

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Lewis v Deputy Commissioner Lindford & Anor* [2020] QCAT 98

PARTIES: **MATTHEW LEWIS**
(applicant)

v

DEPUTY COMMISSIONER TRACY LINDFORD
(first respondent)

and

CRIME AND CORRUPTION COMMISSION
(second respondent)

APPLICATION NO/S: OCR159-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 11 March 2020

HEARING DATE: 30 January 2020

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS: **The disciplinary finding of misconduct with respect to matter 1 is confirmed.**

CATCHWORDS: POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND – where a police officer sought review of a finding of misconduct following a disciplinary hearing – where it was alleged the police officer had used excessive force – where it was alleged the police officer failed to warn the subject of the proposed use of a taser in circumstances where it was reasonably practicable to do so before firing – where the police officer claimed it was not reasonably practicable to give a warning – where it was alleged the police officer had placed his foot on the subject’s head – where that was denied by the police officer – where the tribunal reviewed body wear camera footage – where the finding of inappropriate behaviour and misconduct was confirmed

Crime and Corruption Act 2001 (Qld), s 219G, s 219H
Police Service Administration Act 1990 (Qld), s 1.4

Aldrich v Ross [2000] QCA 501
Briginshaw v Briginshaw (1938) 60 CLR 336

Chapman v Crime and Misconduct Commission & Rynders [2012] QCATA 16
Hearn v Assistant Commissioner Carroll [2012] QCAT 412
Rowe v Kemper [2008] QCA 175

**APPEARANCES &
 REPRESENTATION:**

Applicant: L J Marshall instructed by Gilshenan & Luton
 First Respondent: M Nicholson instructed by QPS Legal Unit
 Second Respondent: D Caughlin, legal counsel for Crime and Corruption Commission

REASONS FOR DECISION

- [1] Mr Lewis was a Senior Constable of Police when he was dismissed from the Queensland Police Service (QPS) by Deputy Commissioner Lindford on 7 August 2019 for misconduct.
- [2] There were two matters of improper behaviour alleged against Senior Constable Lewis. The first, matter 1, concerned an incident on 17 July 2016. The second, matter 2, related to an incident which took place on 1 January 2017.
- [3] In respect of both matters the Deputy Commissioner found the allegations of improper behaviour substantiated and that the behaviour was misconduct. The Deputy Commissioner decided the appropriate sanction in the circumstances was that Mr Lewis be dismissed from QPS.
- [4] Mr Lewis has applied to the tribunal for review of the Deputy Commissioner's finding that his behaviour in matter 1 was improper behaviour. He does not challenge the finding that his behaviour in the second matter was improper and constituted misconduct. He does challenge and seeks review however of the sanction applied of dismissal.
- [5] The decisions made by the Deputy Commissioner are reviewable in the tribunal.¹
- [6] The matter was heard before me on 30 January 2020. The parties agreed that it was appropriate that I make an initial determination about substantiation of the behaviour in matter 1 before the parties make submissions about sanction. Accordingly these reasons for decision relate only to the issue whether Mr Lewis' behaviour on 17 July 2016 in matter 1 was improper and misconduct.
- [7] The Crime and Corruption Commission applied to be joined and was joined in the proceedings as second respondent.
- [8] By Order made 30 September 2019 pursuant to s 66 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), publication of the contents of a document or thing filed in or produced to the tribunal or evidence given before the tribunal and any Order made or reasons given by the tribunal was prohibited to the extent it can identify or lead to identification of any third party, save as necessary for the parties

¹ *Crime and Corruption Act 2001* (Qld), s 219G.

to engage in and progress the proceedings. It is appropriate that de-identification continue. Accordingly, third parties and their details have been changed.

