

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Assistant Commissioner Brian JA Wilkins & Anor v Gunter* [2020] QCATA 101

PARTIES: **ASSISTANT COMMISSIONER BRIAN JA WILKINS**
CRIME AND CORRUPTION COMMISSION
(applicants)
v
JOSHUA GUNTER
(respondent)

APPLICATION NO/S: APL305-19

ORIGINATING APPLICATION NO/S: OCR114-19

MATTER TYPE: Appeals

DELIVERED ON: 30 June 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Deputy President Judge Allen QC
Member Browne

ORDERS: **The Crime and Corruption Commission is joined as an applicant in the proceeding APL305-19.**

THE APPEAL TRIBUNAL DIRECTS THAT:

1. Unless otherwise directed, the Crime and Corruption Commission is limited to making submissions in respect of the grounds of appeal identified in the application for leave to appeal or appeal filed 11 November 2019 and the supporting submissions filed by Assistant Commissioner Brian JA Wilkins.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES – GENERALLY – where party seeks to be joined as applicant to appeal proceeding – whether statutory role provides an interest in the proceedings – whether there is power to limit a party’s role in the proceedings – whether a party’s role should be limited

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 3, s 28, s 42, s 62, schedule 3
Crime and Corruption Act 2001 (Qld) s 33, s 37, s 219H

Australian Securities Commission v Bell (1991) 32 FCR 517

Bhamjee v Forsdick (No 2) [2004] 1 WLR 88

Crime and Misconduct Commission v Wilson and Anor [2012] QCA 314

Cocker v Tempest (1841) 7 M & W 502

Commissioner of Police, New South Wales Police Force v Fine [2014] NSWCA 327

Cuttler v Browne & Anor [2010] QCA 346

Officer Carey v Assistant Commissioner Mickelson [2019] QCAT 109

Shafer v Acting Deputy Commissioner Tony Wright [2020] QCAT 108

Kioa v West (1985) 159 CLR 550

Aon Risk Services Aust Ltd v Australian National University (2009) 239 CLR 175

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] Assistant Commissioner Brian Wilkins ('Assistant Commissioner') seeks to appeal against the Tribunal's decision made in its review jurisdiction setting aside the Assistant Commissioner's finding that one matter of misconduct presented against Joshua Gunter is substantiated.¹ Relevantly, the Tribunal below conducted a fresh hearing on the merits and substituted its own decision in finding that Matter 1 set out in the disciplinary proceedings notice dated 23 November 2018 is not substantiated.
- [2] The parties to the review proceeding below were Mr Gunter as the applicant and the Assistant Commissioner as the respondent decision-maker. The review proceeding concerned Mr Gunter's conduct as a police officer and allegations that between 9 November 2016 and 16 February 2017, inclusive, he accessed confidential information contained in the Queensland Police Service ('QPS') computer system called QPRIME without an official purpose related to the performance of his duties as a police officer. Relevant to the allegations of misconduct and accessing information on QPRIME is the QPS standard of practice for professional conduct identified as Standard of Practice 2012/33.
- [3] The Tribunal below delivered oral reasons and made findings about the allegations of misconduct and the Standard of Practice. The Tribunal below found that, amongst

¹ Decision of the Tribunal dated 15 October 2019. See s 219H of the *Crime and Corruption Commission Act 2001* (Qld) and s 18 and s 20 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

other things! the Standard of Practice does not prohibit a police officer from checking their own records; and does not prohibit a police officer checking up on someone who they reasonably suspect of criminal activity merely because that officer has some personal or commercial relationship with the person.²

- [4] The Crime and Corruption Commission (‘the Commission’) was not a party to the Tribunal proceeding. The Commission now applies to be joined as an applicant in the appeal proceedings.³
- [5] In support of the joinder application, the Commission contends that the Appeal Tribunal may join a party to a proceeding under s 42 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (‘the QCAT Act’). Further, the Commission says that it has a clear interest in police disciplinary review proceedings and any arguments raised by it would not add substantially to the complexity of the matter.⁴
- [6] In responding to the joinder application, Mr Gunter submits that, if the Commission is joined as a party, it be directed not to take active steps in the proceedings without first obtaining the leave of the Appeal Tribunal.⁵
- [7] The Assistant Commissioner does not oppose the joinder application and says that he does not wish to be heard in the application and will abide by the decision of the Appeal Tribunal.⁶

