SUPREME COURT OF QUEENSLAND

CITATION:	*Flori v Queensland Police Service* [2016] QCA 239
PARTIES:	**RICKY ANTHONY FLORI** (applicant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	Appeal No 12077 of 2015 QCATA No 579 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – Unreported, 30 October 2015
DELIVERED ON:	20 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	19 May 2016
JUDGES:	Gotterson and Morrison and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against the decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal, given on 30 October 2015.** **2. Dismiss the appeal.** **3. The appellant to pay the respondent's costs of this appeal.**
CATCHWORDS:	POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND – where a complaint was made to police that undue force had been used in an arrest – where the event was captured on CCTV footage and was published by the media – where the police commenced an investigation into who was responsible for the release of the footage and the applicant was a suspect – where a search warrant was obtained and executed at the applicant's house – where the police found information personal to the applicant and this information was recorded in an Executive Briefing Note – where an article was published by the media containing this personal information – where the applicant complained that there had been a breach of the *Information Privacy Act* 2009 (Qld) (the Act) by the journalist and the Queensland Police Service – where the applicant claimed compensation from the Queensland Civil and Administrative

Tribunal (QCAT) – where it was found that the respondent breached the Act but that none of the privacy principles in the Act applied to information obtained by the police service in an investigation of this kind due to the exemption under cl 3 of sch 1 of the Act – where the Appeal Tribunal of QCAT dismissed an appeal by the applicant, agreeing that the privacy principles did not apply because of the exemption – where the applicant appeals to this Court pursuant to s 149(2) of *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) – whether, on the correct construction of cl 3 of sch 1 of the Act, the privacy principles apply to the Executive Briefing Note

Crime and Misconduct Act 2001 (Qld), s 4, s 20, s 23, s 47, s 48, s 53
Information Privacy Act 2009 (Qld), s 3, s 29, s 67, sch 3
Police Service Administration Act 1990 (Qld), s 7.2
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 149(2)
Right to Information Act 2009 (Qld), s 47(3)

Australian National Airlines Commission v Newman (1987) 162 CLR 466; [1987] HCA 9, cited
Colbran v State of Queensland [2007] 2 Qd R 235; [2006] QCA 565, cited
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, cited
Lee v Crime and Corruption Commission & Anor [2016] QCA 145, cited
O'Keefe & Ors v Commissioner of the Queensland Police Service [2016] QCA 205, applied

COUNSEL:	W Sofronoff QC, with A D Scott, for the applicant J M Horton QC, with S McLeod, for the respondent
SOLICITORS:	Queensland Police Union Group for the applicant Public Safety Business Agency Legal Services for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by both Morrison JA and Philip McMurdo JA.

[2] I have had the advantage of reading their respective draft reasons which amply justify an order dismissing the appeal.

[3] The central question posed in the appeal is: did the personal information concerned arise out of an investigation of misconduct under the *Crime and Misconduct Act* 2001 (Qld)? I agree that the construction recently adopted by this Court in *O'Keefe & Ors v Commissioner of the Queensland Police Service*[1] of a relevantly identical expression in Sch 2 of the *Judicial Review Act* 1991 (Qld) provides a strong analogical basis for answering the question in the affirmative.

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1 [2016] QCA 205.

[4] **MORRISON JA:** Mr Flori is a police officer in the Queensland Police Service, aggrieved by the publication of certain personal details contained in an Executive Briefing Note concerning him. The information was about a search warrant which was executed at his home address.

[5] On 16 March 2012 the Executive Briefing Note (**EBN**) was prepared. An EBN is a document used to communicate important information to other officers in the QPS. The EBN was distributed to other officers in the QPS.

[6] Mr Flori complained that the personal information in the EBN was released to a journalist, in breach of Privacy Principles 4 and 11 of the *Information Privacy Act* 2009 (Qld) (**Privacy Act**). The personal information was then the subject of a published article.

[7] His complaint was dealt with initially by the Information Commissioner. The complaint was then referred to the Queensland Civil and Administrative Tribunal. It determined that the EBN was not subject to the privacy principles under the Privacy Act. Mr Flori appealed to the appeal division of QCAT.

[8] QCATA dismissed the appeal, holding that on the proper construction of item 3 of schedule 1 to the Privacy Act, the EBN was a document which contained personal information arising out of a complaint, or an investigation of misconduct, under the *Crime and Misconduct Act* 2001.

[9] Mr Flori seeks leave to appeal to this Court from the decision of QCATA.

[10] The issue raised is whether the EBN is a document which contains personal information arising out of a complaint, or an investigation of misconduct, under the *Crime and Misconduct Act* 2001.

[11] That is a question of the statutory construction of item 3 of schedule 1 of the Privacy Act. Section 16 of that Act provides that the documents mentioned in schedule 1 are **not** subject to the information privacy principles in the Act.

[12] The respondent approached the hearing on the basis that if an error by QCATA could be established, leave was warranted.