- [9] The purpose of review proceedings is to produce the correct and preferable decision. To that end the tribunal usually hears and decides the review by way of fresh hearing on the merits applying as at date of hearing. However, in police disciplinary matters such as the one at hand, the review is limited to the evidence given in the proceeding before the original decision maker, unless there is application to adduce fresh evidence.² There is no application for fresh evidence here.
- [10] The standard of proof required is not the criminal standard of proof of satisfaction beyond reasonable doubt, but the civil standard of reasonable satisfaction on the balance of probabilities. Given the seriousness of the matter at hand however, which involves the livelihood and career of a police officer, what amounts to reasonable satisfaction on the balance of probabilities is not to be reached lightly.³
- [11] In determining the matter the tribunal is required to make its own decision on the available evidence; however, the views of the Deputy Commissioner as decision maker are appropriate considerations assisting it in reaching its decision:

That is not to say that considerable respect should not be paid to the perceptions of the Commissioner as to what is needed for the maintenance of internal discipline. It would be appropriate for the Misconduct Tribunal in making up its own mind to give considerable weight to the view of the original decision-maker who might be thought to have particular expertise in the managerial requirements of the police force.⁴

The first matter

- [12] The allegation of improper behaviour levelled against Mr Lewis in matter 1 was:

That on 17 July 2016 at Toowoomba your conduct was improper in that whilst on duty you used inappropriate force against [‘TT’].

- [13] The further and better particulars of the allegation were:

Investigations identified that at approximately 1.50pm you attended [address] after there had been a report of a male person attempting to break into a car. Shortly after arriving at the aforementioned address:

- (i) You approached TT, who was in the front yard of the address;
- (ii) After drawing and presenting a service issued taser towards TT you attempted to deploy the taser, but it failed to discharge;
- (iii) You then reloaded and deployed the taser in probe mode temporarily incapacitating TT, who fell into a rose bush;
- (iv) You did not verbally warn TT in circumstances where it was reasonably practicable to do so;
- (v) You used the taser against TT at a time it was not clear if he was offering passive resistance;

² Ibid, s 219H.

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362; *Chapman v Crime and Misconduct Commission & Rynders* [2012] QCATA 16, [13].

⁴ *Aldrich v Ross* [2000] QCA 501, [43] (Thomas JA).

- (vi) You applied your right foot to the back of TT's head; and
- (vii) TT was restrained and handcuffed.

Background of matter 1

- [14] The parties agree that on 17 July 2016 Mr Lewis responded to a call over the police radio involving a suspected home invasion, Code 2.
- [15] Another officer, Senior Constable Hardgrave ('SC Hardgrave'), was the initial responder to the call.
- [16] On arrival at the address SC Hardgrave could not see anyone at the premises so approached the house where he saw TT sitting in a chair on the front porch. TT appeared to be under the influence of drugs or alcohol or both.
- [17] SC Hardgrave spoke to him and TT sat forward but was clearly unbalanced. SC Hardgrave returned to his motorcycle and radioed VKR Toowoomba and said there was *'one highly intoxicated aboriginal male here wearing that clothing'* and *'he's sitting at the front of the house'*. TT yelled out and continued to yell out in an aggressive manner.
- [18] Mr Lewis responded to the call.
- [19] TT left the front porch and went to the middle of the front yard. TT continued to yell out aggressively. He took off his beanie, jumper and shirt. TT walked out of the yard through the front gateway along the footpath towards SC Hardgrave. As TT approached him SC Hardgrave said over the radio *'just so you know, he's taken his shirt off, wanting to have a go at me out on the street'*.
- [20] As TT approached SC Hardgrave, SC Hardgrave said to him *'mate, am I causing you a problem?'* TT stopped and stretched out his arms and said with slurred speech *'I'm not causing you nothing mate.'* SC Hardgrave told TT firmly *'fuck off and sit against the fence'*. TT turned, mumbling something, and walked away and SC Hardgrave said again *'sit against the fence and shut your trap'*. TT did not sit against the fence but walked back into the yard.
- [21] En route to the address Mr Lewis heard SC Hardgrave's radio call that TT had taken off his shirt, had *'shaped up'* to SC Hardgrave and was trying to fight him.
- [22] SC Hardgrave radioed VKR Toowoomba again advising he had had trouble getting through on the radio and said he (SC Hardgrave) *'has used appropriate language and told him to sit inside the fence line at this particular point in time'*.
- [23] Mr Lewis arrived. He said to SC Hardgrave *'how are you going'* and SC Hardgrave replied *'he's off his nut, yeah. He came out, right out here and I just told him to...'*
- [24] SC Lewis walked to the gateway and said to TT who was facing away towards the house *'how are you going? Just have a seat for us please. My name's Matt. How about you have a seat'*. Then he said *'we're not here to blue you. We're not here to carry on okay?'*
- [25] TT spun around and said *'fight me'*. He walked towards Mr Lewis. SC Hardgrave, standing behind and to the left of Mr Lewis outside the fence said, *'we're not going to fight ya'*.
- [26] TT approached Mr Lewis with arms raised out to the side and Mr Lewis drew his taser, pointing it at TT. TT stopped with arms raised and Mr Lewis triggered the