The application to join a party

- [8] Section 42 of the QCAT Act confers a discretionary power on the tribunal to join a person as a party to a proceeding if the tribunal considers that the person should be bound by, or have the benefit of, a decision of the tribunal in the proceeding; or the person’s interests may be affected by the proceeding; or for another reason, it is desirable that the person be joined to the proceeding.
- [9] Relevantly, ‘proceeding’ includes, amongst other things, an appeal and an application for leave to appeal to the Appeal Tribunal.⁷
- [10] In support of the joinder application, the Commission contends that it was notified of the application for leave to appeal or appeal but not the disciplinary review proceedings at first instance before the Tribunal.⁸ The Commission contends that the question centrally at issue in the present appeal is the correct approach to assessing whether access to QPRIME information is authorised in a given case. Further, the Commission submits that that (i.e. the correct approach to accessing QPRIME) is a question in which the Commission has a specific interest, as it potentially bears on how the Commission assesses cases of potential corrupt conduct and police misconduct in respect of unauthorised access to police information

² Transcript of proceedings OCR114-19 dated 15 October 2019, p 47.

³ Application to be joined to a proceeding filed 20 December 2019. See Appeal Tribunal Directions dated 8 January 2020.

⁴ Submissions filed (by the Commission) in support of the application to be joined dated 20 December 2019.

⁵ Respondent’s submissions filed 21 January 2020.

⁶ Submissions on behalf of the applicant filed 21 January 2020.

⁷ See Schedule 3 of the QCAT Act and meaning of ‘proceeding’ that includes an appeal before the appeal tribunal and an application for leave to appeal to the appeal tribunal.

⁸ Applicant’s submissions dated 20 December 2019.

systems.⁹ It is for this reason, the Commission says, it seeks to be joined to these proceedings and seeks to be heard on the question of the correct approach to assessing whether conduct is authorised. Further, the Commission says that its submissions would be of assistance to the Appeal Tribunal in reaching the correct and preferable decision.¹⁰

- [11] Relevant to the discretion under s 42 of the QCAT Act, and more importantly whether the Commission's 'interests may be affected by the proceeding', the Commission contends that the principles in *Crime and Misconduct Commission v Wilson & Anor*¹¹ can be applied with equal force to an application to be joined to an appeal proceeding.
- [12] In *Wilson*,¹² the Court of Appeal held that the Commission's statutory role provides a sufficient interest in a police disciplinary review proceeding for the purposes of s 42 of the QCAT Act.¹³ Relevantly, the Court of Appeal recognised the Commission's interest in disciplinary proceedings as being, amongst other things, a clear interest specific to it derived from its statutory role.¹⁴ Further, the Court of Appeal found that the Commission's interests remained the same irrespective of the role it intended to play in the proceedings.¹⁵ Muir JA said:

The roles vested in the Commission by s 33 of the [former *Crime and Misconduct Act* 2001 (Qld) now the *Crime and Corruption Act* 2001 (Qld)] of raising standards of integrity and conduct in units of public administration and ensuring complaints about misconduct are dealt with appropriately, distinguish the Commission's interest in disciplinary proceedings from those of members of the public. The Commission's interest in such matters is hardly a broad public interest. On the contrary, it is a clear interest specific to it derived from its statutory role...

...Whether the Commission was to be an active or passive participant in the proceedings before the Tribunal until its appeal rights were engaged concerned the manner in which the Commission intended to protect or advance its interests, not the existence of those interests. The Commission's interests remained the same irrespective of the role it intended to play in the proceedings.¹⁶

- [13] We accept that the Commission has a sufficient interest in police disciplinary proceedings due to its monitoring role for police misconduct under the *Crime and Corruption Act* 2001 (Qld) ('the CC Act').¹⁷ We consider that, as found in *Wilson*, the Commission's interests remain the same irrespective of the role it takes in a police disciplinary proceeding. However, the question of whether a party should be joined to a proceeding that involves the exercise of a broad discretion should not be determined by the role the party may take in the proceeding if joined.¹⁸

⁹ Ibid.

