SUPREME COURT OF QUEENSLAND

CITATION:	*Townsville Housing Resource Unit Inc v Flegg* [2013] QSC 96
PARTIES:	**TOWNSVILLE HOUSING RESOURCE UNIT INC (applicant)** **v** **THE HONOURABLE BRUCE FLEGG, MINISTER FOR HOUSING AND PUBIC WORKS (respondent)**
FILE NO:	S699 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application for review
DELIVERED ON:	15 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2013
JUDGE:	Mullins J
ORDER:	**Application dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – DECLARATIONS – where the Residential Tenancies Authority submitted its budget to the respondent Minister for approval under s 482 *Residential Tenancies and Rooming Accommodation Act* 2008 (the Act) – where the respondent refused to approve the budget – where the respondent attached written comments to his decision stating that grants should be redirected away from the proposed tenancy advice program and paid to a capital fund for social housing – where the Authority submitted a revised budget that accorded with the respondent's comments – where the applicant was funded under the tenancy advice program – whether the respondent's comments amounted to a direction to the Authority under s 470 of the Act – whether the respondent's comments otherwise amounted to a direction unauthorised under the Act *Residential Tenancies and Rooming Accommodation Act* 2008, s 121, s 152, s 153, s 467, s 468, s 469, s 470, s 480, s 481, s 482 *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404, considered *Hughes Aircraft Systems International v Airservices Australia*

(1997) 76 FCR 151, considered
Waratah Coal Pty Ltd v Nicholls [2013] QSC 68, considered

COUNSEL: P J Callaghan SC and C J Klease for the applicant
M D Hinson SC and S A McLeod for the respondent

SOLICITORS: Maurice Blackburn Lawyers for the applicant
G R Cooper, Crown Solicitor for the respondent

[1] The Residential Tenancies Authority is established under the *Residential Tenancies and Rooming Accommodation Act* 2008 (the Act) as a body corporate which under s 467 of the Act represents the State to perform the functions conferred under s 468 of the Act.

[2] On 25 May 2012 the Authority submitted to the respondent Minister the Authority's budget for 2012 – 2013 for approval under s 482 of the Act.

[3] The budget was forwarded to the respondent under cover of a briefing note with the recommendation of the Director-General of the Department that the respondent approve the budget. On 24 June 2012 the respondent decided not to approve the budget and circled the words "not approved" on the briefing note and added the handwritten comment "See attached." Attached to this decision were handwritten notes of the respondent under the heading "Minister's comments" that relevantly stated:

> "I do not support the grants as proposed.
>
> We are currently in grip of a social housing crisis with no current budget going forward for additional public housing.
>
> As part of an extensive response to that crisis the $5.25 million grants program to Dept of Housing & Public Works should be directed to the newly created 'Capital Division' in the Housing Fund.
>
> This is a response to a desperate public housing situation that may see us able to only house as few as 2000 families next year 2012/13.
>
> I realize this will create some difficulties in the tenant advocacy and advice area.
>
> I will encourage the RTA itself and community funded NGO to fill this void where possible."

[4] The applicant contends that there were two components to the respondent's decision:

(a) a rejection of the Authority's budget; and
(b) a direction that funds the Authority had budgeted to grant to the Tenant Advice and Advocacy Service (Queensland) (TAAS(Q)) program (from which the applicant was funded) be directed to social housing.

[5] The applicant does not complain about the first component. The applicant seeks a declaration pursuant to Part 5 of the *Judicial Review Act* 1991 that the second

component of the decision was a direction which was *ultra vires* and should be quashed.

[6] The issue to be decided is whether the comments made by the respondent at the time of making the decision on 24 June 2012 can be characterised as a direction to the Authority either within the meaning of s 470 of the Act or otherwise as a direction which was not authorised under the Act. It is common ground that, if it were a direction under s 470, the respondent had not complied with the requirements under s 470 for making a direction.