taser but it failed to fire. He reloaded the taser and said *'let's go again hey?'* TT remained standing stationary with his arms outstretched and said *'shoot me'* and possibly *'I'm a brave motherfucker ain't I.'* Mr Lewis shot the taser successfully this time and TT fell to the ground rolling onto his stomach under a rose bush.

- [27] Mr Lewis walked towards TT, saying to him *'does that hurt? Is that good? Is that good? How about hands behind your back now? Come on. Come on.'*
- [28] He then tried to drag TT out from under the rose bush by pulling on the back of TT's tracksuit pants with his left hand, the taser in his right, without assistance from SC Hardgrave.
- [29] Mr Lewis put the taser into his left hand and again tried to drag TT out from the bush with his right hand, again without assistance from SC Hardgrave. Then using both hands, the taser in his left hand, Mr Lewis dragged TT out from the rose bush onto a path, still without assistance from SC Hardgrave.
- [30] SC Hardgrave then said *'arms out mate, hand out, hand out'* and nudged TT's right upper arm with his foot. Mr Lewis, standing at TT's left side still holding the taser said *'hands behind your back, c'mon.'*
- [31] TT remained lying face down. Mr Lewis grabbed TT's left wrist. TT tried to roll and lifted his right arm and Mr Lewis placed his right foot on TT's right shoulder. SC Hardgrave placed his foot on TT's right buttock and Mr Lewis said *'you'll cop it again'*.
- [32] Mr Lewis' foot slipped forward off TT's shoulder and Mr Lewis brought it back up but this time placed it angled forward across TT's left shoulder as Sergeant Simpson ('Sgt Simpson') arrived. Sgt Simpson took TT's left arm and Mr Lewis removed his foot and stepped back to allow Sgt Simpson to twist TT's left arm behind his back. SC Hardgrave kept his foot on TT's buttock.
- [33] Sgt Simpson knelt on TT to restrain him and Mr Lewis said *'that's it'* and *'get your other hand up'*. Mr Lewis handed his handcuffs to Sgt Simpson and Sgt Simpson completed hand cuffing TT.

The Taser

Mr Lewis' Submissions

- [34] Mr Lewis says his involvement started when he heard a number of calls over the radio for a Code 2 suspected home invasion.
- [35] When he arrived he found SC Hardgrave standing next to his motorcycle. He said he believed SC Hardgrave wasn't prepared to use any force options against TT or attempt to use communication skills to engage with him.⁵ When he walked towards the house he could see TT exhibiting signs of intoxication. TT was larger than either SC Hardgrave or Mr Lewis. TT was facing away from the road and not threatening the officers. Mr Lewis tried to use communication skills to de-escalate the situation by saying to TT *'how you going, all right? Can you just have a seat for us please? My name is Matt, how about you have a seat? All right, we're not here to blue you, we're not here to carry on mate okay.'*⁶

⁵ Submissions by Mr Lewis in response to direction to attend disciplinary hearing, page 10.

⁶ Ibid, page 11.

