SUPREME COURT OF QUEENSLAND

CITATION:	*Murphy v Legal Services Commissioner* [2016] QSC 174
PARTIES:	**JOHN PAUL MURPHY** (applicant) **v** **LEGAL SERVICES COMMISSIONER** (respondent)
FILE NO/S:	BS6839/15
DIVISION:	Trial
PROCEEDING:	Application for a statutory order of review
DELIVERED ON:	8 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2016, further submissions received 18 March 2016 and 4 April 2016
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. The originating application is dismissed.** **2. The applicant provide any submissions as to costs in writing of no more than 5 pages supported by any affidavit relied upon on that question on or before 15 August 2016.** **3. The respondent provide any submission as to costs in writing of no more than 5 pages on or before 22 August 2016.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – GENERALLY – where the applicant made complaints to the respondent about the conduct of solicitors acting for an adverse party in litigation – where the respondent decided to dismiss the complaints relating to "Australian legal practitioners" pursuant to s 448 of the *Legal Profession Act* 2007 (Qld), and decided to no longer deal with the complaint relating to an "unlawful operator" pursuant to s 446 – where the applicant applied for a statutory order of review in relation to the decision – whether the respondent's decision to dismiss the complaints under s 448 was a decision to which the *Judicial Review Act* 1991 (Qld) applies – whether the decision to dismiss the complaints conferred, altered or otherwise affected legal

rights or obligations

Administrative Decisions (Judicial Review) Act 1977 (Cth), s 9A
Legal Profession Act 2007 (Qld), ss 428, 446, 447, 448
Judicial Review Act 1991 (Qld), ss 16, 19, 20, 30, 48, sch 2

Attorney-General (Cth) v Oates (1999) 198 CLR 162; [1999] HCA 35, cited
Attorney-General (NT) v Emmerson (2014) 253 CLR 393; [2014] HCA 13, cited
Aye v Minster for Immigration and Citizenship (2010) 187 FCR 449; [2010] FCAFC 69, cited
Ayles v The Queen (2008) 232 CLR 410; [2008] HCA 6, not applied
Barton v The Queen (1980) 147 CLR 75; [1980] HCA 48, cited
Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256; [2006] HCA 27, cited
Churchill Fisheries Export Pty Ltd v Director-General of Conservation [1990] VR 968, cited
Director of Public Prosecutions (SA) v B (1998) 194 CLR 566; [1998] HCA 45, cited
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, applied
Hanna v Director of Public Prosecutions (NSW) (2005) 62 NSWLR 373; [2005] NSWSC 134, cited
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, not applied
Leadpoint Pty Ltd v Legal Services Commissioner [2015] QSC 254, considered
Likiardopoulos v The Queen (2012) 247 CLR 265; [2012] HCA 37, considered
Maxwell v The Queen (1996) 184 CLR 501; [1996] HCA 46, cited
Mid Brisbane River Irrigators Inc v The Treasurer and Minister for Trade of the State of Qld [2014] 2 Qd R 592; [2014] QSC 196, cited
Murphy v Legal Services Commissioner [2013] QSC 70, considered
Newby v Moodie (1988) 83 ALR 523, considered
Oates v Attorney-General (Cth) (1998) 84 FCR 348, cited
QUBE Ports Pty Ltd v Chief Executive, Department of Justice and Attorney-General [2013] 2 Qd R 260; [2012] QCA 285, considered
R (Pretty) v Director of Public Prosecutions [2002] 1 AC 800; [2001] UKHL 61, cited
Smiles v Commissioner of Taxation (Cth) (1992) 35 FCR 405, cited
Walker v Criminal Justice Commission [1993] 2 Qd R 467, distinguished

Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, cited

COUNSEL: Applicant in person
J Bell QC and A Scott for the respondent

SOLICITORS: Legal Services Commission for the respondent

[1] **Jackson J**: The respondent applies under s 48 of the *Judicial Review Act* 1991 (Qld) ("JRA") for an order summarily dismissing the originating application. The originating application is for review of the respondent's decision to dismiss complaints made by the applicant against two legal practitioners under the *Legal Profession Act* 2007 (Qld) ("LPA").

Legal Profession Act

[2] Chapter 4 of the LPA deals with complaints against members of the legal profession. Section 416 provides that the main purposes of the chapter are to provide for the discipline of the legal profession, to promote and enforce the professional standards, competence and honesty of the legal profession and to provide a means of redress for complaints about lawyers. That section also provides that another main purpose is to protect members of the public from unlawful operators. Section 417 applies the chapter to "Australian lawyers" and "Australian legal practitioners".[1] The key concepts set out in s 418 of "unsatisfactory professional conduct" and s 419 of "professional misconduct" inform the statutory structure of regulation for those lawyers. Under ss 422 and 423, ch 4 applies to Australian legal practitioners for relevant conduct happening in this jurisdiction, whether before or after the commencement of the sections.

[3] Part 4.4 provides for the making of complaints about Australian legal practitioners and unlawful operators.[2] Section 428(1) provides, inter alia, that a complaint may be made under ch 4 about an Australian legal practitioner's conduct to which the chapter applies or the conduct of an unlawful operator that contravenes ss 24 or 25.

