

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Yeeha Tours and Holidays Pty Ltd t/as Mile High Aviation v Department of Environment & Science* [2020] QCAT 131

PARTIES: **YEEHA TOURS AND HOLIDAYS PTY LTD T/AS
MILE HIGH AVIATION**
(applicant)

v

DEPARTMENT OF ENVIRONMENT & SCIENCE
(respondent)

APPLICATION NO/S: GAR062-16

MATTER TYPE: General administrative review matters

DELIVERED ON: 27 April 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Howard

ORDERS: **1. The Department of Environment and Science must pay Yeeha Tours and Holidays Pty Ltd t/as Mile High Aviation the sum of \$25,000.00 within 60 days of this order.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – POWER TO AWARD GENERALLY – GENERALLY - where legislative contra-indication against awarding costs - whether disadvantage caused by other party's actions - whether respondent observed the rules of procedural fairness in internal decision-making process – whether basis to award indemnity costs - whether in interests of justice to award costs

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL - where legislative contra-indication against awarding costs - whether disadvantage caused by other party's actions - whether respondent observed procedural fairness – whether basis to award indemnity costs - whether in interests of justice to award costs

Queensland Building and Construction Commission Act 1991 (Qld), s 77(3)(h)

Queensland Civil and Administrative Tribunal Act 2009
(Qld) s 20(1), s 21(1), s 32, s 100, s 102(1), s 107(1)

Queensland Civil and Administrative Tribunal Rules 2009
(Qld) r 87

Recreation Areas Management Act 2006 (Qld) s 52(1)

Airstrike Industrial Pty Ltd v Robertson & Anor [2014]
QCATA 209

Campbell v Kerry M Ryan Pty Ltd [2014] QCATA 58

CMG Homes Pty Ltd v QBCC [2019] QCAT 294

Colgate-Palmolive Co v Cussons Pty Ltd [1993] FCA 531

*Crusty Devil Bakehouses Pty Ltd v WAW Developments
Pty Ltd* [2013] QCAT 159

Gardener & Ors v OLGR & Anor [2012] QCAT 62

*Joanne Baxter and Fifties Food Pty Ltd v Subway Realty
Pty Ltd & Anor* [2013] QCAT 316

QBSA v Johnston [2011] QCATA 265

*Ralacom Pty Ltd v Body Corporate for Paradise Island
Apartments (No. 2)* [2010] QCAT 412

Stuart v QBCC [2016] QCATA 135

Thiess Pty Ltd v FLSMIDTH Minerals Pty Ltd (No 2)
[2010] QSC 120

Todrell Pty Ltd v Finch (No 2) [2008] 2 QdR 95

Whalley v QBCC (No 2) [2017] QCAT 188

*Yeeha Tours and Holidays Pty Ltd v Department of
National Parks, Sport and Racing* [2018] QCAT 345

*Yeeha Tours and Holidays Pty Ltd v Department of
Environment & Science* [2019] QCAT 176

*Yeeha Tours and Holidays Pty Ltd v Queensland Parks
and Wildlife Services* [2017] QCAT 60

REPRESENTATION:

Applicant: Bell Dixon Butler Lawyers

Respondent: Litigation Branch, Department of Environment and Science

APPEARANCES: This matter was heard and determined on the papers pursuant to s32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] Yeeha Tours and Holidays Pty Ltd ('Yeeha Tours') applied to the Department of National Parks, Sport and Racing, which later became the Department for Environment & Science ('the Department'), for a Commercial Activity Permit ('CAP') under the *Recreation Areas Management Act 2006* (Qld) (the 'RAM Act'). If granted, Yeeha Tours proposed to operate a scenic flight operation including beach landings within the Fraser Island recreation area. The application was refused by the Department at first instance, and again on internal review. Yeeha Tours sought review by the Tribunal.
- [2] I heard the review application over three days and delivered written reasons for decision. My reasons for decision were published.¹ I made orders and directions, including: for Yeeha Tours to amend its Operations Manual to address identified shortcomings; inviting the Department to reconsider its decision pursuant to s 23 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act); for the Department to provide material concerning the adequacy of the amended Operations Manual in addressing the identified shortcomings; and for the parties to make submissions about the form of the final orders (having regard to my decision, subject to relevant matters being appropriately addressed, to set aside the decision made by the Department and grant a CAP to Yeeha Tours on conditions).
- [3] The Department subsequently reconsidered and confirmed its decision.
- [4] I then made final orders setting aside the decision of the Department and substituted my own decision granting the permit for two years on stated conditions. My further reasons for decision were published.²
- [5] Yeeha Tours now makes an application for costs, submitting that costs should awarded on an indemnity basis, against the Department. A summary of its costs and disbursements (including estimated costs relating to the costs application of \$5,000), totals some \$46,557.88. The Department submits that the costs application does not disclose a basis for departing from the usual position provided for in the QCAT Act that parties bear their own costs.
- [6] In these reasons for decision, I have again adopted abbreviations used in my previously published reasons for decision as follows:

Air Fraser Island (**AFI**);

Commercial Activity Agreement (**CAA**);

Commercial Activity Permit (**CAP**);

¹ *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345.

² *Yeeha Tours and Holidays Pty Ltd v Department of Environment & Science* [2019] QCAT 176.