- [36] TT turned around swinging his arms and said '*fight me, fight me*'. He started walking towards Mr Lewis and SC Hardgrave. Mr Lewis continuously assessed the threat posed by TT but due to his escalating behaviour decided to increase the use of force options and he drew his taser. He had made the decision he had to effect an arrest on TT and he was conscious there were scared people behind TT in the house. He did not draw the taser until TT indicated he wanted to fight Mr Lewis.
- [37] Mr Lewis said he ruled out other use of force options such as OC spray. Given TT's size, his level of aggression and his level of intoxication Mr Lewis also ruled out the use of open hand techniques or a baton. He decided the taser would be the safest and most effective way to gain control of TT and effect the arrest.
- [38] TT had refused to comply with Mr Lewis's direction to sit down, he was exhibiting aggressive behaviour, verbally indicating he wanted to engage in physical confrontation and Mr Lewis was concerned about serious injury either to himself or TT. TT had put his arms up in a way that Mr Lewis considered aggressive saying '*come at me*' or '*bring it on*'. Mr Lewis considered TT was trying to entice the police officers to fight him and he had no reason to doubt that should they come closer TT would action his threat. He therefore decided to fire the taser. The first shot failed to fire. TT's demeanour did not change and therefore Mr Lewis's concerns remained and he fired a second time and that was a successful deployment of the taser.⁷
- [39] Mr Lewis said he was aware that a taser should not be deployed against a person who is only passively resisting police but that he considered TT's continued aggressive threats to fight him (and SC Hardgrave before Mr Lewis arrived) and his subsequent "shaping up" to Mr Lewis more than mere failure to comply with police directions and more than passive resistance. He also had '*in the back of (his) mind*' that the attempts at communication by SC Hardgrave had been unsuccessful.⁸

The Deputy Commissioner's view

- [40] The Deputy Commissioner based her decision principally on the Body Wear Camera (BWC) footage, submissions by Mr Lewis and an interview conducted by investigating police with Mr Lewis.
- [41] I note the Deputy Commissioner had the benefit of Body Wear Camera (BWC) footage from SC Hardgrave and Sgt Simpson only in making her decision. Mr Lewis said at interview⁹ that his BWC was not working at the time of the incident with TT.
- [42] In the Deputy Commissioner's opinion, when Mr Lewis arrived TT was in a relatively stationary position in the yard and SC Hardgrave was standing beside his motorcycle observing him. The situation was contained. Had Mr Lewis stopped to engage with SC Hardgrave instead of walking past him towards TT there would have been time and safe distance sufficient to make an informed threat assessment and to communicate with SC Hardgrave to make a planned approach. Immediate tactical action was unnecessary.
- [43] After Mr Lewis approached TT and TT turned towards him and approached Mr Lewis, there was serious risk of injury to Mr Lewis and it was reasonable to draw

⁷ Ibid.

⁸ Ibid, page 13.

⁹ Interview with Ethical Standards Command, 4 October 2016, page 15.

and present the taser pointing towards TT. However the failure to give a verbal warning before firing the taser was contrary to policy. That policy¹⁰ required a warning to be given to the subject before use where practicable and also stated a taser should not be used where a subject was offering only passive resistance.¹¹ Mr Lewis was an experienced officer and trained as a taser instructor at the time. He was aware of the policy not to use a taser against a subject offering only passive resistance.¹²

- [44] The Deputy Commissioner concluded the firing of the taser in these circumstances was use of inappropriate force in the circumstances.

Discussion

- [45] The tribunal has also had the benefit of viewing the BWC footage that exists.
- [46] SC Hardgrave's BWC footage shows him arriving at the house in question. The house occupied a corner allotment. He parked his motorcycle almost on the corner some metres away from the gateway entrance into the yard.
- [47] After speaking to TT near the porch of the house he returned to his motorcycle and spoke on his radio to the despatcher and informed the despatcher of TT's presence at the house and that TT appeared highly intoxicated. TT comes out into the yard and gesticulates wildly, walks back and forth then removes a beanie and pullover and then shirt and throws them to the ground, shouting at SC Hardgrave, his actions overtly aggressive. TT then walks out of the gateway and along the footpath towards SC Hardgrave. The first officer informs despatch that TT has taken his shirt off *'wanting to have a go at me out on the street.'*
- [48] TT is of solid build and his demeanour as he approaches SC Hardgrave is overtly aggressive. He stops to stand close in front of SC Hardgrave's motorcycle and holds his arms out to the side looking at SC Hardgrave. SC Hardgrave is standing on the nearside of the bike probably two to three metres away from TT.
- [49] SC Hardgrave speaks to him in a measured voice: *'mate, am I causing you a problem?'* TT answers *'I'm not causing you nothing mate.'* SC Hardgrave points to the fence and says *'fuck off and sit against the fence, ok?'* TT turns around, mutters something, perhaps *'didn't say anything'* and walks back into the yard, ignoring another direction from SC Hardgrave, louder this time, to *'sit against the fence and shut your trap.'*
- [50] TT stands in the middle of the yard, gesticulating and talking, generally facing towards the house, sometimes looking back over his shoulder at SC Hardgrave. SC Hardgrave radios through that *'I have used the appropriate language and told him just to sit inside the fence line there at this point in time'*.
- [51] Shortly after that Mr Lewis arrives and parks on the corner and walks past SC Hardgrave as SC Hardgrave says to him *'he's off his nut, yeah. He came out here, right out here and I just told him to...'* SC Hardgrave doesn't finish as Mr Lewis does not stop to talk but continues past SC Hardgrave towards the gateway.