¹⁰ Ibid.

¹¹ [2012] QCA 314.

¹² Ibid.

¹³ Ibid, [32].

¹⁴ Ibid, [35].

¹⁵ Ibid, [36].

¹⁶ Ibid.

¹⁷ See s 33 and s 47 of the CC Act.

¹⁸ See *Commissioner of Police, New South Wales Police Force v Fine* [2014] NSWCA 327, [81].

- [14] In *Commissioner of Police, New South Wales Police Force v Fine*,¹⁹ the New South Wales ('NSW') Court of Appeal, in considering the Civil and Administrative Tribunal's power to join a party to a review proceeding under similar legislation to the QCAT Act, held that whether a party should be joined as a party to the proceedings is not to be determined by reference to the question whether the decision-maker is or is not an active protagonist in the proceedings.²⁰
- [15] In *Fine*, the decision-making authority issued a long-term banning order against Mr Fine under the *Liquor Act 2007* (NSW). The order was made on the application of the Commissioner of Police, NSW. Mr Fine sought a review of the order in the Tribunal. The Tribunal at first instance refused the Commissioner of Police's application to be joined to the review proceedings under s 44 of the *Civil and Administrative Tribunal Act 2013* (NSW) predominantly on the basis that the proceedings were not adversarial 'in the usual sense' and the need for a contradictor was not pressing.²¹ The Tribunal considered that the relevant decision-making authority would file documents in the proceedings as required under the relevant legislation and that the Commissioner of Police could give evidence in the proceedings where appropriate. The Tribunal's decision was upheld by the Appeal Panel of the Tribunal.
- [16] In *Fine*, the NSW Court of Appeal, in allowing the appeal and setting aside the Tribunal's decision, held that the Tribunal's approach (upheld by the Appeal Panel) to determining the joinder application imputes a pre-condition to the power of joinder which is not founded in the text of the legislation. The Court of Appeal held:
- ... the Tribunal has restricted the joinder of a party to circumstances where there is a "*special or unusual*" case. As explained above, s 44 is not so limited. The error in failing to appreciate the role of the Tribunal on a hearing of the review application and in proceeding on a basis that the discretion was constrained by reference to principles applicable in other contexts, was such as to warrant appellate intervention.²²
- ... However, the question whether a party should be joined as a party to the proceedings is not to be determined by reference to the question whether the decision-maker is or is not an active protagonist in the proceedings. To take that approach imputes a pre-condition to the power of joinder which is not founded in the text of the legislation....²³
- [17] We agree with the approach taken by the Court of Appeal in *Fine* that the discretion to join a party to a proceeding is not fettered by preconditions not found in the text of the legislation. The discretion should not be determined by the question of whether the decision-maker will take an active role in the proceeding. Likewise, it is not to be determined by the question whether a party will take an active or passive role in the proceeding.
- [18] We consider that the discretion under s 42 of the QCAT Act should not be determined by reference to the question whether a decision-maker in a review

¹⁹ *Commissioner of Police, New South Wales Police Force v Fine* [2014] NSWCA 327.

²⁰ *Ibid*, [81].

²¹ *Ibid*, [24].

²² *Ibid*.

²³ *Ibid*, [82].

proceeding, or indeed a party seeking to be joined to an appeal or an application for leave to appeal, will be taking an active or passive role in the proceedings.

