fairness".

[163] Before the show cause stage, that is, at the interview stage, the applicant had been provided with an outline of the allegations against him and invited to respond to them. In my view, the outline was a fair representation of the written allegations made against the applicant.

[164] The applicant was provided with two further opportunities to be heard during the show cause process by which time he had been provided with all of the evidence against him, including the written complaints.

[165] The applicant has not articulated how it might be said that he suffered unfairness because it was not until the show cause stage that he was provided with a copy of the written complaints. For example, the applicant has not suggested that he was misled during the interview. Nor has he asserted that he would have responded in a materially different way had he been in possession of the written complaints during his interview.

[166] The applicant was not denied natural justice because it was at the show cause stage, rather than the investigative stage, that he was provided with the complainants' complaints in their written form. The decision making process in its entirety afforded the applicant procedural fairness.

Were the particulars of the allegations inadequate?

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[26] See affidavit of the applicant, dated 15 July 2014, paragraph "July 15 – EG4" (if indeed he did not already have a copy of it after his interview with Mr Grant): exhibited to the affidavit of Mark Roche, at page 308*ff*.

[27] (1992) 175 CLR 564 at 578.

[167] The applicant's complaint seems to be that the final allegations themselves did not recite the *evidence* of, for example, his inappropriate behaviour. He made a similar complaint during his interview.[28]

[168] This complaint confuses the allegations as framed with the evidence underpinning them.

[169] The allegations referred to the applicant's conduct in a short-hand, qualitative way – for example his "inappropriate" behaviour, his "aggressive" manner, his "disrespectful" tone, his "intimidation".

[170] But the applicant was not only given the allegations, he was also provided with the evidence upon which they were based.

[171] The applicant is not an unintelligent man. While he may not have agreed with the qualitative descriptors of his conduct, he would have appreciated the evidential basis for them.

[172] Having been provided with the allegations in final form and the investigation report, the applicant was sufficiently informed about the case he had to meet. He was given a fair opportunity to say all that he wished to say in response to it. His responses reflected his accurate understanding of that which was alleged against him. The applicant was not denied natural justice in this regard.

Was the applicant denied natural justice because of the time taken to reach a disciplinary outcome?

[173] The applicant's complaint about the time taken to reach a disciplinary outcome seems to be more of a complaint about the applicant's suspension than a complaint that, because of the passage of time, the applicant suffered injustice.

[174] The directives required the determination of complaints "as soon as possible". The directives provided for the suspension of the applicant's membership of the SES while the investigation was conducted.

[175] The history of the progress of the investigation is outlined above.

[176] In my view, the investigation proceeded at a reasonable pace –

- on 16 May 2013, the applicant was advised about the complaints and the proposed investigation and his appointment as a member of the SES was suspended until 18 August 2013;
- the investigator was appointed on 4 June 2013;
- the investigator was required to provide a draft report by 10 August 2013;
- before that date, on 6 August 2013, the applicant posted photographs of the Diamantina on his Facebook page, with comments about asbestos;
- on 10 August 2016, the applicant was informed that the investigation had been expanded to cover his conduct on 6 August 2013 and other conduct;[29]

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[28] For example, he complained during his interview that he had not been provided with "the words and actions" which were classed as aggressive.

[29] The applicant's interview on 12 August 2013 covered all of the allegations.

- because of that expansion, the investigator's draft report was not due until 24 August 2013;
- on 16 August 2013, the applicant's suspension was extended until 18 October 2013; and
- the investigation report was completed on 3 September 2013.

[177] Thereafter, the delay in resolving the complaints was hoped or intended to be to the applicant's benefit. As outlined above, at the meeting on 17 September 2013, an alternative to the disciplinary process was proposed to the applicant by Mr Grant – namely the applicant's placement at another SES group. Ultimately the meeting ended with
Mr Grant indicating that he would pursue alternative placement for the applicant and get back to him in another three weeks. While the applicant was not enthusiastic about this option, he acquiesced in it and the investigation report (that is, the disciplinary process) was put to one side while his alternative placement was explored.