¹⁰ Operational Procedures Manual Issue 52 May 2016, [14.23.3].

¹¹ Examples given: refusing to move or offering little or no physical resistance and refusing to comply with police instruction.

¹² Submissions by Mr Lewis in response to direction to attend disciplinary hearing, page 9.

- [52] TT remains standing in the middle of the yard, facing away towards the house as both officers now move towards the gateway. Mr Lewis calls out to TT '*just have a seat for us please, my name is Matt, hey how about have a seat*' but TT remains standing facing away. Mr Lewis stops in the gateway entrance and says '*alright we're not here to blue you, we're not here to carry on mate ok.*'
- [53] TT turns suddenly and says '*well fight me*' and takes a couple of slow steps towards Mr Lewis who immediately draws his taser and points it at TT. TT stops walking towards Mr Lewis and stretches his arms out to the side. He is standing probably no more than three to four metres away. Mr Lewis triggers the taser but it misfires. TT remains standing stationary with arms out. Mr Lewis has time to reload another cartridge. TT remains immobile standing with his arms out. Mr Lewis says '*go again hey*' and TT says something unintelligible but then clearly '*shoot me*', still stationary, arms out. Mr Lewis shoots him with the taser. TT falls down.
- [54] SC Hardgrave BWC showed TT standing stationary in front of Mr Lewis with his arms held out to the side for approximately 6 seconds. There was sufficient time to allow Mr Lewis to replace the cartridge and fire the taser a second time. TT did not move forward whilst Mr Lewis reloaded.
- [55] Mr Lewis said in his submissions to the Deputy Commissioner that when TT turned and said '*fight me, fight me*' and started walking towards him and SC Hardgrave TT's escalating behaviour caused him to assess the threat posed by TT as justifying increasing the level of force to be used and therefore he drew his taser.¹³
- [56] I accept that was an appropriate response in those circumstances. However I do not accept Mr Lewis' further submission that after the first shot failed to fire and TT's demeanour did not change that therefore, with his concerns remaining, it was appropriate that he fire a second time.
- [57] My difficulty is this. After the taser misfired and Mr Lewis had time to reload a cartridge, he should have taken TT's continuing stationary posture and position into account and reassessed the appropriate level of force required in those circumstances. He should have recognised that TT at that stage was offering only passive resistance.
- [58] A verbal warning was reasonably available and should have been given before triggering the taser the second time. Verbal communication should have been attempted to de-escalate the situation to try to avoid using the taser. The Taser Good Practice Guide¹⁴ ('Guide') of QPS suggests initially using words like '*this is a taser, don't move.*'¹⁵ There was adequate time for Mr Lewis to do that. Mr Lewis had had enough time in the course of reloading the taser to say '*go again hey*' before raising it and discharging it. Quite clearly he could just as well have given the appropriate warning stipulated by the Guide.
- [59] Or he could simply have held up the taser but not fired it, protecting himself and SC Hardgrave whilst reassessing the passive resistance being offered by TT.

¹³ Ibid, page 11.

¹⁴ Conducted Energy Weapon X26 Taser, Version 1.0, November 2015.

¹⁵ Ibid, page 25.