[4] Section 429 provides for the manner of making the complaint. An entity may make a complaint to the respondent in the approved form about the conduct of an Australian legal practitioner or an unlawful operator. The complaint must comply with the requirements of s 429(3). Under s 431, the respondent may require further information and verification of the complaint.

[5] Under s 432, the respondent may summarily dismiss a complaint for one or more of a number of reasons. Under s 432(2), the respondent may dismiss a complaint without

[1] Under s 5(1) an "Australian lawyer" is a person who is admitted to the legal profession under this Act or a corresponding law. Under s 6(1), an "Australian legal practitioner" is an Australian lawyer who holds a current local practising certificate or current interstate practising certificate.

[2] Misleadingly, the part is headed "Complaints about Australian legal practitioners".

completing an investigation if the respondent forms the view that the complaint requires no further investigation.

[6] Under s 435, the respondent may refer a complaint about an Australian legal practitioner, law practice or an unlawful operator to the relevant regulatory authority, in this case the Queensland Law Society ("QLS"). Alternatively, under s 436 the respondent may investigate the complaint himself. Under s 437, the entity carrying out any investigation must ensure that written notice is given to the relevant Australian legal practitioner or unlawful operator.

[7] It is unnecessary to consider all of the subsequent steps provided for by the LPA to deal with a complaint.

[8] Section 446 of the LPA applies after there has been an investigation of a complaint about an unlawful operator and provides:

> (1) This section applies after a complaint or investigation matter about an unlawful operator has been investigated.
> (2) As the commissioner considers it appropriate, the commissioner may—
> (a) start proceedings to prosecute the unlawful operator under this Act; or
> (b) give to the commissioner of police the results of the investigation; or
> (c) refer the complaint or investigation matter to the law society for further investigation; or
> (d) decide to no longer deal with the matter the subject of the complaint or investigation matter.
> (3) Subsection (2)(a) does not limit the *Acts Interpretation Act* 1954, section 42.
> (4) For subsection (2)(b), the commissioner may enter into arrangements with the commissioner of police.

[9] Part 4.7 of the LPA provides for the respondent to make a decision in relation to a complaint about, inter alia, the conduct of an Australian legal practitioner. Under s 447, the respondent may start a proceeding under ch 4 before a disciplinary body.

[10] Section 448 of the LPA provides:

> (1) The commissioner may dismiss the complaint or investigation matter if satisfied that—
> (a) there is no reasonable likelihood of a finding by a disciplinary body of—
> (i) for an Australian legal practitioner—either unsatisfactory professional conduct or professional misconduct; or
> (ii) for a law practice employee—misconduct in relation to the relevant practice; or
> (b) it is in the public interest to do so.

(2) The commissioner must give the respondent and any complainant written notice about the commissioner's decision to dismiss the complaint or investigation matter.

[11] A discipline application is started by the respondent under s 452 of the LPA before either the tribunal or the committee. Where the proceeding is started before the tribunal, a finding of either unsatisfactory professional conduct or professional misconduct may be made. Such a finding is a condition precedent to the power of the tribunal to make an order under s 456(1).

[12] There are distinctions between the way the LPA provides for a decision upon a complaint about the conduct of an unlawful operator in relation to conduct that constitutes a contravention of s 24 of the LPA on the one hand and the way it provides for a decision on a complaint made against an Australian legal practitioner.

[13] A source of the distinction is that s 24(1) of the LPA prohibits a person in this jurisdiction from engaging in legal practice unless the person is an Australian legal practitioner. A person who does so is defined in Sch 2 of the LPA to be an "unlawful operator" for the purposes of the LPA. Contravention of s 24 is an offence.

[14] In contrast, the key concepts of unsatisfactory professional conduct and professional misconduct under Pt 4.4 principally relate to the conduct of an Australian legal practitioner.[3]

[15] Importantly, a complaint against an unlawful operator may result in a prosecution for an offence against s 24 but not a decision to start a discipline application for unsatisfactory professional conduct or professional misconduct under Pt 4.7.

[16] For present purposes, there is also a relevant difference between the power under s 446 to "decide to no longer deal with the matter the subject of the complaint" against an unlawful operator on the one hand and the power under s 448 to decide to "dismiss" a complaint against an Australian legal practitioner on the other hand.

[17] That difference proved important to the outcome of the respondent's first consideration of the applicant's complaints when the respondent purported to dismiss the applicant's complaints under s 448. This court held that the respondent did not have power to do so under that section in relation to the applicant's complaints made against the "unlawful operator" as that is governed by s 446.[4]

Applicant's complaints

[18] On 10 November 2009, the applicant made complaints to the respondent pursuant to Ch 4 Pt 4.4 of the LPA concerning a solicitor and a former solicitor. Those solicitors had represented the adverse parties in litigation commenced by the applicant in 2003.

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[3] There are, however, other persons to whom they apply, such as Australian lawyers and former Australian lawyers as defined, but they are not engaged in this case.

[4] *Murphy v Legal Services Commissioner* [2013] QSC 70, [97].

[19] In 2010, the respondent referred the complaints to the QLS for investigation.

