SUPREME COURT OF QUEENSLAND

CITATION:	*McLaren v Rallings & Ors* [2014] QSC 68
PARTIES:	**CARL ANTHONY McLAREN** (applicant) v **MARK RALLINGS** (first respondent) and **CHIEF EXECUTIVE QUEENSLAND CORRECTIVE SERVICES** (second respondent) and **KERRITH McDERMOTT** (third respondent) and **SAMANTHA NEWMAN** (fourth respondent)
FILE NO/S:	BS8079/13
DIVISION:	Trial
PROCEEDING:	Originating Application
DELIVERED ON:	17 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2013
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. the decision of the third respondent, made on 18 October 2013 as delegate of the second respondent, making a further maximum security order for the applicant to take effect on 23 October 2013 is set aside;** **2. the second respondent pay the applicant's costs of the application.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT –

GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXISTENCE OF OBLIGATION – GENERALLY – where prisoner currently serving term of imprisonment – where chief executive increased prisoner's security classification to maximum security and made maximum security order requiring accommodation in a maximum security unit – where two further determinations and orders continuing the prisoner's maximum security classification – where confidential intelligence information relied upon for determinations which was not provided to the prisoner prior to the determinations – whether procedural fairness applied to each of the second and third determinations – whether sufficient disclosure of the effect of the intelligence information was given to the prisoner

Acts Interpretation Act 1954 (Qld), s 27 B
Corrective Services Act 2006 (Qld), s 3, s 12, s 13, s 14, s 15, s 17, s 60, s 61, s 63
Judicial Review Act 1991 (Qld), s 32, s 33

Leeming, "The riddle of jurisdictional error", (2014) 38(2) *Aust Bar Rev* 139
Groves, "Administrative Segregation of Prisoners", (1996) 20 *Melbourne University Law Review* 639

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88, cited
Ashley v Southern Queensland Regional Parole Board [2010] QSC 437, cited
Assistant Commissioner Condon v Pompano (2013) 87 ALJR 458, cited
Attorney-General (NSW)l v Quin (1990) 170 CLR 1, cited
Harms v Queensland Parole Board [2008] QSC 163, referred to
Kidd v Chief Executive, Department of Corrective Services [2001] 2 Qd R 393, applied
Kioa v West (19895) 159 CLR 550, cited
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531, cited
Lee v New South Wales Crime Commission (2013) 87 ALJR 1082, cited
M47/2012 v Director-General of Security (2012) 86 ALJR 1372, cited
McEvoy v Lobban [1990] 2 Qd R 235
Minister for Immigration and Citizenship v Li (2013) 87 ALJR 618, followed
Momcilovic v The Queen (2011) 245 CLR 1, cited
Nicopoulos v Commissioner for Corrective Services (2004) 148 A Crim R 74, cited
Onea v Chief Executive, Department of Corrective Services

(2002) 136 A Crim R 488, cited
Plaintiff M61/2010E v The Commonwealth (2010) 243 CLR 319, cited
Plaintiff S10/2011 v Minister for Immigration and Citizenship (2012) 246 CLR 636, cited
Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme (2003) 216 CLR 212, cited
Re Refugee Review Tribunal; ex parte Aala (2000) 204 CLR 82, cited
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294 cited
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252, cited
X7 v Australian Crime Commission (2013) 248 CLR 92, cited

COUNSEL: G Rebetzke for the applicant

J Horton for the respondents

SOLICITORS: Prisoner's Legal Service for the applicant

Crown Solicitor for the respondents

[1] **Jackson J:** Carl Anthony McLaren is 39 years of age. He is serving terms of imprisonment. The offences include house-breaking and armed robberies involving actual violence. These terms of imprisonment are his seventh period of incarceration.

[2] In prison, he committed further offences which added to the original terms imposed. He had a poor prison history for a long period.

[3] The terms of imprisonment total 10 years and six months. They will expire on 4 August 2014.

[4] On 23 July 2012, he applied for parole under s 180 of the *Corrective Services Act* 2006 (Qld) ("CSA"). At that time, he was classified into a high security classification within the meaning of s 12(1)(b) of the CSA and detained in a secure unit in the Maryborough Correctional Centre. On 12 September 2012, he was interviewed for the purpose of a parole report. On 17 and 18 September 2012, a positive report was made by the panel appointed for that purpose.

[5] On 9 October 2012, he says he was anticipating transfer from the unit in which he was located. He was in the exercise yard. He says he was farewelling other prisoners from the unit. He says he spoke to one of them who was a friend. Moments later, he was standing close by when the friend attacked and killed another prisoner. He says he was not otherwise involved.

[6] On 22 October 2012, the chief executive's delegate changed the applicant's security classification by increasing it from high to maximum, effective 23 October 2012 ("first MSC"). That was done under ss 13(1) and 14 of the CSA. The maximum

classification continued for six months. The chief executive was then required to review it under s 13(1)(a) of the CSA.

[7] Also on 22 October 2012, the chief executive's delegate made a maximum security order under s 60(1) of the CSA, requiring that the applicant be accommodated in a maximum security unit ("first MSO"). He was transferred to the maximum security unit in Brisbane.

[8] On 23 January 2013, his application for parole was refused, under s 193 of the CSA.

[9] On 25 January 2013, the official visitor, having reviewed the first MSO under s 63 of the CSA, recommended that the first MSO be cancelled.

[10] On 28 February 2013, the chief executive's delegate confirmed the first MSO, under s 63(9) of the CSA ("first confirmation").

[11] On 19 April 2013, the chief executive's delegate determined the applicant's security classification as maximum, effective 23 April 2013 ("second MSC"). The second MSC was made by way of review, under s 13(1) of the CSA.

[12] On the same day, the chief executive's delegate made a consecutive maximum security order under s 60(1) of the CSA, effective from 23 April 2012 for a period of six months, requiring that the applicant be accommodated in a maximum security unit ("second MSO").

[13] On 9 August 2013, the official visitor, having reviewed the second MSO under s 63 of the CSA, recommended that the second MSO be cancelled.

[14] On 2 September 2013, the chief executive's delegate confirmed the second MSO under s 63(9) of the CSA ("second confirmation").

[15] On 18 October 2003, the chief executive's delegate determined the applicant's security classification as maximum ("third MSC"). The third MSC was presumably made by way of review, under s 13(1) of the CSA.

[16] On the same day, the chief executive's delegate made a consecutive further maximum security order, effective from 23 October 2012 for a period of six months, under s 61(1) of the CSA, requiring that the applicant be accommodated in a maximum security unit ("third MSO").

[17] The applicant applies for judicial review of the second MSC, second MSO and the second confirmation. He also applies for judicial review of the third MSC and third MSO.