[178] Mr Grant and the applicant (and others) met again on 9 October 2013. Mr Grant's approach was as it had been at their previous meeting. The applicant indicated that he was "prepared to go to Arana Hills". Mr Grant said that he would explore that option.

[179] On 11 October 2013, the applicant's suspension was extended until 31 December 2013 "pending his placement elsewhere".

[180] On 21 January 2014, the applicant's suspension was further extended until 14 December 2014 because of the difficulties in finding an alternative placement for him. The applicant would not tolerate that further delay. In February 2014, he took steps to bring the investigative process to a head by applying for a statutory order of review of the decision to suspend him.

[181] The applicant argued that his suspensions were not in accordance with "SES procedural doctrine".[30] He argued that his suspensions amounted to the de facto revocation of his SES appointment without allowing him an opportunity to be heard.

[182] The respondent submitted that the applicant's complaint about the time taken to conclude the investigative process could not properly be a ground of review because the investigation was suspended (rather than a lengthy process in itself) and "its length [was] not said to have had an impact on Mr Gilmour".[31]

[183] I anticipate that the applicant's response to that submission would be either that his suspension was for an ulterior purpose (namely his de facto termination) or that under the directives he could not be suspended for the purposes of finding an alternative placement.

[184] I am satisfied that Mr Grant was genuine in his desire to find a way for the applicant to continue as an SES volunteer notwithstanding his history with the Metro Group executives.

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[30] Transcript 1 – 29 – 1 – 30.
[31] Submissions on behalf of the respondents, para. 22.

[185] I am satisfied that Mr Grant explained to the applicant frankly and fully why he considered it appropriate to seek an alternative SES placement for him.

[186] I am satisfied that the suspension of the disciplinary process was intended for the applicant's benefit. I am satisfied that the investigation report was not "put to one side" for an ulterior purpose.

[187] Although somewhat reluctantly, the applicant acquiesced in his suspension from 18 October 2013 until 31 December 2013, which had the effect of delaying the disciplinary process.

[188] Even if his suspension for the purpose of finding an alternative placement was contrary to the directive, in all of the circumstances, particularly his acquiescence in it, this "breach" of the directive did not deprive the applicant of natural justice in any real sense.

Was the applicant denied procedural fairness because the decision to revoke his appointment was made while his application for a statutory order of review of his suspension was pending?

[189] In his written submissions, the applicant argued as follows:

> "11. The decision by Mark Roche (under direction) to reopen the investigation against Edward Gilmour while a Judicial Review case was already open was a vexatious intent in that the existing allegations were reworded with a different intent made for an improper purpose in that the Judicial Review against Steve Waddell and others for a lack of Procedural fairness against the decision of Steve Waddell was likely to succeed …"

[190] I have already dealt with the "rewording" of the allegations by Mr Roche and will say nothing more about that aspect of the complaint.

[191] As I understand the balance of his argument, the applicant contends that the reinstatement of the investigation report deprived him of the opportunity to succeed in his application for a statutory order of review of the decision to suspend his membership and was, in effect, improper or at least unfair.

[192] The contention that the investigation report was reinstated to thwart the applicant's likely success in his application for a statutory review of the decision to suspend his membership ignores the fact that it was the applicant's own conduct in March 2014 which promoted its reinstatement.

[193] Further, even if the applicant had been successful in his application for a review of the decision to suspend his membership, his success would have led to the revival of the disciplinary process – not his return to the SES.

[194] In no real sense did the reinstatement of the investigation report deprive the applicant of procedural fairness by denying to him the opportunity to pursue his application in relation to his suspension. The reinstatement of the investigation report ended his suspension and allowed the disciplinary process to conclude.

Was the applicant denied procedural fairness because he was not provided with the detail of the "repeated requests" of Mr Boyd to terminate his membership of the SES?

[195] In his written submissions, the applicant argued –

> "18. Mark Roche acting for an improper purpose or with vexatious intent:
>
> Furthermore within that same Executive Briefing Note 10th June 2014 is the statement which states '*Mr Gilmour's refusal to accept his suspension as just and thereby ignore the terms of it gives cause to again consider the initial complaints against him and the repeated requests of the Local Controller to terminate his membership*'.
>
> The communication requests from the Local Controller Lowry Boyd to dismiss Edward Gilmour are missing from the discovery or disclosure documents.
>
> In that briefing note, it gave a direction and licence to Mr Mark Roche to effect a **vindictive process** for an **improper purpose** of pretending to give the due process (Procedural Fairness) after the fact. Procedural Fairness that was missing from the investigation of the John Hannan … and the subsequent sequence of administrative decisions for suspensions made by Steve Waddell …"

[196] The Executive Briefing Note was in evidence.