[20] On 8 March 2011, the respondent wrote to inform the applicant of investigations which had been undertaken, and to advise that the respondent had decided not to take any further action in respect of the applicant's complaints.

[21] By a letter dated 8 April 2011, the applicant asked the respondent to reconsider that decision.

[22] On 2 August 2011, the respondent wrote to the applicant to advise that the respondent proposed taking no further action on the complaints, confirming the 8 March 2011 decision, as well as setting out the material on which the decision was based and his reasons.

[23] On 31 August 2011, the applicant applied for statutory orders of review of the respondent's decision of 8 March 2011 pursuant to the JRA.

[24] In March 2013, Daubney J set aside the respondent's decision of 8 March 2011 and the applicant's complaints made on 10 November 2009 were referred to the respondent for further consideration according to law.[5]

[25] The respondent reconsidered the applicant's complaints, that may be summarised as follows:

(1) That the solicitors had pleaded an allegation of fraud against the applicant without a proper evidentiary basis;

(2) That the solicitors had drafted a paragraph of an affidavit alleging fraudulent conduct without evidentiary support;

(3) That the solicitors created a company and an associated trust to facilitate a sham transaction regarding the sale of land;

(4) That the solicitors had drafted an affidavit containing details known to be false, and that one of the solicitors falsely swore an affidavit to the effect that a new Amended Statement of Claim was a new document and that the previous Statement of Claim had been discarded;

(5) That one of the solicitors acted when they lacked a practising certificate; and

(6) That one of the solicitors swore another false affidavit.

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[5] *Murphy v Legal Services Commissioner* [2013] QSC 70.

[26] All but one of those complaints concerned the conduct of the solicitor concerned as an Australian legal practitioner. The exception was the complaint made against one of the solicitors who ceased to hold a practising certificate while the litigation was ongoing. As against him a complaint thereafter was that his continued involvement in the proceeding amounted to acting as an unlawful operator.

[27] On a reconsideration of the complaints, by letter dated 27 May 2015 the respondent made the present decision to dismiss those complaints against the Australian legal practitioner and former Australian legal practitioner under s 448(1) that are subject to the current originating application for review. The respondent also decided, under s 446, to no longer deal with the complaint against the former Australian legal practitioner for acting as an unlawful operator.

[28] On 2 June 2015, the respondent's decision was received by the applicant.

[29] On 14 July 2015, the applicant filed the present application.

JRA

[30] The parties proceeded on the footing that the respondent's letter dated 27 May 2015 was a decision to "dismiss" the applicant's complaints.

[31] Section 19 of the JRA confers jurisdiction upon the court to hear and determine applications made to it under the Act.

[32] Part 3 of the JRA provides for statutory orders of review. Section 3 defines that term to mean, inter alia, "an order on an application made under s 20 in relation to a decision". Section 20 provides that a person who is aggrieved by a "decision to which [the] Act applies" may apply to the court "for a statutory order of review in relation to the decision". The application may be made on one or more of the grounds set out in s 20(2), which are expanded by the provisions in ss 23 to 24. By s 25, an application for a statutory order of review must set out the grounds of the application and be made in the way prescribed by the rules of court. Section 30 provides for the orders that the court may make "on an application for a statutory order of review".

[33] The statutory remedies, including an application under s 20 resulting in an order made under s 30, provided for in Pt 3 of the JRA are quite separate from the power to make an order in the class of a "prerogative order" as provided for under Pt 5. By s 41, a "prerogative order" is an order the relief or remedy under which is in the nature of and to the same effect as the relief or remedy that could have been granted by way of the prerogative writs of mandamus, prohibition or certiorari, which are no longer to be issued.[6] The originating application in the present case does not seek any relief of that kind.

[34] The right to make an application under s 20 and the power to make an order under s 30 depend on the existence of "a decision to which this Act applies". In s 4, that term is

[6] *Judicial Review Act* 1991 (Qld), ss 3 (definition of "prerogative order") and 41(2).

relevantly defined to mean "a decision of an administrative character made … under an enactment…"

[35] Under s 48 of the JRA, the respondent may apply for an order dismissing an originating application made under s 20. The court may dismiss the originating application if the court considers that no reasonable basis for the application is disclosed, or the application is frivolous or vexatious, or the application is an abuse of process of the court.[7] If an application is made for a statutory order of review of a decision which is not a decision to which the JRA applies, the court may make an order under s 48. Alternatively, if there is some reason in law why the application cannot succeed, an order under s 48 to dismiss the application may be appropriate.

Respondent's application

[36] The respondent applies for such an order on grounds that include:

(1) first, that a statutory power to judicially review the respondent's powers to "dismiss" the applicant's complaints would be invalid as contrary to the Constitution;

(2) second, that the challenged decision is not a decision to which the JRA applies.

Relief sought in the originating application

[37] The substantive[8] relief claimed by the originating application is an order declaring the rights of parties under s 30(1)(c) of the JRA. The declaration sought is that there is a reasonable likelihood of a finding by the tribunal of either unsatisfactory professional conduct or professional misconduct against each of the solicitors about whose conduct the complaints were made. In my view, the claim for that relief is misconceived. The applicant also seeks an order remitting each of the complaints to the respondent and directing the respondent to make a decision on the complaints according to law.