Public interest immunity and intelligence reports

[18] Each of the second MSC and second MSO was made by the first respondent Mark Rallings as delegate of the second respondent chief executive. He had regard to information contained in confidential intelligence reports. The intelligence reports were made a confidential exhibit to his affidavit. A claim was made of public interest immunity from production of the intelligence reports. The claim was not

opposed.[1] The parties joined in asking that I look at the reports. Before the second MSC or second MSO were made, the only disclosure that the applicant had of any matter raised by the reports was in a letter from Mr Rallings to the applicant dated 26 March 2013 as follows:

> "In October 2012 you were issued a Maximum Security Order due to the high risk of you killing or seriously injuring other prisoners or other persons with whom you may come into contact. This was supported by Intelligence information received in October 2012 that indicated you were continuing to demonstrate aggressive, assaultive and threatening behaviour towards other prisoners...
>
> Further Intelligence information provided on 15 March 2013 indicates you presented as a threat to other prisoners within the unit at Maryborough Correctional Centre, which was not available at the time of issuing your current Maximum Security Order in October 2012."

[19] In fact, there was also information provided after 15 March 2013 in the intelligence reports before Mr Rallings for the purposes of the second MSC and second MSO. The applicant is still unaware of the contents of or the specific matters raised by any of the intelligence reports.

[20] The second confirmation was made by the third respondent Ms McDermott as delegate of the chief executive. She had regard to information contained in confidential intelligence reports. The intelligence reports were made a confidential exhibit to her affidavit. A claim was made of public interest immunity from production of the intelligence reports. The claim was not opposed. The parties joined in asking that I look at the reports. The information was the same as that before Mr Rallings. Ms McDermott made no disclosure of any matter raised in the reports to the applicant. The applicant is still unaware of their contents.

[21] The third MSC and MSO were made by the fourth respondent Ms Newman as delegate of the chief executive. She had regard to information contained in confidential intelligence reports. The intelligence reports were made a confidential exhibit to her affidavit. A claim was made of public interest immunity from production of the intelligence reports. The claim was not opposed. The parties joined in asking that I look at them. The only disclosure of any matter they raised that the applicant had before the third MSC and the third MSO were made was in a letter from Ms Newman to the applicant dated 24 September 2013 as follows:

> "In October 2012 you were issued a Maximum Security Order due to the high risk of you killing or seriously injuring other prisoners or other persons with whom you may come into contact. This was supported by Intelligence information received that indicated you were continuing to demonstrate aggressive, assaultive and threatening behaviour towards other prisoners.

[22] Ms Newman's 24 September 2013 letter did not refer to any further intelligence reports made after October 2012. Her letter deleted the reference to intelligence information provided on 15 March 2013 which had been referred to in Mr Rallings'

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1 See, for another example, *Harms v Queensland Parole Board* [2008] QSC 163.

26 March 2013 letter. However, the information before Ms Newman included that and later obtained intelligence information. Nothing was said to the applicant about its existence or nature before the third MSC and third MSO were made.

[23] As Boddice J said in *Ashley v Southern Queensland Regional Parole Board*:[2]

> "A Court's power to privately examine documents the subject of a public interest immunity claim is ordinarily exercised sparingly. In deciding whether to undertake that course, it is relevant to have regard to the statute creating the power as well as the circumstances of the particular case." (citations omitted)

[24] In this case, I examined the documents. The applicant did not apply to inspect them.[3]

[25] The respondents sought to rely on matters contained in the reasons given for the earlier decisions as informing whether the respondents had given the applicant disclosure of relevant matters for the purpose of making the third MSC and third MSO. As a matter of generality, a court should be careful before accepting such submissions. That is not to say that where a person is aware of and makes submissions about a particular matter, there is likely to be a breach of natural justice by a decision-maker in failing to make disclosure of the matter's relevance. Thus, in this case the applicant was aware of the concern that he was involved in the 9 October 2012 killing and made a submission on that topic before the second MSO was made.

[26] However, let it be assumed in the respondents' favour that Ms Newman's reference in her letter dated 24 September 3013 to assaultive behaviour picked up the references to that subject as contained in a statement of reasons for the second MSO dated 11 June 2013. The relevant references were as follows:

> "…
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> [O]n 10 August 2005, a complaint was received that reported prisoner McLaren allegedly sexually assaulted another prisoner;
>
> …
>
> [O]n 29 December 2005, prisoner McLaren was involved in an assault on other [sic] prisoner;
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> [O]n 6 March 2006, prisoner McLaren was involved in an incident in which he and two other prisoners assaulted another prisoner;
>
> [O]n 27 March 2006, prisoner McLaren was involved in an incident where he assaulted another prisoner;
>
> [O]n 7 April 2006 prisoner McLaren was placed on a MSO for a period of 6 Months for violent behaviour against other prisoners…

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2 [2010] QSC 437.

3 *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458, 478-9 [73]-[74].

…

> [O]n 18 November 2011, a complaint was received that reported prisoner McLaren allegedly sexually assaulted another prisoner…
>
> …"

[27] Still, prior to the making of the third MSO or the third MSC, in effect there was nothing more than previously outlined to inform the applicant that there were allegations made against him of assaults or sexual assaults against other prisoners after 18 November 2011.

Reasons for the third MSC and third MSO

[28] Under s 15(1) of the CSA, the chief executive must give a prisoner an information notice about the chief executive's decision following a review of a prisoner's security classification under s 13. An "information notice" is a notice that includes the reasons for the decision.[4] Ms Newman's reasons for the third MSC were contained in the information notice the chief executive gave to the applicant about the review resulting in the third MSC as follows:

> "After considering the above, I have formed the view that you cannot be safely managed as a high security classification in the general prison population. Due to your history of assaultive and aggressive behaviour I am of the view that you present a substantial threat to the security and good order of the corrective services facility. For this reason I have decided to classify you as a Maximum Security Classification and I will also make a Maximum Security Order requiring your continued placement in a Maximum Security Unit."

[29] Ms Newman's reference to "the above" included the following statement recorded in the factors she considered:

> "You have an extensive history of adverse incidents and breaches for positive urinalysis tests, assaults against other prisoners, alleged sexual assaults against other prisoners, threatening and inappropriate behaviour."

[30] The only reasons the chief executive is required to give to a prisoner for a classification decision are those required to be in the information notice given under s 15(1) of the CSA. That is because s 17(1) of the CSA provides that, inter alia, Part 4 of the *Judicial Review Act* 1991 (Qld) ("JRA") does not apply to a decision under s 13. Thus, the right under ss 32 and 33 of the JRA to a statement of reasons for a decision to which the JRA applies does not extend to a decision under s 13 of the CSA. Further, s 15(3) of the CSA provides that s 27B of the *Acts Interpretation Act* 1954 (Qld) does not apply to the information notice. Thus the reasons in an information notice do not have to set out the findings on material questions of fact or refer to the evidence or other material on which those findings are based.

[31] The third MSO, in contrast, was a decision to which the JRA applied. By the date of the hearing of the application, no statement of reasons for the third MSO had been requested or given under Part 4 the JRA in a form complying with s 27B of the *Acts*

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[4] CSA, Schedule 4, definition "information notice".