Factual findings as to the EBN and the complaint

[13] The QCATA decision sets out a number of factual matters as to how the EBN arose. As this appeal, if leave is granted, would be restricted to a question of law, it is convenient to set those factual matters out:[2]

> "[26] On 15 February 2012 Acting Chief Superintendent Ziebarth made a complaint against Mr Flori to the QPS pursuant to s.7.2 of the PSAA.
>
> [27] The s 7.2 complaint concerned the release of CCTV footage to the media that was published. It was revealed that on 10 February 2012 media outlets had received emails from an anonymous

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[2] [2015] QCATA, at [26]-[32]. Internal footnotes omitted. In these passages abbreviations mean: QPS, Queensland Police Service; PSAA, the *Police Service Administration Act* 1990; CMC, Crime and Misconduct Commission (since renamed the Crime and Corruption Commission); CM Act, the *Crime and Misconduct Act* 2001 (since renamed the *Crime and Corruption Act* 2001).

person offering to release the CCTV footage. The footage captured an interaction between police officers and a male person who had been arrested by police and taken to the basement of a police station. The male person complained about the use of force by the arresting officers.

[28] On 16 February 2012 the complaint was assessed by Chief Superintendent Crawford as a misconduct matter who assigned Senior Sergeant David Winter to investigate it. Chief Superintendent Crawford referred the complaint to the CMC pursuant to ss 37 and 38 of the CM Act.

[29] The CMC assessed the complaint under s 35(1)(a) of the CM Act and on 23 February 2012 referred the complaint back to the Commissioner of Police for investigation.

[30] The CMC Matters Assessed report refers to the 'conduct category' as 'official misconduct' and refers to 'status' as: *'referral to the QPS to deal with the complaint (investigate) – review – interim reports required before dealt with...'*. The report also specifies a 'review before' date for the provision of 'interim reports'.

[31] The CMC report also includes an 'endorsement comment' as follows:

> The allegation could, if proved, amount to official misconduct (breach of trust, criminal offence/dismissible disciplinary breach). After considering the principles which apply under the Act, it has been decided to refer the information to the [QPS]. That decision is considered appropriate also having regard to the nature of the complaint, the information provided in support of the concerns and the capacity of the QPS to deal with the matter, subject to the CMC's monitoring role.

[32] On 16 March 2012 the search warrant was issued under s 151 of the PPR Act. It was issued by a magistrate after hearing a sworn application by Senior Sergeant Winter. The warrant identifies that it was sought in relation to two offences: misconduct in relation to public office under s 92A of the Criminal Code and Fraud under s 408C(1)(a)(i) of the Code."

[14] From those passages there are several factual findings which are potentially important to the resolution of the issues before this Court:

(a) first, the complaint (one of misconduct) was referred to the Commission pursuant to ss 37 and 38 of the CM Act;[3]

(b) secondly, the Commission assessed the complaint and sent it back to the Commissioner of Police;[4]

(c) thirdly, the referral to the Commissioner of Police was to deal with the complaint by way of investigation and review, in the meantime sending interim reports to the Commission;[5]

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3 Reasons below [28].
4 Reasons below [29].
5 Reasons below [30].

(d) fourthly, the Commissioner of Police was to deal with the complaint subject to the Commission's monitoring role.[6]

The statutory provisions

[15] It is important to note that the applicable provisions of the statutes are those in since-amended editions. They are: the *Information Privacy Act* 2009 (Qld), reprint 1I; and the *Crime and Misconduct Act* 2001 (Qld), reprint 5B.

The Information Privacy Act

[16] Section 15 of the Privacy Act provides, relevantly, that for the purposes of that Act "a ***document*** does not include a document to which the privacy principles do not apply". Section 16 provides that "a ***document to which the privacy principles do not apply*** means a document mentioned in schedule 1".

[17] Item 3 of schedule 1 of the Privacy Act provided, at the relevant time:

> "**Disciplinary actions and misconduct**
>
> A document to the extent it contains personal information arising out of—
>
> (a) a complaint under the *Police Service Administration Act 1990*, part 7; or
>
> (b) a complaint, or an investigation of misconduct, under the *Crime and Misconduct Act 2001*."

[18] These are sufficient to show why the issue was framed as it was in QCATA and here. If the personal information of Mr Flori was personal information arising out of a complaint under part 7 of the *Police Service Administration Act* 1990, or a complaint or an investigation of corruption, under the *Crime and Corruption Act* 2001, his appeal cannot succeed.

The Crime and Misconduct Act

[19] Section 14 of the CM Act defined "conduct" to include conduct: (i) that could adversely affect (directly or indirectly) the honest or impartial performance of the functions of a unit of public administration[7] or a person holding an appointment[8]; and (ii) that is not honest or impartial, or a misuse of information or material acquired by a person in connection with that person's functions.

[20] Section 15 of the CM Act defines official misconduct as follows:

> "***Official misconduct*** is conduct that could, if proved, be-
>
> (a) a criminal offence; or
>
> (b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment."

[21] "Police misconduct" is defined by schedule 2 as:

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6 Reasons below [31].

7 Which would include the QPS.

8 Such as a police officer.

"***police misconduct*** means conduct, other than official misconduct, of a police officer that—

(a) is disgraceful, improper or unbecoming a police officer; or

(b) shows unfitness to be or continue as a police officer; or

(c) does not meet the standard of conduct the community reasonably expects of a police officer."