[197] The "repeated requests" referred to by the applicant were those referred to under the heading "Issues" in the briefing note as follows –

> "As allowed by doctrine (BMH 26.5 sect 5.3), the Local Controller of Brisbane SES has twice formally requested the termination of Mr Gilmour's membership for behavioural issues, not following the chain of command and potentially bringing the SES into disrepute."

[198] Section 5.3 did not "allow" a Local Controller to request the termination of the applicant's appointment. At best, a Local Controller might *recommend* a member's "dismissal" but only if they forwarded a report outlining the reasons for their recommendation.

[199] However, the termination of the applicant's appointment to the SES did not occur on the strength of any request from the Local Controller. In the present case, the termination of the applicant's appointment was because of his proven serious misconduct. And the evidence confirmed that the relevant procedures had been followed.

[200] The applicant was well aware of Mr Boyd's attitude towards him. Mr Grant discussed it with him during their conversations about there being no appetite for his return to the Metro Group or placement with any Brisbane group. It was confirmed in writing in the letter from Mr Waddell to the applicant on 1 January 2014 which stated that the Brisbane SES Unit Local Controller (Mr Boyd) refused to accept his membership.

[201] But regardless of Mr Boyd's attitude towards the applicant, the Executive Briefing Note conveyed Mr Grant's change in tack to Mr Roche and referred to Mr Boyd's requests almost incidentally. Mr Boyd's stated reasons for requesting the applicant's termination

("behavioural issues, not following the chain of command and potentially bringing the SES into disrepute") simply summarised the substantiated allegations and added nothing new.

[202] On the evidence, I am satisfied that, until the applicant's conduct in March 2014, Mr Grant was doing all he could to find an alternative placement for the applicant to avoid the disciplinary process which might well lead to the applicant's termination.

[203] After the applicant's March 2014 conduct, Mr Grant, for the reasons stated (that is, the applicant refusing to accept his suspension as just and his ignoring its terms) considered there to be no alternative to the disciplinary process.

[204] That the applicant was not provided with the detail of Mr Boyd's requests for his termination did not result in practical injustice to the applicant.

[205] The applicant's termination was not based on Mr Boyd's request for it. It was based upon the substantiated allegations and occurred after appropriate procedures had been followed.

Was the decision unreasonable?

Unreasonableness

[206] An argument that a decision is "unreasonable" is often referred to as one raising the *Wednesbury*[32] unreasonableness ground. That ground has been considered by the High Court on many occasions, including in *Minister for Immigration and Citizenship v Li*.[33]

[207] The focus of a review of the reasonableness, or unreasonableness, of a decision is on whether the decision is so unreasonable that it lacks intelligent justification in all of the relevant circumstances.

[208] The legal standard of unreasonableness is to be considered by reference to the subject matter, scope and purpose of the statute conferring the power.

[209] A court considering an argument that a decision is unreasonable is not undertaking a merits review. If a decision may be reasonably justified, then it is not an unreasonable decision, even if a reviewing court might disagree with it.

[210] The plurality in *Li* said:[34]

> "A standard of reasonableness in the exercise of a discretionary power given by statute had been required by the law long before the first statement of '*Wednesbury* unreasonableness' …
>
> … when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice. That is what is meant by 'according to law'. It is to be legal and regular, not arbitrary, vague and fanciful …

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[32] A short hand reference to *Wednesbury Corporation v Ministry of Housing and Local Government (no 2)* [1966] 3 WLR 956.
[33] (2013) 249 CLR 332 at [63] – [76].
[34] Ibid at [65] – [76].