Interpretation Act 1954 (Qld). However, by an undated letter from Ms Newman to the applicant marked as received on 25 October 2013 advising her decision to make the third MSO, she stated:

> "I have formed this belief [that the applicant is a substantial threat to the security or good order of the corrective services facility][5] after giving consideration to your institutional behaviour which demonstrates a pattern of assaultive and sexually aggressive conduct towards other prisoners. You have been the subject of numerous adverse incident and intelligence reports which, when considered together, indicate that you pose a substantial threat to the security and good order of the corrective services facility.
>
> ... intelligence information has continued to become available regarding your alleged activities when accommodated in the general prisoner population. After considering all of this information, I have formed the reasonable belief that you pose a substantial threat to the security or good order of the corrective services facility…"

Procedural fairness - information to make a meaningful response?

[32] The applicant contends, inter alia, that each of the decisions comprising the third MSC and the third MSO was made in breach of the rules of natural justice to accord procedural fairness[6] because of failure to disclose to the applicant sufficient information of the effect of the intelligence information placed before the decision-maker.

[33] In *Onea v Chief Executive, Department of Corrective Services*,[7] Mullins J considered the requirements of procedural fairness by disclosure of confidential materials in the context of a decision to make an order that transferred a prisoner from one corrective services facility to another under the previous Act. Her Honour held that the chief executive was required to "disclose sufficient details of the effect of the intelligence information **to enable the applicant to make a meaningful response**."[8] (emphasis added)

[34] The relevant statutory context for the third MSC includes the following:

> **"12 Prisoner security classification**
> (1) When a prisoner is admitted to a corrective services facility for detention, the chief executive must classify the prisoner into one of the following security classifications—
> (a) maximum;
> (b) high;
> (c) low.

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5 The particular facility was not identified. At the time of the third MSO, the applicant had been detained in the Brisbane Correctional Centre, maximum security unit for 12 months. Before that, he had been briefly at Woodford Correctional Facility. Before that, he had been at Maryborough Correctional Facility for a reasonably lengthy period.

6 The expression "accord procedural fairness" was first used in the High Court in *Kioa v West* (1985) 159 CLR 550. Although recent judgments don't deploy it as much, Bell J used it in *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372. The competing expression "afford procedural fairness" was coined by Dawson J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

7 (2002) 136 A Crim R 488.

8 Ibid, 494.

(1A) …

(2) When deciding a prisoner's security classification, the chief executive must have regard to each of the following—
(a) the nature of the offence for which the prisoner has been charged or convicted;
(b) the risk of the prisoner escaping, or attempting to escape, from custody;
(c) the risk of the prisoner committing a further offence and the impact the commission of the further offence is likely to have on the community;
(d) the risk the prisoner poses to himself or herself, and other prisoners, staff members and the security of the corrective services facility.

13 Reviewing prisoner's security classification

(1) The chief executive must review a prisoner's security classification—
(a) for a prisoner with a maximum security classification—at intervals of not longer than 6 months; and
(b) for a prisoner with a high security classification—at intervals of not longer than 1 year; and
(c) for a prisoner whose term of imprisonment is changed by a court order—when the court orders the change.

(1A) However, the chief executive need not review the security classification of a prisoner with a high security classification if the prisoner—
(a) is being detained on remand for an offence; and
(b) is not serving a term of imprisonment for another offence.

(2) The chief executive may review the security classification of a prisoner with a low security classification.
Example—
The chief executive may review the security classification if the prisoner's behaviour deteriorates.

(3) When reviewing a prisoner's security classification, the chief executive must have regard to the matters mentioned in section 12(2)."

[35] The relevant statutory context for the third MSO includes ss 60 and 61 of the CSA as follows:

"60 Maximum security order

(1) The chief executive may make an order (the ***maximum security order***) that a prisoner be accommodated in a maximum security unit.
(2) The maximum security order may be made only if—
(a) the prisoner's security classification is maximum; and

(b) the chief executive reasonably believes that 1 or more of the following apply—

(i) there is a high risk of the prisoner escaping, or attempting to escape;

(ii) there is a high risk of the prisoner killing or seriously injuring other prisoners or other persons with whom the prisoner may come into contact;

(iii) generally, the prisoner is a substantial threat to the security or good order of the corrective services facility.

(3) The maximum security order must not be for a period of longer than 6 months.

61 Consecutive maximum security orders

(1) The chief executive may make a further maximum security order for a prisoner to take effect at the end of an existing maximum security order.

(2) The further maximum security order must be made not more than 14 days before the end of the existing maximum security order.

(3) However, the chief executive must not make the further maximum security order unless—

(a) not more than 28 days before the end of the existing maximum security order, the chief executive gives written notice to the prisoner advising the prisoner that—

(i) the chief executive is about to consider whether a further maximum security order should be made; and

(ii) the prisoner may, within 14 days after receiving the written notice, make submissions to the chief executive about anything relevant to the decision about making the further maximum security order; and

(b) the chief executive considers any submission the prisoner makes under paragraph (a)(ii)."

[36] It will be noticed at once that the making of an MSC under ss 12 or 13 does not engage any express requirement that the prisoner be given notice of the decision to be made or disclosure of matters to be taken into consideration by the chief executive. Similarly, the making of an initial MSO under s 60 does not attract any express requirement of notice or disclosure. In contrast, a consecutive further MSO under s 61(1) must not be made unless notice is given.

[37] It is also appropriate to notice two further points about the structure of the CSA in relation to the making of an MSC and the making of an MSO. First, as already mentioned, a decision made under s 13 is subject to s 17, which provides as follows:

"17 Application of Judicial Review Act 1991 to decisions about prisoner security classification

(1) The *Judicial Review Act 1991*, parts 3, 4 and 5, other than section 41(1), do not apply to a decision made, or purportedly made, under section 12, 13, 14 or 16 about a prisoner's security classification.

Note—

> The *Judicial Review Act 1991*, part 3 deals with statutory orders of review, part 4 deals with reasons for decisions and part 5 deals with prerogative orders and injunctions.
>
> (2) In this section—
> ***decision*** includes a decision affected by jurisdictional error."

[38] Despite that section, this court's constitutionally entrenched supervisory jurisdiction to grant relief on judicial review for jurisdictional error continues.[9] A breach of procedural fairness may be a jurisdictional error.[10]

[39] Second, there is no such exclusion of the application of the JRA in relation to a consecutive further MSO made under s 61.

[40] To make the following analysis clearer, I first leave to one side the third MSC, because of the different statutory provisions that apply to it.