The legislative framework

[7] Rental bonds paid under residential tenancy agreements are required by the Act to be paid to the Authority which under s 121 of the Act has the legal and beneficial entitlement to the interest earned on the investment of the rental bonds. Other provisions of the Act, however, regulate how the Authority may deal with the rental bond interest.

[8] Sections 152 and 153 of the Act provide:

> "**152 Rental bond interest account**
>
> (1) The authority must pay into the rental bond interest account all amounts earned on investments or loans made by it.
>
> (2) The authority may pay only the following amounts out of the rental bond interest account—
>
> (a) amounts to meet the cost of performing its functions under this Act;
>
> (b) amounts invested under the Statutory Bodies Financial Arrangements Act 1982;
>
> (c) amounts paid out under another provision of this Act."
>
> "**153 Other payments from rental bond interest account**
>
> (1) The authority may make payments from its rental bond interest account (whether by way of grant or loan) for—
>
> (a) establishing or administering rental advisory services; or
>
> (b) establishing schemes for supplying residential accommodation; or
>
> (c) researching, or setting up projects about improving, relationships between lessors and tenants; or
>
> (d) facilitating the resolution of disputes about agreements by tribunals.
>
> (2) However, the authority may make a payment under subsection (1) only with the Minister's agreement.

[9] The Authority's functions and powers are set out in s 468 and s 469 of the Act respectively. Section s 470 of the Act provides:

> "**470 Reserve power of Minister to give directions in public interest**
>
> (1) The Minister may give the authority a written direction if the Minister is satisfied it is necessary to give the direction in the public interest because of exceptional circumstances.
>
> (2) The authority must ensure the direction is complied with.

(3) Before giving a direction, the Minister must consult with the authority.
(4) The Minister must cause a copy of the direction to be gazetted within 21 days after it is given."

[10] With respect to financial matters, the Authority is a statutory body for the purpose of the Acts specified in s 480 and s 481 of the Act. Section 482 of the Act provides:

"**482 Administration budget**
(1) For each financial year, the authority must develop, adopt and submit to the Minister an administration budget within the time the Minister directs.
(2) An administration budget has no effect until approved by the Minister.
(3) During a financial year the authority may develop, adopt and submit to the Minister amendments to its administration budget.
(4) An amendment has no effect until approved by the Minister."

The TAAS(Q) program

[11] The Authority and the Department of Communities entered into an agreement on 22 February 2012 for the funding and operation of the TAAS(Q) program for the period of 1 July 2011 to 30 June 2014. The Authority agreed to fund the Department of Communities recurrently a minimum of $4.495m for the TAAS(Q) program with the contribution being subject to annual budgetary reviews by the Authority, but with agreement in principle to the maintenance at a minimum of that level of annual funding for the period of the agreement. The agreement expressly provided for the funding allocation for 2012-2013 and 2013-2014 to be negotiated with the Authority.

[12] The TAAS(Q) program funded 23 organisations to deliver tenancy services across Queensland from the grant funded by the Authority pursuant to s 153 of the Act of $4.495m in the 2011-2012 financial year. The applicant was funded to operate the program in Townsville. The Authority's budget for the 2012-2013 financial year submitted on 25 May 2012 to the respondent provided for a grant of $4.98m to the TAAS(Q) program.

[13] The applicant has been delivering the TAAS(Q) program (or equivalent program) in Townsville and nearby regional centres for over 21 years. The services provided to residential tenants and residents include housing/tenancy information, advice about available housing options and tenancy rights, referrals to other service providers, and advocacy on behalf of eligible persons. The applicant entered into a service agreement with the State through the Department of Communities that commenced on 1 October 2011 for the period until 30 June 2014 to provide services to eligible persons under the TAAS(Q) program in the locations with the postcodes 4806-4820 and 4849-4850.

The subsequent budget and decisions

[14] It is implicit in the applicant's contention that the respondent's decision amounted to a direction to the Authority that the content of the respondent's comments in response to the Director-General's briefing note were conveyed to the Authority. There is no direct evidence of such communication, but the application has been argued on the assumption that communication occurred.