The Great Sandy Region management plan 2005 (the **Management Statement**);³

Fraser Island Sustainable Visitor Capacity Study 2008 (the **SVC**);⁴

Draft *Great Sandy Region Aircraft Management Strategy* (the **draft AMS**)⁵ that was developed by the Aircraft Working Group (**AWG**) between 2006 and 2009;⁶

The Department of Sport and Racing's operational policy, Visitor management, Landing aircraft and recreational craft in QPWS (Queensland Parks and Wildlife Service) managed areas (the **Operational Aircraft Landing Policy**);⁷

Queensland Eco and Sustainable Tourism Policy (**QuEST**);

Civil Aviation Safety Authority (**CASA**);

CAAP92-1(1) Guidelines for Aeroplane Landing Areas (**CAAP92-1(1)**); and

CAAP166-1(3) Operations in the vicinity on non-controlled aerodromes (**CAAP166-1(3)**).

- [7] For completeness, I note that prior to the hearing of the review application, I had also decided an interlocutory application brought by the Department seeking orders striking out certain evidence filed by Yeeha Tours. I dismissed that application and published reasons for my decision.⁸

Background

- [8] It is useful here to reiterate some further brief background.
- [9] Fraser Island is a World Heritage listed area with outstanding natural, environmental, cultural and recreational values. It was declared a national park in 1971. Regulation of aircraft activities in northern Fraser Island areas began at that time. AFI has been operating on Fraser Island since about 1978. In 1992, the southern area of Fraser Island was declared a national park. AFI was allowed to continue its operations under a permit.
- [10] Fraser Island was then declared a recreation area under the RAM Act. The same convention was applied to allow AFI to continue its operations on Fraser Island. At the time of the hearing, it did so under a CAA.
- [11] AFI is considered by the Department to be a 'legacy operator,' having commenced its operations well prior to development of the current policy and legislative framework. Although at some point there were two legacy operators conducting

³ Exhibit 7, Tab 18.

⁴ Ibid, Tab 26.

⁵ Several versions in evidence, see Exhibit 7, Tab 24 (July 2009 Version); and Exhibit 9 (September 2009).

⁶ Exhibit 7, Tab 24, esp pp 340-341 and 379; and Exhibit 9, esp pp 1-2 and 23.

⁷ Exhibit 7, Tab 19.

⁸ *Yeeha Tours and Holidays Pty Ltd v Queensland Parks and Wildlife Services* [2017] QCAT 60.

flights on Fraser Island, for many years AFI has been the sole aircraft operator in the relevant areas.

- [12] At the time of the hearing, AFI was authorised to operate up to 65 flights each day with a maximum of 44 beach landings, with specified numbers of landings allowed in each of three zones drawn from maps included in, and forming part of, the conditions upon which the CAA was given. Those same maps are part of the draft AMS that was commissioned by the Department and developed with a view to minimising the impacts of aircraft on the natural, cultural and recreational values of Fraser Island. The numbers of flights, flight routes and beach landing areas authorised by the CAA are in accordance with the recommended baseline capacity set out in the draft AMS. It was clear on the evidence that AFI did not operate flights to anywhere near the capacity authorised by its CAA.
- [13] Yeeha Tours proposed that its operations adopt the flight paths and landing areas identified in the draft AMS, as used by AFI to conduct its operations. Further, it proposed that it be authorised to operate some of the latent capacity (to the extent of 6 flights per day) having regard to the baseline capacity recommended in the draft AMS and unused by AFI.

When can a costs order be made?

- [14] The QCAT Act provides that (other than as provided under the Act or an enabling Act) each party to a proceeding must bear its own costs.⁹ This has been described as a strong contra-indication against the making of an order for costs.¹⁰
- [15] That said, the Tribunal may make an order for costs if it is satisfied that the interests of justice require it to do so.¹¹ Certain factors that may be considered in deciding whether to award costs are set out in the QCAT Act in s 102, as follows:

(3) In deciding whether to award costs under subsection (1) or (2) the tribunal may have regard to the following –

- (a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g);
- (b) the nature and complexity of the dispute the subject of the proceeding;
- (c) the relative strengths of the claims made by each of the parties to the proceeding;
- (d) for a proceeding for the review of a reviewable decision—
 - (i) whether the applicant was afforded natural justice by the decision-maker for the decision; and
 - (ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;

⁹ QCAT Act, s 100.

¹⁰ *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412 per Wilson J.

¹¹ QCAT Act, s 102(1).

- (e) the financial circumstances of the parties to the proceeding;
- (f) anything else the tribunal considers relevant.