[38] On an application for a statutory order of review of the respondent's decision to "dismiss" a complaint, it is not the function of this court to make any decision on the merits of a putative discipline application. Nor is it the function of this court to make a finding of fact by way of advice for the purpose of informing a decision maker in the future exercise of the power either to dismiss a complaint, or to start a discipline application, or on the merits of a discipline application.

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[7] *Judicial Review Act* 1991 (Qld), s 48(1)(b)-(d).

[8] Part of the relief claimed by the originating application is for an order enlarging time under s 26(1)(b). By s 26 of the JRA, the application must be made in the period beginning on the day in which the decision was made and ending 28 days after the relevant day. In the circumstances of this case, the relevant day was the day on which the applicant received the document setting out the terms of the decision. The respondent's decision (made by the letter dated 27 May 2015) was received by the applicant on 2 June 2015. The originating application was filed on 14 July 2015, namely 41 days after the relevant day.

[39] Just as it is not the court's function to make a finding of fact by way of advice for a final determination of the question of unsatisfactory professional conduct or professional misconduct, it is not appropriate to make a finding of fact by way of advice to the respondent on the question of whether there is no reasonable likelihood of a finding by a disciplinary body of such conduct.

[40] The applicant does not seek an order quashing or setting aside the decision complained of, under s 30(1)(a) of the JRA, but that is the logical outcome of the statutory order of review that he applies for under s 20 of the JRA. I proceed on that footing.

Invalidity of power to review

[41] The respondent's first ground for summary dismissal of the originating application is that if s 20 of the JRA permits a statutory order of review of the respondent's decision to dismiss the complaints, it is constitutionally invalid on the principle of *Kable v Director of Public Prosecutions (NSW)*.[9]

[42] It is convenient to consider the *Kable* argument on the assumption that the decision is otherwise a reviewable decision under s 20 of the JRA. The respondent relied on a passage from *Ayles v The Queen*,[10] where Gummow and Kirby JJ said:

> "… any suggestion that a court could – let alone should – decide for itself the offences with which a defendant is to be charged would be inimical to the judicial process. It also may well raise concerns about the institutional integrity of the courts in the manner discussed in *Kable v Director of Public Prosecutions (NSW)*." (footnote omitted)

[43] That reference to *Kable v Director of Public Prosecutions (NSW)* may be taken to be a statement of the principle taken from that case that has been explained as follows:

> "The principle for which *Kable* stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid."[11] (footnotes omitted)

[44] In my view, the respondent's reliance on *Ayles* and *Kable* must be rejected. The statement in *Ayles* is no more than a remark in passing made by two members of the court in a context which did not call for a decision on a question of the kind raised in the present case. The other members of the court did not endorse the reference to the possible application of the *Kable* principle in *Ayles*.

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9 (1996) 189 CLR 51.
10 (2008) 232 CLR 410, 422 [37].
11 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 424 [40].

[45] At common law, and under general statutory powers to institute a prosecution for a criminal offence, there is no doubt that many cases stand for the general principle that it is not the court's business to interfere in the decision making process upon a prosecutor's decision whether or not to start a criminal proceeding. It is unnecessary to survey the cases in detail at this point. Both the common law position and the position under a general statutory power to institute a prosecution were discussed in *Barton v The Queen*.[12] An instructive passage appears in *QUBE Ports Pty Ltd v Chief Executive, Department of Justice and Attorney-General*:[13]

> "This ground implicitly accepts that, as a matter of law, decisions to commence or institute prosecutorial proceedings are not amenable to judicial review. The authorities to which the learned Judge referred including *Barton v The Queen*, **demonstrate clearly that** such decisions are non-reviewable judicially. The rationale for this rule of law was explained by Gaudron and Gummow JJ in *Maxwell v The Queen* in terms of maintenance of the integrity of the judicial process, their Honours said:
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> > '… The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.'"[14] (emphasis added, footnotes omitted)

[46] So much may be accepted, as generally expressed. But there are limits to the utility of such a generally expressed proposition.

[47] First, it should be recognised that in the older cases it was significant that the power to institute a prosecution was characterised as a "prerogative" power.[15] Since 1980, when *Barton* was decided, there have been developments of relevance. For example, it is no longer right to say that an administrative decision made in the exercise of any prerogative power or similar is necessarily immune from judicial review.[16] It is unnecessary to go further into that question in general in this case.

[48] Second, in considering the power of this court to make an order on an application for a statutory order of review of a decision not to institute a criminal prosecution, the question is one of construction of the relevant statutory power to institute a proceeding. It should not be assumed that the proper construction of the relevant statutes in all jurisdictions on this question is the same. As well, because the question is the power of this court to judicially review under ss 20 and 30 of the JRA, the question is one of the proper construction of the scope of the power of judicial review conferred by the provisions of that Act, not whether there would have been power at common law to issue one of the former prerogative writs for judicial review of a prerogative power.

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12 (1980) 147 CLR 75.
13 [2013] 2 Qd R 260.
14 [2013] 2 Qd R 260, 268 [38].
15 *Barton v The Queen* (1980) 147 CLR 75, 90-95.
16 For example, see *Aye v Minster for Immigration and Citizenship* (2010) 187 FCR 449.