[15] After the respondent's decision on 24 June 2012, the Authority submitted a revised budget for the 2012-2013 financial year. The Authority's decision to submit the revised budget is not the subject of review in this proceeding. The revised budget was forwarded to the respondent under cover of a briefing note endorsed by the Acting Director-General of the Department which referred to the grants for 2012-2013 proposed in the initial budget and the Minister's requested amendments to the provision of grants by the Authority and recorded:

> "The Office of the Minister has advised that all grant funding by the RTA be provided to the Department of Housing and Public Works to support affordable housing schemes. It is also proposed to direct the $1.56 million of saving detailed above for this purpose. Therefore, the revised total grants for 2012-13 is $7.04 million to be used to support affordable housing schemes."

[16] It is therefore reasonable to infer that at least the content of the respondent's comments of 24 June 2012 was communicated to the Authority, as the revised budget accorded with the respondent's comments. The revised budget was approved by the respondent on 29 June 2012.

[17] On 20 July 2012 the respondent approved a complete cessation of the TAAS(Q) program in 2012-2013. On or about 24 July 2012 the applicant received an undated facsimile from the Director-General of the Department of Housing and Public Works confirming that the TAAS(Q) program was to be discontinued and formal notice was given under the service agreement terminating the service agreement with effect from 31 October 2012. The letter stated that the respondent "has determined as a matter of policy that priority must be given to providing additional accommodation for the thousands of Queensland households in housing need." The letter also advised that the State's policy regarding TAAS(Q) program had changed.

[18] On 3 October 2012 the Federal Minister for Housing and Homelessness announced that the Commonwealth Government would provide $3.3m in emergency funding to enable the services provided under the TAAS(Q) program to continue.

[19] On 4 October 2012 the respondent wrote to the Federal Minister offering for the Queensland Government to administer any funds for the TAAS(Q) program services on behalf of the Commonwealth Government. In the course of that letter, the respondent stated:

> "The Newman Government welcomes this decision as we have continually stressed that TAAS provided a valuable service to the community and, under more conducive economic circumstances, we would have been happy to see it continue.
>
> However, given state Labor's legacy of unmet housing need, waiting list blowouts and million dollar losses in the housing portfolio, the government took the decision to redirect funds to where they were needed most i.e. putting roofs over the heads of our most needy."

[20] The Federal Minister accepted the offer from the respondent. As a result, on 1 November 2012 the State and the applicant entered into a service agreement to provide TAAS(Q) program services under the Commonwealth funding for the period 1 November 2012 to 30 June 2013.

The applicant's submissions

[21] The applicant submits that a proper construction of s 482 of the Act does not permit any positive direction by the Minister to the Authority to do anything. The only power to give a positive direction is found in s 470 of the Act with which the Minister did not comply.

[22] The language of the heading of s 470 "Reserve power" and the location of s 470 within Part 2 of Chapter 10 of the Act which sets out the functions and powers of the Authority warrant an interpretation that the Minister has no power to direct the Authority, except in the confined circumstances of s 470 which is a power of last resort. It places limits on Ministerial intervention and the mode and conditions which must be observed in the exercise of that intervention.

[23] The proper construction of the Act limits the Minister's powers in s 482 of the Act to a power of veto only. When the Minister went further than refusing to approve the budget by directing the Authority as to where the grants should be given, the Minister was obliged to comply with s 470. Any other construction of s 482 would render s 470 ineffectual. A construction which limits s 482(2) to a power of veto gives a field of operation to s 470 and should be preferred.

[24] The applicant points to the language used by the respondent in his comments of 24 June 2012 as consistent with being in the nature of an order or direction and that he anticipated that difficulties would arise from the implementation of his decision.

[25] The applicant relies on the Director-General's description of the respondent's policy decision in the letter to the applicant sent on 24 July 2012 and the respondent's own description of his "decision to redirect funds" in his letter dated 4 October 2012 to the Federal Minister.