- [16] The factors set out in s 102(3) do not provide grounds for a costs order; rather, they are factors that may be taken into account in deciding whether the interests of justice point compellingly to the interests of justice warranting an exercise of the discretion to award costs.¹² What might in summary be described as unreasonable conduct by a public authority has in some circumstances been considered by the Tribunal to support a costs order.¹³ Conversely, taking a reasonable position or approach to the review has been considered not to do so.¹⁴
- [17] Any disadvantage must be ‘unnecessary’, as distinct from a disadvantage experienced in the usual course of litigation.¹⁵ Mere error by a party and its representatives is not sufficient to establish unnecessary disadvantage to another party. Procedural irregularities and deficiencies are disadvantages experienced in the usual course of litigation.¹⁶ Section 48(1)(a) to (g) of the QCAT Act provides a non-exhaustive list of possible acts that may constitute acts that ‘unnecessarily disadvantage’ another party to the proceeding. These include failing to comply with tribunal directions and orders without reasonable excuse; failing to comply with the QCAT Act, an enabling Act, or the QCAT Rules; causing an adjournment; and vexatiously conducting the proceeding.
- [18] I have been referred to a variety of cases by the parties in support of their respective arguments. Those that relate to building disputes are unhelpful because a modifying provision applies to give the tribunal a broad general discretion to award costs in its building jurisdiction.¹⁷ That is, the usual strong contraindication against a costs order does not apply in those circumstances.¹⁸ The cases referred to that relate to disciplinary proceedings before the tribunal are also somewhat unhelpful in my view, as different considerations arise in that context.
- [19] The QCAT Act provides that if an order is made for costs, the costs must be fixed if possible.¹⁹ Otherwise, the Tribunal may order that costs be assessed.²⁰

¹² *CMG Homes Pty Ltd v QBCC* [2019] QCAT 294, [33].

¹³ *Whalley v QBCC (No 2)* [2017] QCAT 188, [29]; *CMG Homes Pty Ltd v QBCC* [2019] QCAT 294, [28], [35-36].

¹⁴ *Stuart v QBCC* [2016] QCATA 135, [42].

¹⁵ *QBSA v Johnston* [2011] QCATA 265, [31]; *Crusty Devil Bakehouses Pty Ltd v WAW Developments Pty Ltd* [2013] QCAT 159, [14]; *Joanne Baxter and Fifties Food Pty Ltd v Subway Realty Pty Ltd & Anor* [2013] QCAT 316, [12]; *Campbell v Kerry M Ryan Pty Ltd* [2014] QCATA 58, [8]; *Airstrike Industrial Pty Ltd v Robertson & Anor* [2014] QCATA 209, [7].

¹⁶ *Campbell v Kerry M Ryan Pty Ltd* [2014] QCATA 58 (failure to comply with directions); *Gardener & Ors v OLGR & Anor* [2012] QCAT 62 (application made out of time, affidavit with material alleged to be misleading and offensive, late amendment of an application); *Joanne Baxter and Fifties Food Pty Ltd v Subway Realty Pty Ltd & Anor* [2013] QCAT 316 (seeking an urgent hearing then requesting an adjournment, making objections without putting other party on notice, referring to evidence not previously provided); *Airstrike Industrial Pty Ltd v Robertson & Anor* [2014] QCATA 209 (failing to progress proceedings in a timely manner).

¹⁷ *Queensland Building and Construction Commission Act* 1991 (Qld), s 77.

¹⁸ *Lyons v Dreamstarter Pty Ltd* [2011] QCATA 142.

¹⁹ *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 107(1).

²⁰ *Ibid*; *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld), r 87.

What is the basis for the costs application?

- [20] In essence, Yeeha Tours submits that an order for costs should be made against the Department because it substantially succeeded in its application in circumstances that the Department failed to afford it natural justice during the decision-making process (that is, before the Tribunal review proceeding), as well as in the proceeding before the Tribunal. It argues that the Department did this in failing to apply relevant policy consistently with its treatment of AFI. It says that as a consequence, the Department improperly required Yeeha Tours to meet an onus of proof that it did not have. It submits that the Department's 'case was otherwise unsupported by compelling evidence or rationale'.
- [21] Further, Yeeha Tours' application refers particularly to the following:
- (a) The Department relied on the Management Statement and the Operational Aircraft Landing Policy to refuse the CAP and oppose the review, without a sound basis for distinguishing between Yeeha Tours and AFI;
 - (b) The Department relied upon the QuEST policy to refuse the CAP when, as revealed at the hearing, it was not relevant to aircraft operations;
 - (c) In refusing the CAP, the Department failed or refused without sound reason to consider relevant evidence, namely the draft AMS, even though its staff considered it and implemented it by using it to form the basis of the CAA granted to AFI ;
 - (d) In respect of cultural impacts, the Department maintained that Yeeha Tours bore the onus of consulting with the traditional owners and determining the impacts in circumstances that the Tribunal found that it was the responsibility of the Department;
 - (e) Yeeha Tours was not advised during the internal decision-making process about the inadequacies in its Operations Manual (as identified in the proceedings by the Department's expert witness, Mr Tonkin) as to bird strike and beach landings, so that it could consider and respond to those issues;
 - (f) The Department did not have a reasonable basis for maintaining that safety issues weighed against granting the CAP, because:
 - (i) It offered no evidence of current safety issues or concerns;
 - (ii) The concerns expressed about compliance with CAAP92-1(1) applied equally to AFI, yet it continued to authorise AFI to conduct activities; and
 - (iii) It was aware that, as the aerodrome operator, it could impose special management arrangements for use of the airspace to manage any potential safety concerns arising from the authorisation of two aircraft operators;
 - (g) The Department ought to have given greater weight to how safety and risk are managed by:
 - (i) Existing CASA regulations;

- (ii) The uncontrolled aerodromes rule and practice;
- (iii) Visual flight rules and ‘fly neighbourly advice’; and
- (iv) The use of special management arrangements.

[22] Yeeha Tours’ submissions then also address more specifically the issues raised in the context of the s 102(3) factors. Those submissions are discussed below.