Procedural fairness and the third MSO

[41] Since the modern development of the rules of natural justice to accord procedural fairness took hold in this country under the principles expounded in *Kioa v West*,[11] there has been a constellation of decisions of binding and persuasive authority which inform the answer to the questions whether there is an obligation to accord procedural fairness and as to the content of the obligation in terms of notice of the decision or disclosure of matters to be taken into account. There have been some casualties in the battles to formulate lasting principles or concepts. Chief among them, perhaps, is the death of the concept of "legitimate expectations", a development urged by Brennan J in *Kioa* itself, with the High Court pronouncing last rites in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*.[12]

[42] No rigid taxonomy can be expected for the assessment of the existence of the obligation or the content of the requirements to give notice of a decision or to disclose material to be taken into consideration in making the decision. Yet, where the decision is one made under an enactment, it will be readily concluded that the decision-maker is required to accord procedural fairness in many situations. That is the assumption which informs the provision in s 20(2)(a) of the JRA that an application for a statutory order to review a decision to which the JRA applies may be made on the ground "that a breach of the rules of natural justice happened in relation to the making of the decision". Still, resolution of any question as to the existence of the obligation to accord procedural fairness and the content of any obligation to give notice of or to disclose material to be taken into account in relation to an administrative decision made under an enactment starts with the provisions of the enactment.

[43] There is no decision of this court as to those matters about a decision made under s 61 of the CSA. However, ss 43A and 43B of the former *Corrective Services Act*

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9 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

10 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 654 [48]; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 354 [207]; see also the discussion in Leeming, "The riddle of jurisdictional error", (2014) 38(2) *Aust Bar Rev* 139.

11 (1985) 159 CLR 550.

12 (2012) 246 CLR 636, 658 [65].

1988 (Qld) were in similar terms to ss 60 and 61. They were considered by this court to raise an obligation of procedural fairness in *Kidd v Chief Executive, Department of Corrective Services*[13] White J held that:

> "if [the equivalent of s 61(3)(a)] is to be anything more than legislative lip service to the concept of procedural fairness, **information adequate for a prisoner to respond** must be given…. The delegate should demonstrate that he has directed his mind to the currency of the risks expressed in the maximum security order and, if he is satisfied on reasonable grounds that those risks continue as high risks he must explain, without revealing the sources of his information, why that is so." (emphasis added)

[44] Where a decision-maker takes into account confidential information to which a claim of public interest immunity is properly made, there must always be difficulty in providing information adequate for a prisoner to respond.. Where the information is as to assaultive and sexually aggressive conduct towards other prisoners, there are risks associated with disclosure of information that would identify the alleged victim of the conduct, what it was, and when and where it happened. It may be impossible to fairly inform the person accused of the conduct without raising a risk to the security and good order of relevant correctional facilities in the form of risk of retaliation against any informant who provided the information, or risk to the investigation of the alleged behaviour.

[45] These are among the risks managed by the chief executive on whom the function and responsibility of management of correctional facilities are conferred. Courts traditionally have been loath to interfere by way of judicial review, even where there may be power to do so. Thus, in *McEvoy v Lobban*,[14] speaking of similar powers, Macrossan CJ said:

> "The necessary controlling actions in such cases are likely to require quick decision and furthermore might involve a degree of restriction of movement of the inmates of the institution or a curtailment of the amenities usually available within the prison. But if the restrictions are not inappropriately prolonged and if they are not imposed for an indirect object of punishing individuals, in short if they involve a bona fide and reasonable use of the power of management, the court would not interfere. In particular the court will not substitute its own discretion for a necessary and reasonable exercise of discretion on the part of the prison authorities. Natural justice as understood in the context of decisions affecting rights or legitimate expectations (cf. *Kioa v. West* (1985) 159 C.L.R. 550 esp. 582) will have no particular application here and will not inhibit a reasonable and necessary exercise of administrative power on the part of the comptroller of a prison."[15]

[46] At a general level, the topic of judicial review of separation of prisoners has been analysed with admirable clarity by academic legal writing.[16] Also speaking generally, the considerations affecting procedural fairness in the present or cognate

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13 [2001] 2 Qd R 393.
14 [1990] 2 Qd R 235.
15 Ibid, 237.
16 Groves, "Administrative Segregation of Prisoners", (1996) 20 *Melbourne University Law Review* 639.

contexts are similar in other jurisdictions.[17] It has been suggested that there are "some rare cases where the rules of procedural fairness have been elided to nothing".[18]

[47] I have found the answer to the question whether the applicant has been denied procedural fairness in respect of the third MSO difficult to resolve in the present case. The statements set out in Ms Newman's letter dated 24 September 2013 as to "specific matters" that may be relevant to the consideration of the delegate were not at all informative. In truth, she had specific information which related to the applicant as to the 9 October 2012 killing not previously disclosed to him, information as to two or three other specific allegations of threatening or retaliatory conduct towards other prisoners and three specific and different allegations of sexual assaults by or involving the applicant.

[48] The deficiencies in the disclosure given to the applicant were demonstrated by the respondents' submission that the making of the decisions was "supported by material suggesting that the applicant had engaged in aggressive and intimidating behaviour and sexual assaults against other prisoners". The totality of this conduct was notified to the applicant by the statement that he was "continuing to demonstrate aggressive behaviour, assaultive and threatening behaviour towards other prisoners". But nothing was said to enable the applicant to respond in any meaningful way. He was not even informed that any relevant behaviour or assault included allegations of such conduct not previously notified to him.

[49] In my view, therefore, unless the requirement of procedural fairness was effectively reduced to nil in the circumstances, the respondent chief executive will have denied the applicant procedural fairness in respect of the third MSO, by failing to disclose anything as to the content of the allegation that his aggressive behaviour, assaultive and threatening behaviour towards other prisoners was "continuing".

[50] Was the obligation to accord procedural fairness effectively reduced to nil in the applicant's circumstances? Having regard to the content of the material in the confidential exhibits, I have reached the conclusion that it was not, in the particular circumstances relating to the third MSO.

[51] The respondents submit that to reveal the information, meaning any of it, would put at risk the safety of those who have informed about the nature of the threats referred to in the intelligence reports and would reveal information as to the modus operandi of maintaining prison order and the manner in which incidents in prisons are investigated and recorded.

[52] Let an example be considered. To enable the applicant to make a meaningful response to an allegation of sexual assault, it is necessary to inform him who was the alleged victim of the conduct, what it was, and in most cases when and where it happened. That could place the alleged victim at risk if he were the person who provided the information or, perhaps, in any event. However, it is well known that there are arrangements made for separation and protection of prisoners to manage such risks. I note that in the statement of the reasons for decision of Mr Rallings dated 11 June 2013 set out above, a number of such incidents were identified in

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17 *Nicopoulos v Commissioner for Corrective Services* (2004) 148 A Crim R 74.

18 *Kioa v West* (1985) 159 CLR 550, 615; *Nicopoulos*, 94-5 [100].

general terms relating to conduct and alleged conduct of the applicant before 2006. In those instances, it was considered to be possible to tell the applicant about the incident or alleged incident to some extent.