[26] The applicant also relies on the observations made by Applegarth J in *Waratah Coal Pty Ltd v Nicholls* [2013] QSC 68 at [59] to [61] as to what will amount to a direction given by a Minister to a board:

> "[59] I proceed on the basis that a direction need not be cast in express terms of a 'direction' or 'requirement,' let alone be one that is expressly stated to be made pursuant to s 115 of the *GOCA*. The word 'direction' in the context of ss 115 and 117 of the *GOCA* connotes an authoritative or binding instruction. An effective direction under s 115 must be in writing. A direction, whether in writing or otherwise, need not be given in a particular form. Whether or not a direction has been given is a question of fact. Where, as here, the direction is alleged to have been given in a letter, the issue of whether the alleged direction was given depends upon the proper construction of the document, viewed in its context. …
>
> [60] A direction to a board may be given informally, even subtly, and if it is, then it will be ineffective unless it complies with s 115 or is authorised by another statutory provision. The issue of whether a letter constitutes a direction is not determined by whether the document is styled as conveying advice, as distinct from a 'direction' or some other requirement. Something presented as polite 'advice' from the Shareholding Ministers may convey the meaning that the Shareholding Ministers wish something to occur and that they are, in

> effect, giving a direction. Whether or not such a direction is given turns upon an objective assessment of the letter, considered in its proper context. It is possible to imagine a direction in fact being given without this being the Shareholding Ministers' actual intention. Equally, it is possible to imagine the Shareholding Ministers subjectively intending to direct a board about a particular matter, but the words of their letter or other communication failing to actually convey their intention.
>
> [61] A direction might be given in a subtle or polite form. Still, the words used must in fact amount to a direction. Something which is incapable of being a direction, such as advice that the Shareholding Ministers do not oppose a proposed course of action, or agree with it, cannot be fairly construed as a direction." (*footnote omitted*)

[27] The applicant seeks to distinguish the observations relied on by the respondent made in *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 418-419, 431 and 439 on the basis of the different statutory framework under which the Prices Commission operated and the decision that was reviewed was that of the Commission and not the relevant Minister.

The respondent's submissions

[28] The respondent submits that the word "direction" is a word of variable meaning and may mean "guidance or instruction," "order or command," or "management or control": *Macquarie Dictionary Revised Edition* p 510. The word "direction" is used in s 470 of the Act in the sense of, and means, an order or command and that is reflected by s 470(2) which requires obedience to the direction.

[29] The effect of a direction under s 470 of the Act is to circumscribe the way the board of the Authority performs its functions and exercises its powers in respect of the matter that is the subject of the direction under s 470. The respondent did not give a direction within the meaning of s 470, but in exercising power under s 482, gave advice on what changes should be made to secure approval of the budget.

[30] The applicant's submission that the Minister's power under s 482(2) is a power of veto only should be rejected, because it does not sufficiently distinguish the different senses of the meaning of "direction," ignores s 153(2) and unduly confines the scope of the power to consent or agree under s 153(2) and the power to approve or not approve under s 482.

[31] There is no impediment to the Minister making his views known to the Authority when exercising power under s 482 to approve or not approve the budget or when exercising power under s 153(2) to agree or not to agree to the payments of grants out of the rental bond interest account. There is nothing in the Act which prohibits Ministerial direction in the form of guidance or advice.

[32] The legislation which was the subject of *Bread Manufacturers* empowered the Commission to fix the maximum prices of declared goods by prices regulation orders. Before making a prices regulation order by publication in the Gazette, the Commission was required to serve a copy of the proposed order on the Minister and was prohibited from publishing the order unless the Minister had informed it that he did not intend to direct that it should not be published.