[49] In any event, the proposition that the integrity of the judicial process would be compromised if the courts were to be in any way concerned with decisions as to who is to be prosecuted and for what requires some explanation. In some ways courts have concerned themselves with who is to be prosecuted and for what. For example, there is no doubt that once a criminal proceeding has been started the courts retain a power to stay the proceeding on the ground of abuse of process,[17] including for reasons that concern whether it should have been started in the first place. Further, it has been recognised that there could be judicial review of a decision not to prosecute made in bad faith.[18]

[50] Third, the question in the present case is not about the power to judicially review a decision made in the exercise of a power to institute a criminal prosecution. The specific powers are to dismiss a complaint under one section of the LPA and to no longer deal with the matter the subject of the complaint under another section.

[51] Reduced to its bare essentials, the respondent's argument about the application of the *Kable* principle to a decision made under s 448 of the LPA is that if a decision to dismiss a complaint and therefore not to start a discipline application could be judicially reviewed by a statutory order of review made under s 30 of the JRA, that would confer upon the court a power or function which substantially impairs the court's institutional integrity. In other words, it would be incompatible with the court's role as a repository of federal judicial power if it had power to interfere with a decision not to start a discipline application on judicial review under a State Act.

[52] It is important to keep in mind that *Kable* is not a principle of interpretation or construction. It is a principle that marks out a limit of constitutional power. That is, the power of the parliament of a State to enact legislation conferring a power or function upon a court of the State that is a repository of federal jurisdiction.

[53] In my view, the constitutional argument is unsustainable. If this court judicially reviews a decision of the respondent to dismiss a complaint under s 448 of the JRA, the ordinary consequence of finding that a relevant ground of review is made out would be to quash or set aside the decision and to require it to be made again in accordance with the law. This court is not permitted to exercise the power for itself, on the merits. It would remain a decision for the respondent to make as the repository of the power. In my view, there is no apparent reason or any reason that was advanced by the respondent that justifies the conclusion that to do so would substantially impair the court's integrity.

[54] The same reasoning, in my view, applies to a decision to no longer deal with the matter the subject of a complaint under s 446 of the LPA.

[55] It seems to me that any argument premised on the proposition that it would be a substantial impairment of this court's institutional integrity, in a way that is incompatible with this court's role as a repository of federal jurisdiction, for the JRA to

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[17] *Likiardopoulos v The Queen* (2012) 247 CLR 265, 280 [37]; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; *Walton v Gardiner* (1993) 177 CLR 378.

[18] *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, 838 [67].

confer upon it power to judicially review a decision to dismiss a complaint under the LPA is unsustainable.

Insusceptibility of review

[56] As an alternative to the argument of constitutional invalidity based on the *Kable* principle, the respondent contends that the decision is insusceptible of judicial review.

[57] The passage from *QUBE Ports* set out above states the principle expressed at a general level. The respondent also relied on *Barton v The Queen, Maxwell v The Queen*[19] and *Director of Public Prosecutions (SA) v B*[20] in support of the general submission that a decision of a prosecutor as to whether or not to institute a criminal proceeding is insusceptible of judicial review.

[58] Specific examples of relevant classes of decision were also given in *QUBE* as follows:

> "… their Honours listed types of decisions that might be required to be made in the prosecutorial process that, by their nature, were insusceptible of judicial review. The list, which was not advanced as an exhaustive one, identified decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence, and decisions as to the particular charges to be laid or prosecuted."[21]

[59] But decisions such as *Churchill Fisheries Export Pty Ltd v Director-General of Conservation,*[22] *Smiles v Commissioner of Taxation (Cth),*[23] *Walker v Criminal Justice Commission*[24] and *Hanna v Director of Public Prosecutions (NSW)*[25] appear to show that the answer to such a question is not always so clear. See also *Likiardopoulos v The Queen*[26] where French CJ said:

> "The general unavailability of judicial review in respect of the exercise of prosecutorial discretions rests upon a number of important considerations. One of those considerations, adverted to in the joint judgment, is the importance of maintaining the reality and perception of the impartiality of the judicial process. A related consideration is the importance of maintaining the separation of the executive power in relation to prosecutorial decisions and the judicial power to hear and determine criminal proceedings. A further consideration is the width of prosecutorial discretions generally and, related to that width, the variety of factors which may legitimately inform the exercise of those discretions. Those factors include policy and public interest considerations which are not susceptible

[19] (1996) 184 CLR 501.
[20] (1998) 194 CLR 566.
[21] [2013] 2 Qd R 260, 268 [39].
[22] [1990] VR 968.
[23] (1992) 35 FCR 405.
[24] [1993] 2 Qd R 467.
[25] (2005) 62 NSWLR 373.
[26] (2012) 247 CLR 265, 269-270 [2]-[4].

to judicial review, as it is neither within the constitutional function nor the practical competence of the courts to assess their merits. Moreover, as their Honours point out, trial judges have available to them sanctions to enforce well-established standards of prosecutorial fairness and to prevent abuses of process.