Discussion of s 102(3) factors

Has the Department acted in a way that unnecessarily disadvantage Yeeha Tours?

[23] Yeeha Tours submits that it has been unnecessarily disadvantaged in the proceeding by the Department’s actions.

[24] Firstly, it submits that the Department filed an interlocutory application seeking to have various parts of an affidavit relied upon by Yeeha Tours struck out. Both parties filed written submissions. Following a hearing, the application was dismissed. The Tribunal found that the application took ‘an unnecessarily technical approach’ in the administrative review proceeding.²¹ The application, Yeeha Tours argues, unnecessarily incurred additional costs and delayed the progress of the review to final hearing.

[25] Secondly, Yeeha Tours argues that the Department’s approach to witnesses and evidence in the proceeding more generally caused unnecessary disadvantage to it. For example, in respect of the draft AMS prepared by the AWG which was led by and at the behest of the Department, the Department’s contention was that it should not be taken into account or applied by the Tribunal. It did not call any witnesses involved in preparing it, rather Yeeha Tours was put to the cost and inconvenience of calling an employee of the Department, Brett Waring, a member of the AWG. During the hearing, Dr Elizabeth Young conceded that staff consider the draft AMS. Ultimately, the Tribunal accepted that the draft AMS contained useful evidence.

[26] Against this, the Department submits that the Tribunal made no factual findings capable of supporting the submission, and none relevant to s 48 of the QCAT Act, and did not criticise the Department’s approach in its reasons for decision.

[27] Although the Department’s interlocutory application may have taken an unnecessarily technical approach, does it amount to an unnecessary disadvantage? Objections to evidence are common in the usual course in litigation. The Department’s role in the proceeding included properly testing the evidence relied upon by Yeeha Tours. That said, the rules of evidence do not generally apply in the Tribunal and the Department was obliged to assist the Tribunal in reaching the correct and preferable decision in the review. The application sought to have the Tribunal disregard relevant evidence, although the weight that might be attributable to it was a matter for the Tribunal in the review hearing. However, on balance, the interlocutory application was in the nature of an incident of litigation rather than plainly unreasonable conduct, even though it was unsuccessful.

²¹ *Yeeha Tours and Holidays Pty Ltd v Queensland Parks and Wildlife Services* [2017] QCAT 60, [18].

- [28] In the review, I found that the draft AMS was useful and relevant evidence in the proceeding;²² indeed, the best evidence.²³ It was the Department's document. The Department used the draft AMS inconsistently, denying its relevance in the review proceeding, even though the CAA granted to AFI authorised it to conduct its activities in keeping with the recommended baseline established in the draft AMS, and that certain of its attachments were attachments to AFI's CAA.
- [29] I also concluded that the draft AMS was the basis for statements included in the operational aircraft landing policy that special management arrangements were in place for the eastern beaches of Fraser Island.²⁴ Dr Young acknowledged that she was aware of significant components of it, and that Departmental staff have regard to it.²⁵ Despite the Department's obligations to assist the Tribunal in reaching the correct and preferable decision, Yeeha Tours was put to the cost and inconvenience of calling Mr Waring, who is a Departmental officer, in respect of the draft AMS.
- [30] The Department maintained throughout the review that the draft AMS should not be taken into account or applied by the Tribunal, contending that the reliability of the conclusions should be regarded as in doubt because it was at the time some nine years old.²⁶ The evidence revealed that although it was not endorsed policy, it had not been rejected. Rather, consideration of it was deferred pending reconsideration of the management plan for Fraser Island.
- [31] With respect to the management plan, the Management Statement was a document developed in 1994, revised in 2005 and on its face effective until 2010, although asserted in evidence to be applicable to 2015.²⁷ It was not detailed in its consideration of issues relating to aircraft on Fraser Island.²⁸ It was more aged than the draft AMS which was developed during 2007-2009. Also, the evidence sought to be relied upon by the Department, although more recent, for example in relation to amenity issues, contained broad general statements and was given less weight.²⁹
- [32] The draft AMS built upon work done in 2006-2007, which resulted in the SVC, which is endorsed policy.³⁰ Both involved input from working groups. The draft AMS involved the AWG (being a sub-group of the broader working group involved in the development of the SVC).³¹ The AWG was formed to consider the impact of different flight heights and aircraft noise on Fraser Island.³² Its work was guided by a CASA representative on relevant matters.³³ Its recommendations were specifically

²² *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345, [56]-[59].

²³ *Ibid*, [141].

²⁴ *Ibid*, [45].

²⁵ *Ibid*, [53].

²⁶ *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345, [42], [43], [51]-[53].

²⁷ *Ibid*, [38]-[40].

²⁸ *Ibid*, [39], [40].

²⁹ *Ibid*, [93], [94], [98].

³⁰ *Ibid*, [41].

³¹ *Ibid*, [72]-[77].

³² *Ibid*, [76].