> … there is an area within which a decision-maker has a genuinely free discretion. That area resides within the within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be applied for that of a decision-maker …
>
> … it is necessary to look to the scope and purpose of the statutory conferring the discretionary power and its real object … The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.
>
> … Unreasonableness is a conclusion which may be applied to a decision which lacks an evidence and intelligible justification."

Statutory subject matter, scope and purpose

[211] The relevant statute (the FESA) sets out the functions of the SES at section 130 which include, but are not limited to, performing rescue or similar operations in an emergency situation.

[212] The legislation requires the appointment of persons with appropriate abilities – and only such persons – to the SES.

[213] Having regard to the legislation (especially section 135) it is reasonable to assume that suitable appointees will have appropriate physical and psychological ability to perform the functions of the SES.

[214] It is also reasonable to assume, having regard to the hierarchical structure of the SES and the nature of its work, that appointees must be able to work as a team and accept direction and authority in all contexts so as to ensure members work as a team and accept direction and authority without question, in an emergency situation. Appointees who are not so able are a threat to the operational effectiveness of an SES group.

May Mr Roche's decision be intelligently justified?

[215] The respondent argued that there was no indication of unreasonableness in Mr Roche's decision. It was based on the material provided to him, which had also been provided to the applicant. He had taken into account the applicant's submissions. His decision was consistent with the statutory scheme. The objects and purpose of the statutory scheme could not be achieved were SES volunteers unable to work together. The statutory discretion was wide. No error in the decision making process had been identified.

[216] I am of the view that the decision to revoke the applicant's appointment to the SES was not unreasonable in the relevant sense.

[217] The particular misconduct alleged against the applicant occurred against the background of previous warnings.

[218] In his statement of reasons, Mr Roche explained that he had taken into account that certain other members of the SES were not prepared to work with the applicant in the Metro Group. He also took into account that attempts to transfer the applicant to another SES group had not been successful for reasons which included the applicant's unwillingness to accept certain conditions which had been placed upon his transfer to a certain group. The applicant argues that those considerations were irrelevant.

[219] Having regard to the statutory context and the serious nature of the work of the SES, it was open to Mr Roche to take into account the risks to the operational effectiveness of an SES group were the applicant placed with it. The risks to teamwork and authority were very relevant ones.

[220] In my view, it cannot be said, having regard to the challenging nature of the applicant's conduct, that the decision to revoke his appointment to this voluntary organisation, which undertakes important emergency work and which depends for its efficiency on respect for authority and adherence to direction from superiors, was not intelligently justified.

What was the significance of Mr Grant's opinion about the weakness of the allegations?

[221] Mr Grant told the applicant, on 17 September 2013, that he would have preferred the "issue of the dust masks" to have been dealt with by way of a "conciliatory process" rather than an investigative process.

[222] That is not inconsistent with the notation which appears on a post-it note on the Executive Briefing Note which was in these terms:[35]

> "Allegation I in my view is very weak and I believe does not help in moving this forward.
>
> – need to discuss,
>
> Cheers Steve G[indecipherable]"

[223] The applicant argues, in effect, that Mr Grant's expressed opinion about the weakness of Allegation 1 supports the contention that the decision to revoke his appointment was an unreasonable one.

[224] Of course, Mr Grant expressed that opinion before the applicant's conduct in March 2014.

[225] However, even if Mr Grant's opinion about the weakness of Allegation 1, or the preferable way to resolve matters, might be thought to be reasonable, the question for me is whether Mr Roche's decision was an unreasonable one in the sense that it lacked intelligent justification in all of the circumstances.

[226] For the reasons I have already given, I do not consider the decision to be unreasonable or without intelligent justification – even though another decision or approach might have been open.

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[35] Exhibit MDR 2, Affidavit of Mark Roche, page 3. It is reasonable to assume that the post-it note post-dated the Executive Briefing Note.

[227] As Brennan J explained in *Attorney General v Quin* (footnotes omitted):[36]

> "… the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined. As Professor Wade explains … in a passage cited with approval in *Reg v Boundary Commission; ex parte Foot*:
>
> > 'The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.'"

Conclusion

[228] The applicant has not established any of the grounds for review.

[229] The application is dismissed.

[230] I will hear the parties as to costs.

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[36] (1990) 170 CLR 1 at 36 – 37.