The above considerations, reflected in a number of decisions of this court referred to in the joint judgment of Gaudron and Gummow JJ in *Maxwell*, support the proposition that in a practical sense prosecutorial decisions are for the most part insusceptible of judicial review. But as Gaudron and Gummow JJ also pointed out, the approach of earlier authorities which treated such decisions as unreviewable because they were seen as part of the prerogative of the Crown 'may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all states and territories and in the Commonwealth'. Further as their Honours observed 'it may pay insufficient regard to the fact that some discretions are conferred by statute'.

The statutory character of prosecutorial decision-making in Australia today does not lessen the significance of the impediments to judicial review of such decisions, which are created by the constitutional and practical considerations referred to above. However the existence of the jurisdiction conferred upon this court by s 75(v) of the Constitution in relation to jurisdictional error by Commonwealth officers and the constitutionally-protected supervisory role of the Supreme Courts of the states raise the question whether there is any statutory power or discretion of which it can be said that, as a matter of principle, it is insusceptible of judicial review. That question was not argued in this case and does not need to be answered in order to decide this case. It involves a question arising under the Constitution. I would not wish my agreement with the reasons given in the joint judgment to be taken as acceptance of a proposition that the exercise of a statutory power or discretion by a prosecutor is immune from judicial review for jurisdictional error, however limited the scope of such review may be in practice." (footnotes omitted)

[60] Except in relation to one of the complaints, this case is not concerned with a decision to institute a criminal proceeding. The decision made under s 448 was a decision not to start a discipline application, but that is not a criminal proceeding. The respondent submits that, nevertheless, it was analogous to such a case because the proceeding would seek relief that is a penalty. The applicant submits that a discipline application proceeding is protective, not penal, in character.

[61] In this case it is convenient to defer consideration of the respondent's contention that the decision to dismiss the complaints and thereby not to start a discipline application is insusceptible of judicial review until after consideration of the next ground of the respondent's application.

Decision to which this Act applies

[62] As stated above, under s 4 of the JRA a "decision to which this Act applies" is defined as "a decision of an administrative character made … under an enactment (whether or not in the exercise of a discretion)". The respondent's second ground for summary dismissal is that the respondent's decision to dismiss the complaints was not a decision to which the JRA applies.

[63] The respondent submits that conclusion follows from my decision in *Leadpoint Pty Ltd v Legal Services Commissioner.*[27] The applicant in that case had made a complaint about the conduct of a person as an unlawful operator in contravention of s 24 of the LPA. The respondent had referred the complaint to the QLS as the relevant regulatory authority under s 435. The QLS reported to the respondent and made a recommendation not to start a proceeding. The specific section relevant to that case was s 446 of the LPA. The relevant alternative to referring the complaint to the QLS in that case was that the respondent had decided "to no longer deal with the matter the subject of the complaint" under s 446(2)(d). That is to be compared with the decision to dismiss the present complaint which was made under s 448(1) in relation to all but one of the complaints in the present case.

[64] In *Leadpoint,* I held that a decision to no longer to deal with the subject matter did not confer, alter or otherwise affect legal rights or obligations.[28] Because of that, in my view, the decision was not one that was a "decision of an administrative character made … under enactment (whether or not in the exercise of discretion)" within the meaning of s 4 of the JRA. Accordingly, it was not a decision to which the JRA applied.

[65] In reaching that conclusion, I referred to the earlier case between the present disputants in *Murphy v Legal Services Commissioner.*[29] In that case, Daubney J set aside a decision made by the respondent on 8 March 2011 to dismiss the same complaints as are the subject of the present proceeding. However, the question whether that decision was one to which the JRA applied was not argued. Daubney J specifically noted that it was not suggested that the respondent's decision in that case was not a decision of an administrative character made under an enactment and was not a decision to which the JRA applied.[30]

[66] The applicant submits that if my decision in *Leadpoint* would otherwise apply, as between the present parties, the respondent was bound by an issue estoppel that a decision under s 448 to dismiss the applicant's complaint is a decision to which the JRA applies. In my view, that contention is misconceived. First, that is because the present decision is not the same decision as that set aside by Daubney J. Accordingly, there is no res judicata. Second, that is because the present point of dispute was not decided upon the earlier application so as to create an issue estoppel. It was simply assumed in the applicant's favour.

[67] The question, then, is whether my decision in *Leadpoint* does apply, or whether the reasoning in it supports the conclusion that the respondent's decision in the present case

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27 [2015] QSC 254.
28 [2015] QSC 254, [30].
29 [2013] QSC 70.
30 [2013] QSC 70, [57].

is not a decision to which the JRA applies because it is not a "decision of an administrative character … made under an enactment".

[68] The precise significance of that expression was explored in *Griffith University v Tang*.[31] The plurality considered the requirements to be as follows:

> "What is it, in the course of administration that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?
>
> The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins,* does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?"[32] (footnotes omitted)

[69] The respondent relies on many cases that deal with the principle that a decision whether to prosecute or not to prosecute is insusceptible of judicial review. In *QUBE*, for example, it was implicitly accepted that decisions to commence or institute prosecutorial proceedings are not amenable to judicial review. However, it does not seem to me that such cases inform the relevant question of statutory interpretation of s 4 of the JRA or its application to the facts of the present case.