³³ *Ibid*, [141].

developed with a view to minimising impacts of aircraft.³⁴ It established a baseline flight capacity for Fraser Island.³⁵

- [33] The Department submits that I was not directly critical of its approach to the draft AMS in my reasons for decision. That may be so. However, it is plain from my reasons that in reaching my decision, I found the position of the Department was inconsistent with the actions of Departmental staff in taking it into account; the use of the draft AMS in preparing AFI's CAA; and inconsistent with the references in the Operational Aircraft Landing Policy to special arrangements on Fraser Island (which I concluded could only be a reference to the draft AMS). To the extent that it may be necessary, I find that the approach was not reasonable having regard to the Department's own actions in relying upon the draft AMS in the manner specified.
- [34] Further, I am satisfied that it was inconsistent with the Department's obligations to assist the Tribunal in the proceeding pursuant to s 21 of the QCAT Act, to place Yeeha Tours in the position that it had to call Mr Waring in order to place relevant evidence, within the Department's control, about the development of the draft AMS before the Tribunal, in circumstances that the Department had commissioned its development and relied upon it in other relevant circumstances.
- [35] I am satisfied that the Department's approach to the draft AMS and associated evidence did not occur as a consequence of mere error. It knew the uses to which the draft AMS had been put. Its actions in this regard unnecessarily disadvantaged Yeeha Tours.
- [36] On balance, this factor weighs in favour of a costs award.

The nature and complexity of the dispute

- [37] Leave for legal representation was granted in the proceedings. The proceeding involved the presentation of complex and technical evidence and consideration of relevant legislation, international and national conventions and agreements, as well as a considerable array of departmental policy and CASA guidelines.
- [38] Yeeha Tours submits that these circumstances weigh in favour of a costs order. The Department submits that the legal matters were 'relatively straight forward', rather than the review concerned the factual matters and that the matter was not relevantly complex such as to warrant an award of costs.
- [39] I accept that there is some complexity in considering the issues and evidence relevant in determining the application for a CAP under the RAM Act. Further, in respect of aircraft operators, there is an overlay by way of the interplay between departmental policy and national regulation through CASA guidelines. This necessitated consideration of technical matters, the province of evidence from suitably qualified experts. The oral hearing took several days. Both parties acknowledge that the documentation was extensive. Written and oral submissions were provided by the parties' representatives. The Tribunal's decision was lengthy.

³⁴ Ibid, [98].

³⁵ Ibid, [99].

[40] I am satisfied that the nature and complexity of the relevant material and other evidence warranted legal representation and the incurring by Yeeha Tours of legal expenses in conducting itself in the review.

[41] However, of itself, that does not weigh in favour of an award of costs in the interests of justice.

Relative strengths of the claims made by each of the parties

[42] Yeeha Tours does not suggest that the Department's position was entirely unfounded or unreasonable, but rather that it was unsupported by compelling evidence such that it was not a strong case. It points to a number of particular matters. It submits that the Department's resistance to the Tribunal having regard to the draft AMS was inconsistent with the evidence of its employees, Mr Waring and Dr Young, and therefore unwarranted. I agree for the reasons earlier explained.

[43] Further, it argues that the criticism by the Department that Yeeha Tours had not consulted the traditional owners was, as the Tribunal found, misplaced, given the MOU between the Department and the traditional owners. As was its criticism of Yeeha Tours for not advancing evidence about visitor numbers and other relevant statistics, since, as the Tribunal found, the Department was best placed to collect and analyse them in its role of administering the relevant legislation and in managing the area, and should have provided them in its role of assisting the Tribunal. Finally, it says that the Department claims the CAP application raised public health and safety issues, but it presented no evidence about any current issues or concerns.

[44] The Department submits that it is 'plainly incorrect' to assert that its case was not strong. It concedes that the approach it contended to the draft AMS was not accepted by the Tribunal, but says that it had not 'attracted any particular criticism' in the Tribunal's reasons for decision. It suggests that mere disagreement on a matter otherwise open is not a basis for awarding costs. For the reasons explained earlier, although I did not directly criticise the Department's approach in my previously published reasons for decision, I am satisfied that its approach was unreasonable in the circumstances, not merely that there was disagreement.

[45] It also suggests that the Tribunal's decision did not find the onus was as a matter of law on the Department to consult with the traditional owners, rather as a matter of practicality in finding that in its overall role it, rather than individual permit holders, should consult with the traditional owners. Therefore, in all the circumstances, the Department argues that these matters are insufficient to displace the usual rule about costs.

[46] The Department had an MOU with the traditional owners that provided for consultation with the traditional owners about the issue of permits that may impact on their cultural heritage.³⁶ As part of the process of conducting itself in the review, if not in deciding the application for a CAP, it should reasonably have consulted the traditional owners to ascertain whether they considered that the proposed CAP impacted on their cultural heritage.

³⁶ *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345, [67].

- [47] Yet here, even when Yeeha Tours sought review, in making a submission to the Tribunal that it was concerned about the conservation of cultural resources on Fraser Island, the Department did not provide evidence from the traditional owners.³⁷ It held the MOU and the knowledge of who to consult with as part of its overall management responsibilities for the areas concerned. In discharging its obligations to assist the Tribunal in the review, it should reasonably have sought and presented relevant evidence about any concerns of the traditional owners rather than merely making broad submissions about its concerns for cultural heritage issues.³⁸
- [48] Similarly, as I said in the review decision,³⁹ it was unhelpful of the Department to criticise Yeeha Tours for not providing evidence about visitor numbers when it is in the best position to collect, hold and present that information, but it failed to assist the Tribunal by providing them in the review.
- [49] I accept also, as Yeeha Tours argues, that the Department, despite raising broad concerns about safety issues, failed to provide evidence as to existing concerns. While I accept that there are potential issues inherent in authorisation of multiple aircraft operators using the same flight paths and landing zones, the use and adequacy of the means available to the Department (as aerodrome operator)⁴⁰ to regulate such activities had not been seriously explored or considered by the Department in the context of the CAP application.
- [50] On balance, this factor weighs in favour of a costs order.