- [19] In the present matter, the Assistant Commissioner seeks to appeal the Tribunal's decision below that found the allegations of misconduct presented against Mr Gunter are not substantiated. In the application for leave to appeal or appeal, the Assistant Commissioner identifies six grounds of appeal that, as contended, raise questions of law only, for which leave to appeal is not required.
- [20] If the Assistant Commissioner is successful on appeal in establishing an error of law, the Appeal Tribunal may, amongst other things, proceed to set aside the Tribunal's decision and substitute its own decision.²⁴ If, on the other hand, the Assistant Commissioner is successful on appeal in establishing an error of mixed fact and law, subject to leave to appeal being granted, the Appeal Tribunal must proceed to rehear the matter, with or without fresh evidence subject to leave being given.²⁵ It is established law that, on an appeal which proceeds by way of a rehearing, 'judgment may be given as ought to be given if the case came at that time before the court of first instance'.²⁶
- [21] We accept the Commission's submission that its interests in a police disciplinary review proceeding apply with equal force to an application to be joined to an appeal proceeding, particularly in circumstances, as is the case here, where the application for leave to appeal or appeal concerns a police disciplinary review proceeding before the Tribunal below. Further, as discussed above, if the appeal is allowed the Appeal Tribunal may rehear the matter, subject to leave being granted, or substitute a decision in circumstances where the matter involves allegations of police misconduct.
- [22] We are satisfied that, for the purposes of s 42 of the QCAT Act, the Commission has enough interest in the proceeding that concerns an application for leave to appeal or appeal about the Tribunal's decision and findings of police misconduct.²⁷ More importantly, the Assistant Commissioner's application for leave to appeal or appeal identifies errors in the learned Member's interpretation and application of the QPS Standard of Practice. Relevantly, Ground Four of the appeal refers to, as contended by the Assistant Commissioner, an error in the Tribunal's 'understanding of the [Standard of Practice] QPS 2012-33' and that the Tribunal had a 'fundamental misunderstanding of the nature of the Standard of Practice'.²⁸
- [23] Consistent with *Wilson*, we consider that the Commission has a monitoring role for police misconduct such as ensuring complaints about misconduct are dealt with appropriately. We are satisfied that the outcome of the appeal proceeding may, as contended by the Commission, potentially bear on how the Commission assesses cases of potential corrupt conduct and police misconduct in respect of unauthorised access to police information systems such as QPRIME.

²⁴ QCAT Act, s 146(c).

²⁵ *Ibid*, s 147(2).

²⁶ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 107 (Dixon J), citing *Quilter v Mapleson* (1882) 9 QBD 672.

²⁷ See 'proceeding' under schedule 3 of the QCAT Act which includes an appeal and application for leave to appeal.

²⁸ Application for leave to appeal or appeal filed 11 November 2019 and see outline of submissions for the appellant filed 24 January 2020, p 6.

- [24] We are satisfied that the discretion under s 42 of the QCAT Act should be exercised to join the Commission as an applicant to the appeal proceedings. We order accordingly.

The power to put limits on the Commission's role in the appeal

- [25] Mr Gunter submits that if the Commission is joined to the appeal, we should direct that the Commission take no active steps in the proceeding without first obtaining the leave of the Appeal Tribunal.
- [26] Mr Gunter relies on *Officer Carey v Assistant Commissioner Mickelson*,²⁹ and submits that in *Carey*, despite joining the Commission to the Tribunal's review proceedings, the Tribunal made an order prohibiting the Commission from taking an active role in the proceedings without leave. Mr Gunter invites us to follow *Carey* and submits that, should the Commission's interests substantially depart from those of the Assistant Commissioner, then the Commission could seek leave to become an active party to the extent permitted by the Appeal Tribunal.³⁰
- [27] In *Carey*, the Tribunal considered s 62(1) of the QCAT Act and found that it may give a direction at any time in a proceeding and do whatever is necessary for the fair conduct of the proceeding.³¹ The Tribunal was satisfied that the making of directions to effectively regulate the steps taken by the Commission, in circumstances where it (the Commission) seeks to be joined to the proceedings to preserve its appeal rights but not intending to actively participate, are directions for the speedy and fair conduct of the proceedings.³² The Tribunal held (footnotes omitted):

Further, subject to the QCAT Act, an enabling Act, and the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) ('*QCAT Rules*'), the procedure for a proceeding is at the discretion of the tribunal. It is a fundamental requirement that all parties to a proceeding be accorded natural justice. The tribunal may give a direction at any time in a proceeding and do whatever is necessary for the fair conduct of the proceeding.³³

That is, the tribunal is empowered to regulate the conduct of proceedings before it, by making the directions as may be necessary for the fair conduct of proceedings. This includes the making of directions to ensure the orderly and fair conduct of proceedings. I am satisfied that the making of directions to the effect sought by Mr Carey to regulate the steps to be taken by the CCC, in circumstances that it seeks to be joined to preserve its appeal rights but not intending to actively participate as the proceeding advances to determination, are directions for the speedy and fair conduct of the proceeding.³⁴

- [28] In *Carey*, the Tribunal also considered that Mr Carey (the subject officer) was entitled to know 'who is in effect his prosecutor at any given time' and the requirement to afford natural justice may arguably be denied to Mr Carey if he does not know who his opponent is.³⁵ The Tribunal said that if the Commission must apply before changing its intended approach to the proceeding and taking any steps

²⁹ [2019] QCAT 109.