[70] To the extent that the respondent's decision was made under s 446 to no longer deal with the subject matter of the complaint about an unlawful operator, I would follow my earlier decision in *Leadpoint*, unless I were persuaded that it is clearly wrong.

[71] However, there is an arguable difference on this point between a decision to no longer deal with the matter the subject of a complaint about an unlawful operator under s 446 and a decision to dismiss a complaint about an Australian legal practitioner under s 448. Under s 448 the respondent must give the Australian legal practitioner and the complainant written notice about the Commissioner's decision to dismiss the complaint.[33]

[72] The question becomes whether a decision to dismiss a complaint under s 448 is thereby distinguishable from a decision to no longer deal with the subject matter of a complaint under s 446(2)(d).

[73] First, a decision to dismiss a complaint under s 448 differs from a decision to start a discipline proceeding under s 447. In the latter case, the proceeding when started engages both rights and obligations as between the respondent (as applicant in the discipline application) and the Australian legal practitioner who is a respondent to that

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[31] (2005) 221 CLR 99.

[32] (2005) 221 CLR 99, 128 [79]-[80].

[33] *Legal Profession Act* 2007 (Qld), s 448(2); cf *Mid Brisbane River Irrigators Inc v The Treasurer and Minister for Trade of the State of Qld* [2014] 2 Qd R 592, 597 [23].

application. That person is obliged to respond to the proceeding. Both that person and the respondent have a right to proceed to a decision of the tribunal or committee and to obtain a relevant outcome.

[74] However, a decision not to start a discipline application or not to prosecute does not change the position of any party. It does not confer any immunity or right upon the person who is subject to a complaint under the LPA. It takes away no right of the complainant to make a complaint. It does not render the respondent functus officio. The respondent can review the decision or make it again.

[75] Similar reasoning applies to, and shows the difference between, a decision not to deal with the matter the subject of a complaint about the conduct of an unlawful operator under s 446 and a decision to start proceedings to prosecute the unlawful operator under that section.[34]

[76] There are some other matters which should be acknowledged before finally deciding that question.

[77] First, *Walker v Criminal Justice Commission*[35] was concerned with a decision by the Criminal Justice Commission ("CJC") to take no action against a police officer for not laying a charge against an alleged offender. The relevant statutory provisions empowered the CJC to bring a proceeding for official misconduct. The legislation defined official misconduct to include execution of a police officer's powers or authority in a manner that was not honest or was not impartial.

[78] The applicant sought a statutory order of review of the CJC's decision not to start a disciplinary action against the relevant police officer. White J said:

> "The decision not to prosecute is a somewhat different matter. It carries with it no liability or obligation to individuals for damage caused to them by that decision. … To review the decision of the CJC … does not lead to the fragmenting of the criminal process which was said by the High Court … to be so undesirable … Further s 2.25 of the *Criminal Justice Act* enables a person who is the subject of an investigation of the kind undertaken here to seek review in the Supreme Court of the conduct of that investigation if aggrieved.
>
> The decision of 25 June 1992 is in my opinion, reviewable."[36]

[79] I accept the force of the proposition that judicial review of a decision not to prosecute will not fragment an existing criminal process, because none has been started. But I do not truly understand the significance of the right of a person who is subject to an investigation to seek review of the conduct of an investigation. If a decision has been taken not to prosecute, it is difficult to see why the person who has been the subject of the investigation would want to review the conduct of the investigation, in most cases. However that may be, the point for present purposes is that *Walker* did not involve any

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[34] *Leadpoint Pty Ltd v Legal Services Commissioner* [2015] QSC 254, [26]-[31].
[35] [1993] 2 Qd R 467.
[36] [1993] 2 Qd R 467, 470.

argument that the decision sought to be reviewed by way of a statutory order of review was not a decision to which the JRA applied. It does not represent an authority on that question.

[80] Second, *Newby v Moodie*[37] held that a decision to prosecute an offence under the *Crimes (Taxation Offences) Act* 1980 (Cth) was a decision of an administrative character under an enactment in the cognate context of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("Commonwealth Act"). The Full Court of the Federal Court of Australia held:

> "Section 6 of the *Director of Public Prosecutions Act* provides that the functions of the Director include the institution of prosecutions for indictable offences against the laws of the Commonwealth (s 6(1)(a)), the carrying on of such prosecutions (s 6(1)(b)), the institution of proceedings for the commitment of persons for trial in respect of indictable offences against the laws of the Commonwealth (s 6(1)(c)), and the carrying on of such proceedings: s 6(1)(e). Section 11 of his Act empowers the Director to give directions with respect to the prosecution of offences against the laws of the Commonwealth to, inter alios, a person who institutes or carries on prosecutions for offences against the laws of the Commonwealth. No doubt the decision of the Director sought to be challenged in the present proceedings was made pursuant to ss 6 and 11.
>
> In our opinion this decision was a decision to which the Judicial Review Act applies, being a decision of an administrative character made under the Director of Public Prosecutions Act. Indeed, on the hearing of the appeal counsel for the respondents did not contend to the contrary. We do not think that the definition in s 3(1) of the Judicial Review Act of the term 'decision to which this Act applies' should be read down so as to exclude a decision which is plainly of an administrative character made by the Director under his Act.
>
> We think the question is put beyond doubt by reference to the Schedules to the Judicial Review Act. Decisions in connection with the prosecution of persons for offences against the laws of the Commonwealth are not excluded from the classes of decisions to which the Act applies (Sch 1) but are specifically excluded from the classes of decisions to which s 13 of the Act applies: Sch 2, para (e)(i). We think this is a clear indication of a legislative intention that a decision to prosecute for an offence against the laws of the Commonwealth may be made the subject of an application under the Act, but that the decision-maker is not required to furnish a statement in writing of the reasons for his decision or of the other matters referred to in s 13."[38]