Factors relevant to reviews of reviewable decisions

- [51] The relevant factors are two-fold. Did the Department afford Yeeha Tours with natural justice? Did Yeeha Tours genuinely attempt to enable and assist the Department to make its decision on the merits?
- [52] The evidence suggests, and the Department does not contend otherwise, that Yeeha Tours genuinely attempted to enable and assist the Department to reach a decision on the merits of its application. I accept that it did so.
- [53] Yeeha Tours submits that the Department did not afford it natural justice. It sought a copy of the draft AMS in the Department's internal decision-making process. The request was refused. Therefore, it could not rely upon the evidence contained in the draft AMS throughout that process. As the review proceedings unfolded in QCAT, the draft AMS was important evidence, as was the evidence of Mr Waring in providing the background to its development. Additionally, Yeeha Tours argued that the Department in the reviewable decision took the view that a CAP, even a short-term permit, would be inconsistent with the Operational Aircraft Landing Policy, which did not provide for approvals for beach landings,⁴¹ even though it did not apply that policy to AFI (However, as the Tribunal, I did not apply it because it found it would be unjust to do so in all of the circumstances).⁴² Yeeha Tours says

³⁷ Ibid, [68].

³⁸ Ibid, [67].

³⁹ Ibid, [105].

⁴⁰ Ibid, [120], [153].

⁴¹ *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345, [49], [126], [140].

⁴² Ibid, [140].

that it was either a breach of natural justice or otherwise unjust for the Department to have relied upon it in refusing the CAP.

- [54] Finally, Yeeha Tours submits that in effect the Department refused to consider the application for a CAP on its merits, relying on a potential expression of interest (EOI) process and the QuEST policy to summarily refuse it. It contends, as the Tribunal found, that the RAM Act provided for the application for a CAP, as well as an EOI system for CAAs. Yeeha Tours was entitled to bring the application and entitled to have it determined on its merits.⁴³ Further, as the Tribunal found and the Department conceded in the review proceeding, the QuEST policy (which had been relied upon in Departmental decision-making) does not apply to aircraft operators and was not relevant to the CAP application.⁴⁴
- [55] It argues that the Department's approach prevented a proper consideration of the merits of its application in its decision-making process and weighs in favour of a costs order in the interests of justice.
- [56] The Department submits that the Tribunal in its reasons for decision did not directly criticise it (the Department) for its inconsistent application of the Operational Aircraft Landing Policy and that the QuEST policy was not relied upon by it in the review proceeding. To the extent that it is necessary, I find that the Department's inconsistent application of the Operational Aircraft Landing Policy was unreasonable and unjust in the circumstances. The Operational Aircraft Landing Policy was not applied to AFI and yet was relied upon to deny Yeeha Tours' application. I found that it was unjust to apply it in the circumstances, particularly having regard to the references in it to the special management arrangements in place for landings on the eastern beaches of Fraser Island which I found could only be a reference to the draft AMS.⁴⁵
- [57] Further, while I accept that the QuEST policy was not relied upon in the review proceedings, I find that it was inappropriately relied upon in the internal decision-making, even though it did not apply to aircraft operators. In this regard, I relevantly accepted that the QuEST policy was relied upon, in part, in the internal decision-making process to refuse the CAP, but was revealed during the hearing not to be relevant to aircraft operators.⁴⁶
- [58] Further, as discussed earlier, I was satisfied that the Department acted inconsistently with respect to the draft AMS. It used it in formulating conditions to AFI's CAA. Its staff had regard to it at times. However, in respect of Yeeha Tours' application, it denied that the draft AMS was relevant and refused to allow Yeeha Tours to have a copy of it during the internal decision-making processes of the Department (and did not consider its contents to be relevant in the making of its internal decisions).
- [59] Whereas I may not have directly criticised the Department's inconsistent application of policy in my reasons for decision, I am satisfied that its application of irrelevant policy (QuEST) and inconsistent application of other policy (operational aircraft

⁴³ Ibid, [137].

⁴⁴ Ibid, [46], [50].

⁴⁵ *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345, [44], [45], [140].

⁴⁶ Ibid, [19], [46], [50].

landing policy) and inconsistent use of and approach to the draft AMS was unjust in the circumstances.

- [60] This factor weighs in favour of a costs order being made.

The financial circumstances of the parties

- [61] Yeeha Tours submits that it properly made its CAP application to advance its commercial and financial interests. It had to incur the costs of legal representation to present its case through a lengthy and complex Tribunal proceeding. It contends that the financial utility of the CAP is diminished and the outcome is unfairly eroded by the legal costs it incurred due to the Department's approach to its application.

- [62] I do not accept that the commercial motivation of Yeeha Tours in making its application and applying for review provides a compelling argument for departure from the usual rule as to costs under the QCAT Act.