³⁰ Respondent's submissions filed 21 January 2020.

³¹ *Officer Carey v Assistant Commissioner Mickelson* [2019] QCAT 109, [24].

³² *Ibid*, [25].

³³ *Ibid*, [24].

³⁴ *Ibid*, [25].

³⁵ *Ibid*, [26].

in it, the Tribunal may at the time of such application make such directions as are necessary for the fair conduct of the proceedings.³⁶ The Tribunal held:

Conducting this proceeding in a manner that is fair to Mr Carey requires that he know who is in effect his prosecutor at any given time. The requirement to afford natural justice, is not denied the CCC in circumstances that it does not currently intend to participate as an active manner, simply because it must apply to the Tribunal before taking steps in the proceeding. However, it may arguably be denied to Mr Carey if he does not know his opponent is. If the CCC must apply before changing its intended approach to the proceeding and taking any steps in it, the Tribunal may at the time of any such application make such directions as are then necessary, and appropriate, for the fair conduct of the proceeding, bearing in mind the legitimate concerns articulated by Mr Carey.³⁷

If the CCC decides at some future time that it intends to be involved, the Tribunal may, having regard to Mr Carey's articulated concerns, make such directions as are then determined to be necessary. The making of a direction as sought by Mr Carey does not, in my view, impinge upon the rights the CCC as a party under the QCAT Act or the enabling Act. It merely regulates speedy and fair procedure for the proceeding.³⁸

[29] On the other hand, the Commission relies on *Schafer v Acting Deputy Commissioner Tony Wright*,³⁹ and submits that in *Schafer* the Tribunal stated that in a merits review proceeding, the decision-maker's role is not adversarial and therefore there is not more than one 'prosecutor' in the relevant sense.⁴⁰ Rather, the decision-maker and the respondent (i.e. the Commission) are obliged to act as model litigants and must use their best endeavours to help the Tribunal on review to make the correct and preferable decision.⁴¹

[30] In *Schafer*, the Tribunal considered that, while s 62(1) of the QCAT Act does provide power to the Tribunal to regulate the conduct of proceedings, it does not allow the negation of rights or requirements mandated by the QCAT Act or an enabling Act.⁴² The Tribunal further held that s 62(1) does not allow for directions that effectively remove the right of a party to be heard and the Tribunal does not have the power to order that the Commission adopt a passive role in the proceeding.⁴³ The Tribunal held (footnotes omitted):

The case law suggests that while s 62(1) does provide power to the Tribunal to regulate the conduct of proceedings, it does not allow the negation of rights or requirements mandated by the QCAT Act or an enabling Act.⁴⁴

...

Consistent with that qualification to the scope of s 62(1) of the QCAT Act, and in particular the need to observe the rules of natural justice, in my view s

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid, [27].

³⁹ [2020] QCAT 108.

⁴⁰ Submissions in response (filed by the Commission) dated 31 January 2020.

⁴¹ Ibid.

⁴² *Schafer v Acting Deputy Commissioner Tony Wright* [2020] QCAT 108, [18].

⁴³ Ibid, [21] and [27].

⁴⁴ Ibid, [18].

62(1) does not allow for directions that effectively remove the right of a party to be heard. Procedural fairness, including the right to be heard, is an essential characteristic of the judicial process. The right to be heard is given statutory effect by s 28(3)(a) and s 95 of the QCAT Act. ...⁴⁵

...