[53] But what is the alternative propounded by the respondents? As in this case, an MSO decision may be made based or partly based on allegations of which the prisoner is not informed. And, as in this case, multiple consecutive further maximum security orders may be made, all based on the secret alleged conduct. The scope for abuse by those providing or managing information in such a system is obvious. The unfairness of it also hangs in the air, like a damp impenetrable fog, that may not be lifted, with the prisoner left unable to say anything in answer. The statutory right of the prisoner to make submissions about "anything relevant to the decision about making the further maximum security order" under s 61(3)(a)(ii) of the CSA is reduced below even mere "lip service", to the depth of a solemn farce.

Is there a critical assessment of the information which supports keeping all of it from the applicant?

[54] Perhaps against that possible view, the respondents submitted that the information in the present case "has been critically assessed and not accepted at face value". This statement referred to the processes engaged in before the information was given to the decision-maker, not to the decision-maker's own assessment of it.

[55] In this context, the respondents referred to a passage from White J's statement in *Kidd* extracted above that the chief executive "must explain, without revealing the sources of his information, why that is so". It is not entirely clear to me that her Honour's reference in that passage was to disclosure of the information that may be taken into consideration before the decision is made, as opposed to the reasonable belief of the risks or threat required to be formed before a maximum security order may be made under s 60(2) of the CSA. In the end, the "critical assessment" inquiry may be a collateral inquiry in considering the requirements of procedural fairness. But since it was set up by the respondents' submissions, I will deal with it.

[56] First, I note that there is no provision made in the CSA relating to the quality of the information contained in the intelligence reports or as to how they are to be dealt with, in exercising the power to make a maximum security order under ss 60 or 61 of the CSA.

[57] Second, I also note that disclosure is not normally required where information is not credible, relevant or significant.[19]

[58] Third, there was no direct evidence as to any process of critical assessment of the information gathered in intelligence reports resulting in non-acceptance of particular information at face value.

[59] The confidential exhibit included a form headed "Administrative Form – Confidential Information" ("CIF") created a few days before the third MSC and the third MSO and signed by Ms Newman. I infer that Ms Newman's signature acknowledges that the confidential information set out on the form is information taken into account in making those decisions. But there are three other numbered

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19 *Kioa v West* (1985) 159 CLR 550, 628-629; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 97 [19]-[20].

reports in the confidential exhibit extracted from the "integrated offender management system" and described as "intelligence reports" as well as one "incident report".

[60] The intelligence reports themselves contain an assessment of the credibility or veracity of the information they contain. As well, the incident report contained comments made by an officer that an informant who complained of sexual assault was known to be someone who had previously made false accusations of a similar kind ("the qualifying comment"). An entry relating to that report was set out in the CIF. That entry made no reference to the qualifying comment. If Ms Newman, as decision-maker, read the CIF without reading the entries in the background incident report, she will not have seen the qualifying comment.

[61] However, that was not the worst of it. There was another telling entry in the CIF in relation to a numbered intelligence report. The intelligence report was not included in the confidential exhibit and was not, therefore, provided to Ms Newman as decision-maker. The entry in the CIF referred to a "review of historical" intelligence reports, without identifying which ones or what they said, followed by a statement of the most serious possible kind. The reviewer (whoever that was) accused the applicant of participation in multiple murders of prisoners, quite apart from the 9 October 2012 incident. There was no identification of any of the alleged circumstances. The basis of the accusation was that the review of the historical intelligence reports "identified allegations" to that effect.

[62] Even if I had set out the relevant part of the entry in full in these reasons, there would be no risk that the applicant could ascertain some particular event so that some person or investigation might be put at risk. The relevant part of the entry is made without any supporting information, or identification of any alleged year, place, other person or persons involved, or victim.

[63] It should be acknowledged that a number of the statements in the CIF and background intelligence reports in the confidential exhibit are not of that character. But at least a couple of the most serious entries are among the least well supported. Accordingly, to the extent that it matters, I reject the submission, otherwise unsupported by the evidence, that the information was critically assessed and not taken at face value before it was provided to the decision-maker as information that the decision-maker may take into account.

Was the gist of the information provided?

[64] The respondents also submitted that the "gist" of the information had been provided to the applicant. They refer to Ms Newman's letter dated 24 September 2013, which I have dealt with above. They also refer to the statement of reasons for the second MSO dated 11 June 2013, which I have also dealt with above. Further, they refer to a letter from Mr Rallings to the applicant dated 19 April 2013, stating that Mr Rallings, in making the second MSO, had formed the belief that:

> "Since your admission into custody, which commenced in February 2004, you have been involved in serious adverse behaviour which has mainly been directed at other prisoners. You have incurred breaches of discipline, further convictions as well as the need to segregate you in a Maximum Security Unit due to your repeated aggressive, assaultive and threatening

> behaviour towards other prisoners. More recently, Intelligence information provided indicates that you present a substantial threat to the security or good order of the corrective services facility."

[65] I accept that where it is necessary to disclose information that may be taken into consideration, an obligation to provide information adequate for a prisoner to respond may be discharged by informing the prisoner of the gravamen or "substance of matters"[20] without disclosure of verbatim copies of relevant materials. The "gist" of an allegation of contrary behaviour by a prisoner may well be enough, having regard to what is set out above. But I am unable to follow the logic of the contention that the extracted text of Mr Rallings' 19 April 2013 letter, or the contents of the other documents referred to, provided the gist of anything to the applicant about any instance of aggressive, assaultive and threatening behaviour which is alleged to have occurred after 18 November 2011.

Official visitor's recommendation

[66] Although it was not mentioned by the respondents as going to the existence or content of the obligation of procedural fairness by disclosure of information in the intelligence reports that may be taken into consideration, I have not overlooked that the official visitor must review a maximum security order made for a period of more than 3 months, under s 63(3) or (6) of the CSA.

[67] A review by the official visitor provides some prospect of assistance to a prisoner, in the form of the official visitor's recommendation under s 63(8). The recommendation must be considered by the chief executive in determining whether to confirm, amend or cancel the MSO, under s 63(9). The official visitor has a right to inspect documents other than a document to which legal professional privilege attaches: s 291(1)(c) of the CSA.

[68] However, that is all after the making of the MSO, and it is a separate process from the statutory opportunity of the prisoner to make a submission under s 61(3)(a)(ii). In my view, it does not reduce the content of the obligation to accord procedural fairness by disclosure.

Conclusions as to procedural fairness and the third MSO

[69] I am able to accept that there may be cases where the circumstances are such that the requirement to accord procedural fairness by disclosure of confidential information that may be taken into consideration by the decision-maker is greatly reduced.[21] However, I am unable to accept that is true of all the information in the CIF and intelligence reports placed before the decision-maker and potentially taken into consideration in making the third MSO in the present case. In my view, if allegations that the applicant:

(a) was involved in prison killings earlier than the 9 October 2012 killing;
(b) was involved in the 9 October 2012 killing;

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20 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 356 [91].