- [60] The general policy on use of force set out in the Operational Procedures Manual ('OPM') of the Queensland Police Service is use of minimum force necessary to resolve an incident.¹⁶
- [61] The OPM also states that tasers should not be used against persons offering only passive resistance. The examples of passive resistance given in OPM are refusing to move or offering little or no physical resistance and refusing to comply with police instructions.¹⁷ The manual warns that prior to using a taser officers should verbally warn the subject person where practicable and be mindful of the area in which the subject may fall.
- [62] These directions are repeated in the Guide.¹⁸ The Guide also reminds officers that every decision to use force should be the subject of a continuous assessment prior to the application of another use of force.¹⁹
- [63] Mr Lewis was, at the time of the incident, a taser training officer. He was also at the time a police operational skills and tactics instructor. He had been a police officer for a suitable length of time to be familiar with applicable policies and procedures.
- [64] Mr Lewis admitted he was aware of the situational use of force model and that every decision to use force should be the subject of continuous assessment.²⁰ Yet I conclude he did not do that in triggering the taser the second time.
- [65] Mr Lewis says his decision on the day should not be second guessed. He refers to comments made in *Hearn v Assistant Commissioner Carroll* [2012] QCAT 412 relying on the Court of Appeal decision *Rowe v Kemper* [2008] QCA 175 and in particular the comments made in the latter by Mackenzie AJA to the following effect:²¹

[84] Police officers whose lot is to maintain good order and public safety in public places face a multitude of situations which often develop suddenly and have potentially unpredictable outcomes. Officers are required to make assessments, in real time, of the nature of the behaviour and how to respond to it so that good order is restored by means appropriate in the circumstances. Not infrequently, as in this case, the person whose conduct attracts attention will be disposed to be unco-operative when commonsense would suggest that a degree of give and take would avoid an escalated confrontation.

...

This case requires analysis, almost in the manner of a video referee or third umpire, of the sequence of brief events that occurred in the Queen Street Mall over 18 months ago. Emulating those officials, I have viewed the footage of the arrest a number of times in real time and frame by frame. It involves reviewing the electronically recorded evidence of what happened and of the thought processes, as disclosed in that and in oral evidence, of the parties as it unfolded. In such a case, care must be taken to keep in mind that:

“In evaluating the police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment and not

¹⁶ **Ibid.**, [14.3].

¹⁷ *Ibid.*, [14.23.3].

¹⁸ Page 2.

¹⁹ *Ibid.*

²⁰ Relevant material, page 10.

²¹ *Rowe v Kemper* [2008] QCA 175, [84]-[85].

by reference to hindsight.” (Pringle v Everingham [2006] NSWCA 195; (2006) 46 MVR 58 at 73 – 74; [2006] NSWCA 195 at [67]).

[66] As in *Rowe v Kemper* I have had the benefit of the BWC footage and have carefully evaluated what the footage shows. I cannot but conclude that after the initial presentation of the taser towards TT, the threat he represented had clearly changed by the time the taser was triggered again. Mr Lewis, an experienced police officer familiar with the requirement of QPS policies and guides, should, after reloading the taser, have recognised that TT was offering only passive resistance. Mr Lewis chose and had time to speak in almost conversational tones to TT whilst reloading the taser yet failed to give a warning that he might fire the weapon. It was reasonably practicable that he give such a warning before firing again.

[67] I determine that Mr Lewis’ firing of the taser was use of excessive force unnecessary in the circumstances.

Foot on the head

[68] The further particular of improper conduct in matter 1 was that Mr Lewis put his right foot on the back of TT’s head when he was lying on the ground after the taser had rendered him incapacitated and prone.

[69] Mr Lewis denies doing that. He says after using the taser he removed TT from under a rose bush. TT reared up so Mr Lewis put his foot on TT’s shoulder to stop him from rolling over and trying to punch him. He concedes it would have been better for him to use his knee instead but SC Hardgrave was not offering assistance other than to nudge TT in an attempt to get him to move his arm out from under him. After some short time SC Hardgrave simply placed a foot on TT’s buttock.

[70] Sgt Simpson arrived and he took over pinning TT down using his knees.