Accordingly, in my view, the Tribunal does not have power to order that the Commission adopt a passive role in the proceeding....⁴⁶

- [31] Both *Carey* and *Schafer* concerned applications to join the Commission to a review proceeding before the Tribunal exercising its review powers.⁴⁷ In *Carey* and *Schafer* the Tribunal on review took different approaches in determining the Commission's joinder application and whether the Tribunal has the power under the QCAT Act to put limits on the Commission's role in the proceeding, the Commission having been joined as a party to the review application.
- [32] Put simply, in *Carey*, relied upon by Mr Gunter, the Tribunal made a direction under s 62(1) of the QCAT Act that unless otherwise directed, the Commission take no active steps in the proceeding. In *Schafer*, relied upon by the Commission, the Tribunal found that the power under s 62(1) of the QCAT does not allow for directions that effectively remove the rights of a party to be heard and therefore did not make any directions about the Commission's role in the review proceeding.
- [33] The submissions raise two questions:
- (a) Whether the QCAT Act and more specifically s 62(1) permits the tribunal to make a direction that could, in effect, limit a party's role in a proceeding; and
 - (b) If the answer to question (a) above is yes, what, if any, directions should be made regarding the Commission's role in the proceeding APL305-19.

The power to make a direction – s 62(1) of the QCAT Act

- [34] The power to give a direction in a proceeding is clearly at the tribunal's discretion. This requires the tribunal to weigh up the relevant circumstances of the matter to determine whether the direction is necessary for the speedy and fair conduct of the proceeding.⁴⁸ Relevantly, s 62(1) of the QCAT Act provides as follows:
- The tribunal may give a direction at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding.⁴⁹
- [35] The QCAT Act mandates that the procedure for a proceeding is at the discretion of the tribunal, subject to the QCAT Act, an enabling Act and the QCAT rules.⁵⁰ In all proceedings, the tribunal must act fairly and according to the substantial merits of the case.⁵¹ In conducting a proceeding, the tribunal must observe the rules of natural justice and, amongst other things, is not bound by the rules of evidence, may inform itself in any way it considers appropriate, and must act with as little formality and technicality and with as much speed as the requirements of the QCAT Act, an

⁴⁵ Ibid, [21].

⁴⁶ Ibid, [27].

⁴⁷ See s 17 to s 24, inclusive, of the QCAT Act.

⁴⁸ QCAT Act, s 62.

⁴⁹ Ibid.

⁵⁰ Ibid, s 28.

⁵¹ Ibid, s 28(2).

enabling Act or the QCAT rules and a proper consideration of the matters before the tribunal permit.⁵² Further, the tribunal must ensure, so far as is practicable, that all relevant material is disclosed to the tribunal to enable it to decide the proceeding with all the relevant facts.⁵³

- [36] Section 95 of the QCAT Act mandates that the tribunal must allow a party to a proceeding a reasonable opportunity to call or give evidence and, amongst other things, make submissions to the tribunal. Section 95(2) clearly contemplates, however, that in certain circumstances the tribunal may effectively put limits on a party's role in the proceeding such as to refuse to allow a party to a proceeding to, amongst other things, call evidence on a matter if the tribunal considers there is already sufficient evidence about the matter before the tribunal. In such circumstances it may be appropriate for the tribunal to direct the relevant party as to whether evidence may be filed and relied upon in the proceeding.
- [37] The mechanism by which the tribunal may limit a party's role in the proceeding such as to refuse to allow a party to call evidence, in appropriate cases, is to give a direction to the relevant party under s 62(1) of the QCAT Act. The power to give a direction is discretionary and may be made by the tribunal having satisfied itself that it is necessary for the speedy and fair conduct of the proceeding, subject to any modifying provisions in an enabling act and the QCAT rules. More importantly, the tribunal must ensure that procedural fairness is afforded to all parties.
- [38] As observed by Mason J in *Kioa v West*,⁵⁴ the requirements of procedural fairness convey the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. Mason J said (footnotes omitted):

What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting... In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations...⁵⁵

- [39] It is implicit in s 62(1) of the QCAT Act that the power to give a direction at any time is unlimited provided it is necessary for the speedy and fair conduct of the proceeding. As discussed in *Cuttler v Browne & Anor*,⁵⁶ there is authority that in order to protect its processes from abuse, the power of each Court over its own processes is unlimited.⁵⁷ In *Cuttler*, the Court of Appeal said (footnotes omitted):⁵⁸

⁵² Ibid, s 28(3).