[81] But the question in that case was whether a decision to institute a prosecution was a decision to which the Commonwealth Act applied. It was not about whether a decision

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[37] (1988) 83 ALR 523.

[38] *Newby v Moodie* (1988) 83 ALR 523, 526-527.

not to institute a prosecution was a decision to which the Commonwealth Act applied. And it was decided long before *Tang*. Subsequent cases have questioned whether it was correctly decided, but it is unnecessary to pursue that point.

[82] In *Oates v Attorney-General (Cth)*,[39] another Full Court of the Federal Court of Australia said:

> "The second development is that there are now a number of decisions that have held that a decision to commence a prosecution made under a Commonwealth enactment is reviewable under the [Commonwealth Act]; see for example, *Newby v Moodie; Wouters v Deputy Commissioner of Taxation*. We will assume it to be correct that the [Commonwealth Act] has brought about a fundamental change to the type of decision that is capable of review so that a decision to prosecute may now be reviewable. This would require the conclusion that a decision to prosecute is relevantly a 'decision' that is capable of review under the [Commonwealth Act]. It must be remembered that the only decisions that are capable of review under that enactment are ultimate or operative determinations and not expressions of opinion: see *Australian Broadcasting Tribunal v Bond*. However, the fact that a decision to prosecute might be reviewable if made under a Commonwealth enactment does not alter our conclusion that such a decision is not reviewable under the common law."[40] (citations omitted)

[83] Although the decision in *Oates* was reversed in the High Court,[41] the reasoning in the passage selected above was not overruled.

[84] Third, I also recognise that paragraph 1 of Sch 2 to the JRA is relevant to the present question of construction. For the purposes of Pt 4 of the JRA (entitled "Reasons for decision"), s 31 defines a decision to which that part applies as a decision to which the Act applies but not including a decision included in a class of decisions set out in Sch 2.

[85] Paragraph 1 of Sch 2 provides that decisions relating to the "administration of criminal justice" and, in particular, "decisions in relation to the investigation or prosecution of persons for offences", are included in a class of decision for which reasons need not be given under s 31. The assumption of the drafter is that such a decision might otherwise be a decision to which the JRA applies.

[86] That view of the possible operation of the JRA is confirmed by a comparison of the current provisions of the Commonwealth Act. Under s 16 of the JRA, if a provision of the Commonwealth Act expresses an idea in particular words and a provision of the JRA appears to express the idea in different words because of a different legislative drafting practice, the ideas "must not be taken to be different merely because different words are used". Taking that provision into account, the close comparison between the texts of the JRA and the Commonwealth Act, from which it was modelled, is of significance.

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[39] (1998) 84 FCR 348.
[40] (1998) 84 FCR 348, 353-354.
[41] *Attorney-General (Cth) v Oates* (1999) 198 CLR 162.

[87] The Commonwealth Act was amended in 2000 to include s 9A, which provides in part as follows:

> (1) Subject to subsection (2), at any time when:
>
> (a) a prosecution for an offence against a law of the Commonwealth, a state or a territory is before any court; or
>
> (b) an appeal arising out of such a prosecution is before any court;
>
> no court has jurisdiction to hear, continue to hear or determine an application under this Act by the person who is or was the defendant in the prosecution in relation to a related criminal justice process decision…

[88] A "related criminal justice process decision" is defined to mean a decision, other than a decision to prosecute, made in the criminal justice process in relation to the offence.[42]

[89] However, in my view, it is also not of assistance to pursue the precise operation of s 9A in order to decide the operation of the JRA in the present case, because that amendment was not made in Queensland to the JRA. In any event, that amendment was also made before the decision in *Tang*.

[90] In my view, the contextual matters and decisions I have mentioned and the textual differences between s 448 under which the present decision was made in part and s 446 that I considered in *Leadpoint* are not such that the reasoning in *Leadpoint* is not applicable to the respondent's decision in the present case. In my view that decision, as made under both s 446 to no longer deal with the subject matter of the complaint about an unlawful operator and s 448 to dismiss the complaint about the conduct of an Australian legal practitioner was not a decision to which the JRA applied.

Conclusion

[91] The result is that, in my view, the originating application should be summarily dismissed under s 48 of the JRA.

[92] This conclusion makes it unnecessary to decide whether the respondent's decision to dismiss the complaint was "insusceptible" of judicial review, as previously discussed, or to consider the other grounds for dismissal under s 48 advanced by the respondent at the hearing of the application.

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[42] *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 9A(4)(a).