21 There may be a debate about whether that should be described as "nil". At least in the case of a court, there is a debate of that kind: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458, 499-500 [192].

(c) sexually assaulted another prisoner or prisoners after the alleged assaults specifically referred to in the 11 June 2013 statement of reasons;
(d) otherwise assaulted another prisoner or prisoners after the assaults specifically referred to in the 11 June 2013 statement of reasons; or
(e) threatened another prisoner or other prisoners after the threats specifically referred to in the 11 June 2013 statement of reasons

were to be placed before the decision-maker on the decision under s 61(1) of the CSA, disclosure of those alleged facts as information that may be taken into account should have been made to the applicant with or as part of the notice under s 61(3)(a) of the CSA and before the delegate made the third MSO, with sufficient details to enable the applicant to make a meaningful response. It was not necessary to disclose the sources of the intelligence reports or the documents as such.

[70] No such disclosure was made. It follows, in my view that the third MSO is invalidated because of failure to accord procedural fairness to the applicant.

[71] Because the third MSO was a decision to which the JRA applied, the invalidity in this case arises under s 20(2)(a) of the JRA for a breach of the rules of natural justice that happened in relation to making the third MSO under s 61 of the CSA. It is unnecessary to make any finding that the decision was also made in jurisdictional error so as to give rise to relief by way of an order in the nature of certiorari in the supervisory jurisdiction of the court.

Relevant considerations and the third MSO

[72] Alternatively, the third MSO is challenged as an improper exercise of power because the decision-maker failed to take a relevant consideration into account.

[73] One such consideration relied upon by the applicant was that the official visitors' recommendations in respect of the first MSO and the second MSO were relevant considerations that the delegate of the chief executive was required to take into account in making the decision on the third MSO.

[74] The respondents accept that the third MSO was made without regard to the official visitors' recommendations. They submit that the delegate was not required to do so.

[75] Where an MSO is made for a period of six months, the official visitor is obliged to review it, under s 63(6), and make a recommendation to the chief executive whether to confirm, amend or cancel it, under s 63(8). In that case, the chief executive must consider the recommendation. The CSA does not otherwise expressly require the chief executive to consider a recommendation of an official visitor in making a maximum security order.

[76] However, it is unnecessary to decide this question. I have already determined that the third MSO is invalid. It is also unnecessary to consider the other grounds set out in paragraph 3 of the further amended application for review.

Other grounds and the third MSO

[77] Alternatively, the third MSO is challenged on the basis that there was no evidence or other material from which reasonable belief could be formed that the applicant was a substantial threat to the security or good order of the Brisbane Correctional Centre.

[78] Lastly, the third MSO is challenged on the ground that it was unreasonable in a legal sense. The applicant relies on s 23(g) of the *Judicial Review Act* 1991 (Qld) and *Minister for Immigration and Citizenship v Li* ("*Li*").[22]

[79] Again, it is unnecessary to decide these questions.

Procedural fairness and the third MSC

[80] Do the same requirements of procedural fairness as apply to the third MSO apply to a security classification on review under s 13 of the CSA? Specifically, is there a requirement to give notice that the decision is to be made and to disclose to the prisoner information that may be taken into account in making the decision before it is made? No detailed submissions were made on this point by either the applicant or the respondents.

[81] The third MSC is not subject to judicial review under the JRA. Until relatively recently it may have been thought that a decision of that kind was not subject to judicial review for jurisdictional error. In any event, there is no case of which I am aware in which that question has been decided.

[82] Part of the context of the operation of s 13 is that there are thousands of prisoners detained and managed under the provisions of the CSA. Most have a high security classification. For most prisoners with a high security classification, s 13 requires an annual review of their security classification. For prisoners with a maximum security classification, the review is six monthly.

[83] A possibly convenient starting point is the applicant's contention, in general, that the exercise of a power which affects the conditions under which a person may be detained is one which may affect rights or interests of the kind which can require that the power be exercised in a way that is procedurally fair.[23] To start from that point suggests a presumptive outcome.

[84] In the case of a statutory power, the surest way to proceed is to start from the terms of the statute itself. In that context too, there is a presumptive approach to the interpretation of statutory provisions which must be taken into account. Thus in *Momcilovic v The Queen*,[24] French CJ said:

> "The common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as 'the ultimate constitutional foundation in Australia'. It also underpins the attribution of legislative intention on the basis that legislative power in Australia, as in the United Kingdom, is exercised in the setting of a 'liberal democracy founded on the principles and traditions of the common law'. It is in that context that this Court

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22 (2013) 87 ALJR 618, 637-640 [63]-[76].

23 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 353 [76]-[77].

24 (2011) 245 CLR 1, 46 [42]-[43].

> recognises the application to statutory interpretation of the common law principle of legality.
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> The principle of legality has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law. The range of rights and freedoms covered by the principle has frequently been qualified by the adjective 'fundamental'. There are difficulties with that designation. It might be better to discard it altogether in this context. The principle of legality, after all, does not constrain legislative power. Nevertheless, the principle is a powerful one. It protects, within constitutional limits, commonly accepted 'rights' and 'freedoms'. It applies to the rules of procedural fairness in the exercise of statutory powers. It applies to statutes affecting courts in relation to such matters as procedural fairness and the open court principle, albeit its application in such cases may be subsumed in statutory rules of interpretation which require that, where necessary, a statutory provision be read down so as to bring it within the limits of constitutional power. It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations." (citations omitted)

[85] The "principle of legality" referred to by French CJ took centre stage in the law of statutory interpretation, in recent decisions of the High Court in *Lee v New South Wales Crime Commission*[25] and *X7 v Australian Crime Commission*.[26]

[86] However, a discussion closer to the present problem appears in the plurality reasons in *Saeed v Minister for Immigration and Citizenship*:[27]

> **"**Section 57(2) did not apply in *Ex parte Miah* as the information in question was not 'relevant information' within the meaning of sub-s (1). The issue was whether natural justice nonetheless operated to require the provision of the information. It was argued for the Minister that subdiv AB was a code, as its heading (Code of procedure for dealing fairly, efficiently and quickly with visa applications) suggested. It therefore excluded natural justice principles. The argument was not accepted by a majority of the Court. McHugh J observed that the use of the word 'fairly' in the heading made it difficult to extrapolate a manifestly clear intention to exclude natural justice principles. Gaudron J considered that the heading imparted notions of procedural fairness. Moreover, as her Honour pointed out, the correct question is not whether subdiv AB constitutes a code; it is whether, on its proper construction, it relevantly (and validly) limits or extinguishes the obligation to accord procedural fairness. For it to do so requires a clear expression of intention. No member of the majority found such an expression present in the subdivision." (citations omitted)

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25 (2013) 87 ALJR 1082.

26 (2013) 248 CLR 92.