[71] Mr Lewis says his foot was across TT’s shoulder and the toe of his shoe slipped slightly onto the back of his head. Because of Mr Lewis’ stance and the position of his right foot all the pressure was applied across TT’s shoulder.²²

[72] Deputy Commissioner Lindford disagreed with that submission. She said she was reasonably satisfied the camera footage showed Mr Lewis directly applying his right foot to the back of TT’s head.

[73] The tribunal has again had the benefit of viewing the BWC footage from SC Hardgrave, and also the BWC footage from Sgt Simpson.

[74] The SC Hardgrave footage is shot from his position standing to the right of TT who is lying face down on the ground. Mr Lewis drags TT out from under a rose bush. TT has his left arm bent under his head. Mr Lewis is shown standing near TT’s left shoulder. Mr Lewis reaches down with his left hand to grab TT’s left arm to bring it round behind him. He has the taser in his right hand. TT rolls counter-clockwise slightly towards Mr Lewis raising his right arm and the right side of his body in that process. Mr Lewis puts his foot on TT’s right shoulder. It seems to slip off forward of TT’s shoulder next to his head. His foot drops to the ground. Mr Lewis lifts his foot back up and puts the heel on TT’s left shoulder and the front of the foot appears to be placed on the back of TT’s head.

²² Relevant material, page 15.

- [75] There is also footage available from the body wear camera of Sgt Simpson. Sgt Simpson arrives and walks through the gateway entrance as Mr Lewis puts his right foot on TT's right shoulder. His foot slips off. The footage shows Mr Lewis lifts his right foot and applies his foot to TT's left shoulder and diagonally across the back of TT's head. The footage suggests and I find that he applies pressure to both areas, and in my view, significant pressure. I do not reach this conclusion lightly. I consider the evidence from the BWC clear on the point however.
- [76] Was that action necessary? Was that appropriate behaviour in the circumstances?
- [77] Mr Lewis claims SC Hardgrave failed to support him. I conclude that, throughout the incident, from the time Mr Lewis arrived through to the arrival of Sgt Simpson he had opportunity to consult with SC Hardgrave but failed to do so. It is not readily apparent from the BWC footage why he did not do that. He had never met SC Hardgrave before.
- [78] Mr Lewis maintains he assessed that SC Hardgrave was not prepared to use any force against TT. He based that on finding SC Hardgrave standing beside his motorcycle when he arrived. Mr Lewis does not say where SC Hardgrave should have been standing when he arrived. I do not accept that it was appropriate or reasonable to make that assumption on the scant evidence presented when he arrived, that is, TT standing in the yard and SC Hardgrave standing by his motorcycle.
- [79] The Guide says that officers should adopt control officer and cover officer roles. After firing his taser Mr Lewis should have maintained his role as contact and therefore control officer. If TT offered further resistance another shock could have been given by Mr Lewis to control him.²³ SC Hardgrave should have become covering officer, handcuffing TT.
- [80] Mr Lewis says SC Hardgrave gave no assistance to him to gain control of TT. He says there was ample opportunity for him to do that. I disagree. SC Hardgrave's BWC footage suggests that after triggering the taser Mr Lewis gave scant regard to the presence of SC Hardgrave and simply chose to take physical control of TT by himself.
- [81] What resulted was Mr Lewis using excessive force in the course of taking physical control of TT by putting his foot on the back of TT's head and shoulder. It was unnecessary and could have been avoided had Mr Lewis followed the Guide protocol.
- [82] By s 1.4 of the *Police Service Administration Act 1990 (Qld)* ('the Act') misconduct means:
- ...conduct that—
- (a) is disgraceful, improper or unbecoming an officer; or
 - (b) shows unfitness to be or continue as an officer; or
 - (c) does not meet the standard of conduct the community reasonably expects of a police officer.

²³ Guide, page 31.

- [83] I have found that Mr Lewis used excessive force when he used the taser and when he put his foot on TT's head. I am satisfied that was conduct which was improper, constituting misconduct within the definition of that term in the Act.
- [84] I am satisfied that the disciplinary finding of misconduct in matter 1 is substantiated.
- [85] The issue of appropriate sanction must now be considered. To that end the parties will be asked to make further submissions.