⁵³ Ibid, s 28(3)(e).

⁵⁴ (1985) 159 CLR 550.

⁵⁵ Ibid, 584-585.

⁵⁶ [2010] QCA 346.

⁵⁷ *Cuttler v Browne & Anor* [2010] QCA 346, [51], [52]; see *Bhamjee v Forsdick (No 2)* [2004] 1 WLR 88, 92, citing *Cocker v Tempest* (1841) 7 M & W 502, 503-504.

The Court's power to protect its processes from abuse arising from the misconduct of those availing themselves of its processes was stated in the following terms in *Cocker v Tempest* and approved by the Court of Appeal in *Bhamjee v Forsdick (No 2)*:

"The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion."

- [40] In *Cuttler* the Court of Appeal, in applying the reasons of Sheppard J in *Australian Securities Commission v Bell*,⁵⁹ also considered that the principle extends to tribunals.⁶⁰ In *Bell*, Sheppard J said:

Unless there is a clear legislative intention otherwise, tribunals of all kinds will have the power to regulate and control their own proceedings. That power is implied into the statutory provisions pursuant to which a given tribunal is created. The power is implied because it is necessary that the tribunal have it in order to be able properly to discharge its functions....⁶¹

- [41] We consider that, consistent with established principles, in order to protect its processes from abuse, the power of the tribunal over its own processes is unlimited subject to the QCAT Act, an enabling Act and the QCAT rules. Such an approach is consistent with the terms of s 28(1) of the QCAT Act.

- [42] There is power under s 62(1) of the QCAT Act to give a direction at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding. The power to make a direction under s 62(1) of the QCAT Act is unlimited and may include, if necessary, a direction that has the effect of limiting a party's role in the proceeding.

- [43] Whether a direction should be made by the tribunal will depend on the circumstances of the matter, subject to any modifying provisions in the enabling act, and having regard to the requirements of the QCAT Act, such as to afford procedural fairness to all parties and to meet the tribunal's objectives to deal with matters in a way that is accessible, fair, just, economical, informal and quick.⁶²

- [44] The answer to question (a) above as to whether the QCAT Act and more specifically s 62(1) permits the tribunal to make a direction that could, in effect, limit a party's role in a proceeding, is yes.

What, if any, directions should be made regarding the Commission's role in the proceeding APL305-19

- [45] The issue before us now concerns the Commission's role, as a joined applicant, in the appeal proceedings. More importantly, what, if any, directions should be made and, as submitted by Mr Gunter, whether we should direct the Commission not to

⁵⁸ Ibid, [52], citing *Bhamjee v Forsdick (No 2)* [2004] 1 WLR 88, 92 citing *Cocker v Tempest* (1841) 7 M & W 502, 503-504.

⁵⁹ (1991) 32 FCR 517, 528.

⁶⁰ See *Cuttler v Browne & Anor* [2010] QCA 346, [54], citing *Australian Securities Commission v Bell* (1991) 32 FCR 517, 528.

⁶¹ *Australian Securities Commission v Bell* (1991) 32 FCR 517, 528.

⁶² QCAT Act, s 3.

take active steps in the proceedings without first obtaining the leave of the Appeal Tribunal.⁶³

[46] The Assistant Commissioner seeks final orders that the appeal be allowed, the decision of the Tribunal below be set aside and the decision of the Assistant Commissioner made on 18 March 2019, that a finding of misconduct for Matter 1 was substantiated, be confirmed.⁶⁴

[47] Section 28(3)(a) of the QCAT Act requires the Appeal Tribunal in conducting a proceeding to observe the rules of natural justice. This includes, amongst other things, the right to a fair hearing and the right for Mr Gunter to know the case sought to be made against him such that he be given an opportunity to be heard and respond. In *Kioa v West*,⁶⁵ Mason J said:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.

[48] Mr Gunter, as the respondent in the appeal is entitled to know the grounds of appeal and supporting contentions made such that he may be given an opportunity to respond to them.