27 (2010) 241 CLR 252, 262 [25].

[87] As set out above, s 12(1) of the CSA requires the chief executive to classify a prisoner who is admitted to a correctional facility. That is the first security classification. There is no express obligation to accord procedural fairness to a prisoner on that occasion. It is unnecessary to analyse that question more closely to decide this case. And it is therefore undesirable to say more than that s 12 does not provide any clear contextual support for the applicant's argument that there is an obligation to accord procedural fairness before making a decision on review under s 13.

[88] What is the position upon a review under s 13? By paying close attention to the statutory context and structure, a number of points emerge.

[89] First, the factors set out in s 12(2) which must be regarded in classifying a prisoner inform the use that a security classification has. They are the nature of the offence for which the prisoner has been charged or convicted; the risk of the prisoner escaping, or attempting to escape, from custody; the risk of the prisoner committing a further offence and the impact the commission of the further offence is likely to have on the community; and the risk the prisoner poses to himself or herself, and other prisoners, staff members and the security of the corrective services facility.

[90] Second, s 19 of the CSA provides that the chief executive may make different arrangements for the management of prisoners with different security classifications.

[91] Third, there is no express provision in the CSA for the chief executive to give notice to a prisoner of intention to review the prisoner's security classification. The only express provision for notice operates after the decision on review is made. Every prisoner whose security classification is reviewed is entitled to an information notice under s 15(1) of the CSA.

[92] Fourth, as previously stated, the information notice must contain reasons for the decision, although not necessarily to the standard required under s 27B of the *Acts Interpretation Act* 1954 (Qld).

[93] Fifth, if the chief executive increases the prisoner's security classification, the information notice must also notify the prisoner that he may ask the chief executive to reconsider the decision: s 15(2), CSA. If the chief executive increases a prisoner's security classification and the prisoner is dissatisfied with the decision, he may ask the chief executive to reconsider the decision by notice given within seven days after the information notice is given, under ss 16(1) and (2). If the prisoner gives notice requesting the chief executive to reconsider the decision within time, the chief executive must reconsider the decision: s 16(3), CSA. There is no restriction on the matters to be reconsidered by the chief executive under s 16(3). On making the decision on reconsideration of the original decision, the chief executive must give a further information notice to the prisoner under s 16(4) of the CSA.

[94] Sixth, in the case of a maximum security classification, a prisoner cannot be accommodated in a maximum security unit unless a maximum security order is made under s 60 or a further maximum security order is made under s 61. In the context of a consecutive further maximum security order, as I have already found, the prisoner has a right to procedural fairness.

[95] Seventh, in effect to the extent allowable in law, s 17 of the CSA seeks to exclude judicial review of the chief executive's decision under ss 12, 13, 14 or 16.

[96] If the chief executive is required to give notice of the review and to disclose information that may be taken into consideration by the decision-maker on the review under s 13, how will these provisions work? Those additional requirements will not affect the express statutory obligation to give an information notice about the decision following the review. They will not affect the chief executive's obligation to give reasons in the information notice. In a case where the prisoner's security classification is increased on review, they will not affect the chief executive's obligation to reconsider the decision if the prisoner gives notice asking the chief executive to do so. In such a case, they will not affect the chief executive's obligation to give the prisoner a further information notice about the reconsidered decision.

[97] In my view, the chief executive's obligation to give reasons in an information notice upon making a decision on review under s 13, coupled with the right of a prisoner whose security classification has been increased to request the chief executive to reconsider the decision, raise a question whether the prisoner has a right notice of the review or disclosure of information that may be taken into consideration by the chief executive upon the review before any decision is made.

[98] The statutory scheme for deciding a prisoner's security classification shows a positive intention that the information to be provided to the prisoner about that decision is to come through the reasons in the information notice.

[99] An opportunity for a prisoner to make submissions exists when a prisoner whose security classification has been increased asks for a reconsideration of the decision. The prisoner is able to do so with the benefit of the reasons required to be given in the information notice. Those reasons should identify the matters actuating the chief executive in making the decision.

[100] Under this statutory scheme, the reconsideration is made by the same person on the same materials except for any submissions the prisoner may make or any new materials obtained by the decision-maker. But the right to a reconsideration is only expressly given to a prisoner whose security classification is increased. The implication is that other prisoners do not have that that right.

[101] Having regard to those provisions and the general applicability of the system of review of the security classification of prisoners under s 13, by implication the statutory intention is that a prisoner is not otherwise to receive notice of or disclosure of the information which may be taken into account by the decision-maker upon the review.

[102] Whether such an intention appears is a matter of construction of the provisions of the CSA. It may be accepted that the review results in exercise of a power which affects the conditions under which a person may be detained is one which affects "basic human entitlements". Section 3(2) of the CSA acknowledges the need to safeguard those entitlements. Exclusion of the right to procedural fairness by notice of the review and appropriate disclosure of information which may be taken into account before a decision is made on the review could affect those entitlements. A

clear conclusion as to the proper construction of the statute is required before the conclusion is reached that the right is excluded or modified.

[103] The relevant principles of the law of statutory interpretation recognise that the right to procedural fairness by notice or disclosure of information to be taken into account is not readily excluded in many contexts. I have mentioned the role of the "principle of legality" above. The relevant law was recently and helpfully summarised by Gageler J in *Assistant Commissioner Condon v Pompano*,[28] as follows:

> "In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*, Crennan J (with whom Gleeson CJ agreed) stated that 'Parliament can validly legislate to exclude or modify the rules of procedural fairness provided there is 'sufficient indication' that 'they are excluded by plain words of necessary intendment'. The joint majority judgment did not go that far. The statement of Crennan J is to be read in a context in which her Honour went on to find in the statute in question 'modification', not exclusion. The statement was made with reference to *Commissioner of Police v Tanos* and *Annetts v McCann*. In neither case was a constitutional issue raised. What in *Tanos* was described as the 'deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard' was said to be applicable 'to proceedings in the established courts [as] a matter of course'. The principle was held not to be displaced by the statute in question. *Annetts v McCann* did not concern a court, but a coronial inquiry." (citations omitted)

[104] However, as was said by the plurality in the same case, although dealing with the procedures of a court:

> "The rules of procedural fairness do not have immutably fixed content. As Gleeson CJ rightly observed in the context of administrative decision-making but in terms which have more general and immediate application, '[f]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.' To observe that procedural fairness is an essential attribute of a court's procedures is descriptively accurate but application of the observation requires close analysis of all aspects of those procedures and the legislation and rules governing them."[29] (citations omitted)

[105] If there is a common law right requiring notice and disclosure to accord procedural fairness before a decision is made under s 13 of the CSA, the obvious question is raised as to what is intended to be achieved by the express system of notice of the decision supported by reasons followed (but only where the security classification of the prisoner is increased) by reconsideration of the decision by the same decision-maker if the prisoner asks for it? In my view, the question of the proper construction of the relevant sections must also be answered by keeping in mind that

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28 (2013) 87 ALJR 458, 499 [190].