[33] A majority of the Court (Gibbs CJ, Mason, Wilson and Murphy JJ) held that, because the Minister had a power of veto over a proposed order, the Commission was not precluded from ascertaining the Minister's views before determining a proposed order. Gibbs CJ stated at 418-419:

> "Since the Commission can fix a price only by order published in the Gazette (s. 20(1)), the effect of s. 20(1A) is that the Minister has complete power to prevent the Commission from fixing prices in any case. It would be a futility for the Commission to make an order which it knew that the Minister would veto, and it would therefore not be wrong for the Commission, in considering what price it should fix, to take into account the Minister's views, provided that in the end the decision reached by the Commission was its own. If the Commission can consider the Minister's views, it can treat them as decisive. There is obviously a fine line between a case in which the Commission automatically obeys a ministerial pronouncement, and that in which it decides for itself to grant the largest increase in price that the Minister will not veto. The fact that the Minister has a statutory power of veto makes the case an exceptional one."

[34] Mason and Wilson JJ (with whom Murphy J agreed) expressed a similar view at 431:

> "Further, it would not be unreasonable for the Commission to ascertain the views of the Minister before making a final determination under s. 20. The Commission will, in the nature of things, wish to avoid an exercise by the Minister of his power of veto under s. 20 if it can be avoided consistently with the Commission making a determination of its own.
>
> It is impossible to suppose that the legislature intended that the only avenue whereby the Minister can express a view concerning the fixation of a maximum price under the Act which it is his task as a Minister of the Crown to administer is by way of a public rejection of a formal decision of the Commission in the form of a veto of a proposed order. This would be an extraordinary intention to impute to the legislature in any circumstances, but particularly in the light of the many situations where the Act cannot operate without consultation between the two bodies who between them are responsible for the administration of the Act."

[35] By providing the comments that he did at the time he did not approve the Authority's initial budget, the respondent was indicating where he would like to see the grant funds directed. The Authority was then at liberty to reject or accept wholly or partly that guidance from the Minister, when presenting for approval another budget which reflected the Authority's decision.

[36] It is inherent in the notion of responsible government and Ministerial responsibility that the respondent had the right to communicate with the Authority on any matter concerning its affairs: *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 231. On the assumption that the respondent's comments of 24 June 2012 came to the attention of the Authority, those comments were a proper communication that the board of the Authority was entitled to consider in revising the budget. The Authority was not precluded by any provision

of the Act from taking into account the respondent's views on the payment of the funds available from the rental bond interest account.

The construction of the Act

[37] The power reserved to the Minister in s 470 is a qualification on the Authority's powers and may be exercised only in the circumstances defined by s 470(1), in order to have the effect given to it by s 470(2). Because of the manner and circumstances in which such a direction must be given under s 470 and that the Authority is then bound to comply with it, the term "direction" in s 470(1) must bear the meaning of an order or command.

[38] Does the presence of s 470 in the Act control whether, apart from directions that fall within s 470 of the Act, the Minister may otherwise communicate to the Authority about preferred policy or the Government's approach in respect of the functions of the Authority?

[39] Section 470 of the Act prescribes the limited circumstances in which the Minister may give a binding direction to the Authority. The fact that there will be other communications between the Minister and the Authority is anticipated by the Minister's role under s 153 and s 482 of the Act. If the applicant's submissions on the construction of s 470 were correct, the presence of s 470 would, in effect, regulate other communications between the Minister and the Authority which are not covered by the express terms of s 470.

[40] The difficulty with the applicant's submissions is they assume that the role of the respondent as the Minister administering the Act is exhaustively delineated by the Act. The Act delineates the formal relationship between the Minister and the Authority, but it does not preclude the Minister from otherwise performing the role of Minister in the system of responsible government, as explained in *Hughes Aircraft* at 231.

[41] It is neither necessary nor required by the Act (and not consistent with responsible government) to give effect to s 470 of the Act by circumscribing the Minister's communications with the Authority in the manner suggested by the applicant. If the Minister does not approve the Authority's budget, the Minister must be able to convey the reasons to the Authority to enable the Authority to take them into account when re-considering the budget: *Bread Manufacturers* at 418-419, 431, 439. The communication of such reasons would not necessarily amount to a binding direction. The applicant's approach of construing the Act to limit the Minister's power in s 482 of the Act to one of veto only must be rejected.