- [63] I have no detailed information about the parties' respective financial circumstances, nor any financial hardship occasioned by Yeeha Tours in funding the proceedings. Although the Department no doubt has a considerable budget, it also has considerable responsibilities that might reasonably be expected to be costly to perform. It is reasonable to infer, and I do, that like all publicly funded entities, it has budgetary constraints.

- [64] This factor does not weigh in favour of a costs order being made.

Anything else the Tribunal considers relevant

- [65] The Department argues that it is significant that Yeeha Tours does not submit that it rebuffed Yeeha Tours or prevented it from amending its Operation Manual, and nor say it would have done so if invited (presumably by the Department) to earlier amend its Operations Manual. The Department also submits that neither party was wholly successful in the proceedings because a CAP was granted to Yeeha Tours for 2 years (not 3 years as sought); Yeeha Tours was directed to amend its Operations Manual before the Tribunal would finalise its orders to deal with beach landings (which would otherwise be unlawful)⁴⁷ and with respect to interactions with wildlife and bird strike.⁴⁸ Further, the Tribunal sought confirmation that all CASA requirements were met.

- [66] Further, the Department says that the Tribunal did not criticise it for the manner in which it conducted itself in the review. Yeeha Tours says that, if it is necessary for a finding to be made that the Department acted unreasonably, there is ample basis for the Tribunal to do so, having regard to the matters raised and the Tribunal's earlier findings. As discussed earlier, I have made findings that the Department's approach was unreasonable in identified respects.

- [67] Further, it was bound in the review proceeding to discharge the obligation imposed upon it to use its 'best endeavours to help the tribunal make' its decision in the

⁴⁷ *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345, [124].

⁴⁸ *Ibid*, [147], [159].

review.⁴⁹ In the context of the QCAT Act, the decision in the review must be understood as the correct and preferable decision.⁵⁰ The Department was also bound at common law to act as a model litigant in the proceeding. For reasons to be explained (and those instances already identified as taking an unreasonable approach in the review proceedings and discussed throughout these reasons for decision), irrespective that I may not have directly criticised the Department's actions in my earlier reasons for decision, I am satisfied that it did not in all respects properly discharge those responsibilities.

- [68] It failed to consult with the traditional owners about the CAP application regarding concerns for their cultural heritage,⁵¹ despite the MOU and despite the fact that the RAM Act required the Tribunal to consider the issue in determining the CAP application. Further, despite the range of matters to be considered under the RAM Act and the relevance of other uses generally to those considerations as well as the cumulative effect of the proposed use and other uses, it did not provide relevant statistical information about visitor numbers. Rather, it criticised Yeeha Tours for failing to do so. As I found, in its role of administering relevant legislation, the Department was best placed to have that information and unless it publishes it, it is unlikely to be readily ascertainable.⁵² In its role of assisting the Tribunal to make the correct or preferable decision, the Department ought to have provided it to the Tribunal.
- [69] The Department further contends that the parties agreed to all of the amendments leaving the only live issue concerning flight capacity and transit flights. However, this latter submission overlooks the course of the proceeding, focussing on the couple of items agreed belatedly after the publication of my lengthy reasons for decision on 2 October 2018 by which I had decided the issues relevant to the proceeding subject to specified events occurring by way of amendment of the Operations Manual, submissions about the form of the final orders and confirmation as to dealing with any outstanding CASA requirements.
- [70] I accept that Yeeha Tours was successful in the review: it was granted a CAP. It is irrelevant that Yeeha Tours did not assert that it would have earlier amended its Operations manual if invited to do so by the Department. It is plain that Yeeha Tours took all necessary steps to advance its CAP application. It invested significant resources in the review proceeding. The belated agreement of the Department was in relation to minor issues in the scheme of the review, and after my decision on almost all substantive issues had been made, subject to the further steps specified by me.
- [71] That said, Yeeha Tours was responsible for the contents of its Operations Manual. It should have identified the need for and made provision in its Operations Manual for beach landings and interaction with wildlife and birdstrike in the context of its application. However, its failure to do so did not cause any delays or additional or avoidable costs up until my decision of 2 October 2018, when I ordered its amendment. As a result of the shortcomings in the Operations Manual, it is reasonable to infer that Yeeha Tours incurred some amount of otherwise avoidable

⁴⁹ QCAT Act, s 21(1).

⁵⁰ Ibid, s 20(1).

⁵¹ *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345, [81], [82].

⁵² Ibid, [105].

costs in complying with the further steps required at that stage and the further on the papers hearing before my final orders issued, than it would have done had its Operations Manual been in order in the first instance.

[72] As I observed in my reasons for decision,⁵³ having noted comments of Departmental staff about risk-averse decision-making,⁵⁴ administrators have an obligation to perform their properly delegated statutory functions. As I discussed above, the CAP was refused by the Department on the basis of irrelevant policy (QuEST) and inconsistent application by it of other relevant policy (the Operational Aircraft Landing Policy), as well as inconsistent use of the draft AMS as between Yeeha Tours and AFI. Further, in the RAM Act, Parliament provided for applications for CAPs to be decided having regard to specified matters. Some evidence suggested that there may be an internal preference to calling for expressions of interest (EOI), rather than considering and deciding an application for a CAP.⁵⁵

[73] That said, I acknowledge that the interplay between the relevant policy and legislative framework is not without complexity. It is nevertheless of concern that QuEST, an irrelevant policy, was applied and relied upon in internal decision-making. Further, I make the observation that the Department may wish to consider whether Departmental decision-makers (irrespective that they may be highly qualified in their subject area and well-intentioned in performing their duties) are adequately trained and aware of their responsibilities as delegated decision-makers. A person making an application which he, she or it is entitled to bring, is entitled to have it decided on its merits according to the relevant legislation and within any relevant policy framework and without regard to irrelevant considerations.