29 *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458, 494 [156].

the statute is intended to provide for a manageable and practicable system of periodic review of the question of security classification for many individuals.

[106] Taking those matters into account, in my view, in making the third MSC the chief executive was not required to give to the applicant, as a prisoner facing a review of his security classification as maximum under s 13 of the CSA, notice of the review or disclosure of the information which may be taken into consideration by the decision-maker before the decision on review was made.

[107] Rather, when the first MSC increased the applicant's security classification from high to maximum and the applicant received the information notice setting out the reasons for that decision, the applicant's procedural right was to request a reconsideration of that decision under s 16(2). This the applicant failed to do.

[108] The third MSC did not increase the applicant's security classification. Accordingly, he did not have a statutory right to ask for reconsideration of the decision. I note that the reasons for the third MSC were not the same as the reasons for the first MSC, but both reasoned that the classification was due to the applicant engaging in aggressive and assaultive behaviour towards other prisoners. I have not ignored the possibility that in some cases a prisoner's classification may be continued for substantially different reasons without any statutory right to ask for a reconsideration under s 16(2) of the CSA.

[109] Nevertheless, it would be inconsistent with the statutory scheme to construe the CSA so that a common law right to procedural fairness operates in addition to and outside the statutory scheme, with the consequence that the applicant was entitled to notice of the review and disclosure of the information that may be taken into consideration by the decision-maker on the review in making the third MSC.

[110] It follows that this case is not the occasion to consider the extent of a prisoner's right to make submissions at the time of giving notice requesting reconsideration of a decision under s 16(2), or to be apprised of information which may be taken into account by the decision-maker, if they have not been identified in the reasons contained in the information notice about the classification decision.

[111] Instead, in my view, the conclusion which follows in the present case is that the third MSC was not invalidated because of failure to accord procedural fairness to the applicant before the decision was made.

Unreasonableness and the third MSC

[112] The applicant challenges the third MSC on the alternative ground that it was unreasonable. Because of the privative effect of s 17 of the CSA, this ground is limited to the contention that the decision was made in jurisdictional error because of "Wednesbury unreasonableness". That term was used recently by the plurality in *Li*[30] to identify the relevant area of discourse.

[113] Before *Li*, the relationship between Wednesbury unreasonableness and jurisdictional error had not been definitively established. However, there was strong support for the conclusion that Wednesbury unreasonableness may be

[30] (2013) 87 ALJR 618, 637 [64].

jurisdictional error.[31] Since the High Court in *Li* dismissed an appeal from a judgment that a decision infected by Wednesbury unreasonableness was made in jurisdictional error, I proceed on that basis.

[114] At heart, the contention is that the decision of the third MSC in the present case lacks "an evident and intelligible justification".[32] The applicant's submissions on unreasonableness tended to confuse the different questions arising under s 13, informed by s 12, on the one hand and those arising on making a maximum security order under s 60 or s 61 on the other hand. The requirements in s 12(2) inform the decision under s 13 because the decision-maker must have regard to them, but the discretion under s 13 is not otherwise expressly controlled in the way that the making of a maximum security order is provided for under s 60 or the making of a consecutive further maximum security order is provided for under s 61. The relevance of those provisions is contextual only.

[115] There are two points which may be made by way of analysis of this ground of review. First, where no specific consideration is said to make out Wednesbury unreasonableness, the stringency of the test is still in effect that the exercise of the power is so unreasonable that no reasonable repository of the power could have so exercised it.[33]

[116] In the present case, there were a number of matters in the material disclosed to the applicant that tended towards a possible decision that his security classification should be maximum. They included some of the matters contained in the statement of reasons given by Mr Rallings to the applicant (for the second MSO) dated 11 June 2013. Against those matters, the applicant would point to the fact that many of them are well in the past and are to be seen in the context that at the date of the increase of his security classification to maximum in October 2012 his then existing security classification, taking all but a couple of those matters into account, was high, not maximum. As well, he would point to then recently made positive report in relation to his application for parole, notwithstanding those earlier matters.

[117] It seems clear that the possibility of the applicant's involvement in the 9 October 2012 killing was a significant factor in the decision made to increase his security classification to maximum by the first MSC. Against that, the applicant would point to his submissions as to non-involvement and the recommendations of the official visitors in respect of the first MSO and the second MSO.

[118] Without more, these matters show that by the material disclosed to the applicant differing views were held by persons involved as to whether a maximum security order should have been made in his case and even whether he was a suitable candidate for parole, at least immediately before 9 October 2012. Those differing views may support the contention that to make his security classification maximum was not only disputable but wrong as a matter of merit. But it does not follow from the existence of that dispute that the exercise of the power in making the third MSC was so unreasonable that no reasonable repository of the power could have so exercised it.

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31 *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, 100-101 [40]; *re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212, 221 [30].

32 *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618, 639-40 [76].

33 *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618, 639-40 [76], 645 [108].

[119] Secondly, the decision-maker had regard to the intelligence information in the confidential exhibit. I have summarised the effect of some of that information in paragraph [47] above. When regard is had to it, in my view there is no serious question that the exercise of the power in making the third MSC was so unreasonable that no reasonable repository of the power could have so exercised it. It is to be regretted that my conclusion on that point cannot more clearly identify the essentially factual basis from which the answer to the Wednesbury unreasonableness question, in a case like the present, must proceed.

[120] It follows, in my view, that the third MSC was not made in jurisdictional error because of Wednesbury unreasonableness.

Procedural fairness and the second MSC, second MSO and second confirmation

[121] In my view, there is no reason to declare whether the second MSC or second MSO or the second confirmation was invalidated because of the failure to accord procedural fairness to the applicant.

[122] By the time of the hearing of the application, those decisions were no longer operative. The substantive questions have been decided in relation to the third MSO and third MSC. Beyond those questions, this case does not raise considerable public interest in the observance of the requirements of procedural fairness of the kind for which declaratory relief is sometimes granted.[34]

[123] In my view, apart from any question of costs, their relevance was limited to the factual background that they represented to the questions of validity of the third MSC and third MSO.

Costs

[124] Although the applicant succeeded in setting aside only one of the challenged orders, I consider that he has achieved a substantial degree of success in the proceeding. The second MSO was not amenable to a similar order only because its operation expired before the hearing of the application.

[125] Although I have concluded that the application for judicial review of the third MSC should be refused, the parties' costs of the application were not increased or significantly increased by the need to consider that question.

Orders

[126] For those reasons, the orders I propose to make are:

1. the decision of the third respondent, made on 18 October 2013 as delegate of the second respondent, making a further maximum security order for the applicant to take effect on 23 October 2013 for a period of six months is set aside; and

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[34] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 359-360 [102]-[103].

2. the second respondent pay the applicant's costs of the application.