How should the respondent's comments of 24 June 2012 be characterised?

[42] The issue is whether the respondent's comments of 24 June 2012 amount to a binding direction to the Authority, whether under s 470 of the Act or otherwise. The characterisation of the respondent's comments must be determined in the context of the statutory framework, the respective roles and powers of the Minister and the Authority, and the circumstances in which the comments were written.

[43] A similar provision to s 470 of the Act was considered by Applegarth J in *Waratah Coal* on an application by the respondents in that matter to dismiss Waratah's application for a statutory order of review on the basis that the alleged direction of

the Shareholding Ministers was not a direction within the meaning of s 115 of the *Government Owned Corporations Act* 1993 (*GOCA*). Section 115 expressly confers on the Shareholding Ministers of a government owned corporation (GOC) a reserve power to give the board of the GOC a written direction in relation to the GOC, if the Shareholding Ministers are satisfied that, because of exceptional circumstances, it is necessary to give the direction in the public interest. The board then must ensure that the direction is complied with in relation to the GOC. *Waratah Coal* was concerned with a letter from the Shareholding Ministers to the GOC.

[44] Applegarth J concluded (on the basis of the material that was available at that stage of the proceeding) that the relevant letter that was responsive to an inquiry from the chairman of the board of the relevant GOC was not a direction given pursuant to s 115 of the *GOCA*. The observations made by Applegarth J at [59] to [61] as to what will be a direction were made in the context of the *GOCA* where s 115 must be read with s 117 of the *GOCA*. Section 117 provides that, except as otherwise provided by the *GOCA* or another Act, a GOC and its board are not subject to direction by or on behalf of the Government.

[45] The form of a communication is not determinative of its character, but it may not be an irrelevant matter in considering its character. The respondent's comments of 24 June 2012 were direct in expressing the respondent's preference for the disposition of the grant funds on social housing in response to the decision required under s 482 of the Act, but were not expressed to be made under s 470 of the Act or in a written communication sent from the respondent to the Authority after consultation with the Authority under s 470(3) of the Act. The respondent's comments therefore did not purport to be a direction given under s 470 of the Act.

[46] The fact the board of the Authority appears to have given the respondent's views decisive weight in revising its budget does not determine the character of the respondent's communication.

[47] After the board submitted the revised budget that accorded with the respondent's views, those views were effectively implemented and the preferred policy of the respondent prevailed. The fact that the Director-General refers to the priority given to that policy after the Authority's revised budget was approved by the respondent therefore does not assist in the characterisation of the Minister's prior comments of 24 June 2012. The same approach applies to the respondent's own description of the effect of the approval of the Authority's revised budget in the letter to the Federal Minister.

[48] Of greater significance than the form of the communication or that it appears to have been acted upon by the Authority is the context in which the respondent's comments were made. The importance of context was noted in *Waratah Coal* at [60]. The respondent's comments were in response to a decision required of the respondent under s 482 of the Act which would result in the budget being remitted to the Authority for further consideration in the light of the respondent's reasons for not approving it, but in the exercise of the functions conferred on the Authority. It was obviously relevant for the Authority to have the benefit of the respondent's views in revising its budget, as the respondent was charged under the Act with approving both the budget and the disposition of the grants from the rental bond interest account. The respondent's comments identified the respondent's preferred

policy for the payment of the grants and therefore were in the nature of guidance or advice. They were a proper communication explaining the respondent's refusal to approve the initial budget. In the circumstances, the respondent's comments were neither a direction under s 470 of the Act nor an unauthorised communication to the Authority. The applicant has failed to show that the respondent's comments of 24 June 2012 amounted to a direction that was *ultra vires*.

Order

[49] It follows that the application must be dismissed.