[49] In keeping with the requirement to afford natural justice to all parties, the Assistant Commissioner is required to apply to the Appeal Tribunal for leave to amend the application or leave to appeal or appeal, should he seek to include a further ground of appeal or contention not previously raised in the application for leave to appeal or appeal, and/or his submissions filed in the appeal.⁶⁶ Similarly, to ensure procedural fairness is afforded to all parties, the Commission as a joined applicant to the appeal proceeding should also be required to apply, where necessary, to the Appeal Tribunal to raise any contentions or a new ground of appeal not previously raised by the Assistant Commissioner in the application for leave to appeal or appeal. This is particularly important in circumstances where the Assistant Commissioner has identified a number of grounds of appeal that, as contended, raise errors of law.

[50] As observed by the Court of Appeal in *Lee v Crime and Corruption Commission & Anor*,⁶⁷ it is inherent in the monitoring role of the Commission, that, on occasion, the Commission will disagree with the QPS Commissioner in his or her dealing with a complaint.⁶⁸

[51] To ensure that Mr Gunter and, where appropriate, the Assistant Commissioner, is afforded procedural fairness and is given an opportunity to respond, the Commission should be required to apply for leave to raise a new contention. The Appeal Tribunal would then be properly placed to consider the Commission's application for leave to raise the contention that may be analogous to an application for leave to amend the application for leave to appeal or appeal to include a new contention or ground of

⁶³ Respondent's submissions filed 21 January 2020, [3].

⁶⁴ Application for leave to appeal or appeal filed 11 November 2019.

⁶⁵ (1985) 159 CLR 550, 582.

⁶⁶ See s 64 of the QCAT Act and the power to amend an application.

⁶⁷ [2016] QCA 145.

⁶⁸ *Ibid*, [67].

appeal in circumstances where the Commission's views no longer align with the Assistant Commissioner.

- [52] Whether leave should be given to a party to amend the application for leave to appeal or appeal will be determined according to established principles.⁶⁹ Consideration of the delay, wasted costs, the legitimate concerns of proper case management and the use of resources must be weighed in considering whether to allow the amendment. In *Aon Risk Services Aust Ltd v Australian National University*,⁷⁰ the High Court said (footnotes omitted):

An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future. A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.⁷¹

- [53] In this matter, it is appropriate in all the circumstances to direct that the Commission, unless otherwise directed, is limited to making submissions in respect of the grounds of appeal identified in the application for leave to appeal or appeal and the supporting submissions filed by the Assistant Commissioner.
- [54] Such a direction is necessary for the speedy and fair conduct of the proceeding such as to ensure that Mr Gunter and the Assistant Commissioner in certain circumstances are given an opportunity to respond to any contentions sought to be raised by the Commission in the appeal proceedings that may give rise to a new ground of appeal.
- [55] In this matter, Mr Gunter should be firstly given an opportunity to respond to the Assistant Commissioner's submissions in support of the grounds of appeal before any submissions are filed by the Commission. The Commission will then be required to indicate to the Appeal Tribunal whether it intends to file any submissions or apply for leave to raise a new contention or ground of appeal on the basis that its views no longer align with the Assistant Commissioner.
- [56] We do not consider that at this early stage of the proceeding, a direction, as sought by Mr Gunter, that the Commission must not take active steps in the proceeding without first obtaining the leave of the Appeal Tribunal, is necessary for the speedy and fair conduct of the proceeding. The Commission as a joined party may consider

⁶⁹ See *Aon Risk Services Aust Ltd v Australian National University* (2009) 239 CLR 175.

⁷⁰ (2009) 239 CLR 175.

⁷¹ *Ibid*, [217].

it necessary, in its monitoring role, to file submissions that supplement the Assistant Commissioner's supporting submissions particularly when addressing the Appeal Tribunal about the QPS Standard of Practice that is relevant to one of the grounds of appeal. If, however, the Commission's views and its supporting submissions no longer align with the Assistant Commissioner's views, the Commission must apply accordingly.

- [57] Consistent with *Aon* and the statutory requirement to afford natural justice to all parties, any application made by the Commission for leave to raise a new contention or ground of appeal should be considered according to established principles. We direct that unless otherwise directed, the Crime and Corruption Commission is limited to making submissions in respect of the grounds of appeal identified in the application for leave to appeal or appeal and the supporting submissions filed by the Assistant Commissioner.