[74] Yeeha Tours was entitled to a decision on its application for a CAP made by the Department on the merits of the application after proper consideration of relevant matters. I am satisfied that the Department did not fulfil its obligations in administering the relevant legislation having regard to the relevant considerations, available evidence and policy framework. Further, to a limited extent as explained above, it did not in all respects fulfil its obligation to use its best endeavours to assist the Tribunal to make the correct and preferable decision in the review.

[75] I conclude that this matter weighs in favour of a costs order.

Do the interests of justice require that a costs order be made?

[76] In the circumstances discussed and after weighing the various considerations, I am satisfied that a costs order in favour of Yeeha Tours is required in the interests of justice.

[77] Yeeha Tours has been unnecessarily disadvantaged by the approach and actions of the Department during its internal decision-making processes and, to a lesser extent, in the tribunal review proceeding, putting it to significant expense in order to obtain a decision on the merits of its application for a CAP, having regard to relevant considerations. That said, Yeeha Tours also occasioned some expense unnecessarily by failing to address beach landings, bird-strike and interaction generally with

⁵³ Ibid, [154].

⁵⁴ Ibid, [121].

⁵⁵ *Yeeha Tours and Holidays Pty Ltd v Department of National Parks, Sport and Racing* [2018] QCAT 345, [46], [158].

wildlife in its Operations Manual. Its own failings occasioning otherwise unnecessary expense must properly be factored into the amount of any costs award to be made.

Should costs be awarded on an indemnity basis?

[78] As discussed, the Department's task as a statutory decision-maker was to make decisions on the merits of the application, having regard to the relevant considerations; and then in the tribunal proceedings to use its best endeavours to assist the Tribunal to make the correct and preferable decision. I have identified shortcomings.

[79] However, in respect of the Department's internal-decision-making process, the evidence does not go so far as to support (and I have not made) a finding that the misperceptions of the officers concerned about the relevant policy and content of it were more than mere errors, having regard to the complexity of the decision-making framework. If the application was refused deliberately and/or knowingly without consideration of the merits of the application for the purpose of risk avoidance (that is, without considering any other relevant factors) or to further an internal preference for an EOI process, that might well be conduct sufficiently irresponsible and blameworthy to support an award of indemnity costs.⁵⁶ However, I have not made, and do not now make, a finding that the Department deliberately or knowingly failed to decide the CAP application on its merits for the purposes of achieving either of those aims.

[80] Further, while it is the case that I have found that the Department might have been expected to consult with the traditional owners and present that evidence in the review, as well as additional statistical information in assisting the Tribunal in the review, I am not satisfied that its conduct in respect of the failure to do so is sufficiently blameworthy as to ground an award for indemnity costs. I was able to make the decision in the review absent that additional evidence.

[81] Costs should be awarded on a standard basis.

Fixing costs

[82] I have not been provided with an itemised account for Yeeha Tours' costs and disbursements. Rather I have a summary which lists amounts charged on particular dates which Yeeha Tours provided to the Department. According to the available information, Yeeha Tours' costs and disbursements up to 3 July 2019 were a little under \$40,000, including an amount of some \$6,740 for the period from 25 January 2018 to 3 July 2019. I published my substantive decision on 2 October 2018 and my final orders (after amendment of the Operations Manual) on 2 July 2019.

[83] A further account on 5 August 2019 was in the amount of some \$1,570. A further sum of \$5,000 was estimated as likely costs thereafter, including as to the costs application. It is neither party's interests, nor the interests of justice, in the circumstances to increase costs by ordering an assessment of costs.

⁵⁶ *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 531; *Todrell Pty Ltd v Finch (No 2)* [2008] 2 QdR 95; *Thiess Pty Ltd v FLSMIDTH Minerals Pty Ltd (No 2)* [2010] QSC 120.

- [84] In light of the voluminous material filed in the proceedings and the three days of oral hearing, as well as several on the papers hearings for which the parties provided written submissions on each occasion, I am satisfied that the costs of Yeeha Tours as set out in the summary are reasonable.
- [85] I have concluded that, with a reduction of 50% of the costs between 25 January 2018 and 3 July 2019 (because of Yeeha Tours' own failings in preparation of its Operations Manual and the additional costs that will have been incurred during the period when it was attending to amendment of the Manual), that the costs incurred up until 3 July 2019, should be taken into account as the basis for awarding costs on a standard basis. That is, costs of \$36,630 (being \$40,000 less \$3,370) represent the total costs to be discounted to reflect an award on a standard basis.
- [86] Doing the best I can to award an amount that represents costs on a standard basis, I discount the amount by 30%, and I fix the costs in the sum of \$25,000. I make no award relating to the estimated costs relating to the costs application and assessment.

Orders

- [87] Accordingly, I make orders that the Department must pay Yeeha Tours the sum of \$25,000 within 60 days of this order.