[22] Section 33(b) provides that the Commission has, as one of its misconduct functions: "to ensure a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way, having regard to the principles set out in section 34".

[23] Section 35(1) provides how the Commission may perform its misconduct functions, as follows:

"(1) Without limiting how the commission may perform its misconduct functions, it performs its misconduct functions by doing 1 or more of the following—

(a) expeditiously assessing complaints about, or information or matters (also ***complaints***) involving, misconduct made or notified to it;

(b) referring complaints about misconduct within a unit of public administration to a relevant public official to be dealt with by the public official;

(c) performing its monitoring role for police misconduct as provided for under section 47(1);

(d) performing its monitoring role for official misconduct as provided for under section 48(1);

(e) dealing with complaints about official misconduct, by itself or in cooperation with a unit of public administration;

(f) investigating and otherwise dealing with, on its own initiative, the incidence, or particular cases, of misconduct throughout the State;

(g) assuming responsibility for, and completing, an investigation, by itself or in cooperation with a unit of public administration, if the commission considers that action to be appropriate having regard to the principles set out in section 34;

(h) when conducting or monitoring investigations, gathering evidence for or ensuring evidence is gathered for—

(i) the prosecution of persons for offences; or

(ii) disciplinary proceedings against persons."

[24] The Commissioner of Police is required to notify the Commission of complaints reasonably suspected of involving police misconduct: s 37.

[25] The Commission has the primary responsibility for dealing with complaints about, or information or matter involving, official misconduct: s 45(1).

[26] Where the Commission refers a complaint about, or information or matter involving, official misconduct, s 41(2) confers a responsibility on the Commissioner of Police to deal with the referred complaint. Then s 42(5) provides what must follow if such a complaint is referred by the Commission to the Commissioner of Police:

> "If the commission refers a complaint about official misconduct to the commissioner of police to be dealt with, the commissioner of police must deal with the complaint in the way the commissioner of police considers most appropriate subject to the commission's monitoring role."

[27] Section 46 provides how the Commission deals with a complaint about, or information or matter involving, misconduct. In that section "misconduct" includes official misconduct and police misconduct: s 10. Relevantly, s 46 provides:

> "(1) The commission deals with a complaint about, or information or matter (also a ***complaint***) involving, misconduct by—
>
> (a) expeditiously assessing each complaint about misconduct made or notified to it, or otherwise coming to its attention; and
>
> (b) taking the action the commission considers most appropriate in the circumstances having regard to the principles set out in section 34.
>
> (2) The commission may take the following action—
>
> (a) deal with each complaint about official misconduct that it considers should not be referred to a public official to be dealt with;
>
> (b) refer a complaint about official misconduct to a public official to be dealt with by the public official or in cooperation with the commission, subject to the commission's monitoring role;
>
> (c) without limiting paragraph (b), refer a complaint about official misconduct of a person holding an appointment in a unit of public administration that may involve criminal activity to the commissioner of police to be dealt with;
>
> (d) if it is a complaint about police misconduct notified to the commission by the commissioner of police—allow the commissioner of police to continue to deal with the complaint, subject to the commission's monitoring role;
>
> (e) if it is a complaint about police misconduct made to the commission by someone other than the commissioner of police—give the complaint to the commissioner of police to be dealt with, subject to the commission's monitoring role…"

[28] The Commission's monitoring role is dealt with in s 48:

> "(1) The commission may, having regard to the principles stated in section 34—
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> …

(c) require a public official-

(i) to report to the commission about an investigation into official misconduct in the way and at the times the commission directs; or

(ii) to undertake the further investigation into the official misconduct that the commission directs; or

(d) assume responsibility for and complete an investigation by a public official into official misconduct.

(3) If the commission assumes responsibility for an investigation, the public official must stop his or her investigation or any other action that may impede the investigation if directed to do so by the commission.

(4) In this section—

complaint, about official misconduct, includes information or matter involving official misconduct."

[29] As seen above, various provisions require or permit an entity to "deal with" a matter, for example ss 35(1), 42(5), 45(1) and 46(2). Schedule 2 of the CM Act provides what the phrase "deal with" means:

"***deal with,*** a complaint about misconduct or information or matter involving misconduct, includes—

(a) investigate the complaint, information or matter; and

(b) gather evidence for—

(i) prosecutions for offences; or

(ii) disciplinary proceedings; and

(c) refer the complaint, information or matter to an appropriate authority to start a prosecution or a disciplinary proceeding; and

(d) start a disciplinary proceeding; and

(e) take other action, including managerial action, to address the complaint in an appropriate way."

The Police Service Administration Act

[30] The PSA Act defines *"misconduct"* for the purposes of that Act in a way which is substantially the same as that in the CM Act. It means conduct that:

(a) is disgraceful, improper or unbecoming an officer; or

(b) shows unfitness to be or continue as an officer; or

(c) does not meet the standard of conduct the community reasonably expects of a police officer.

[31] The PSA Act provides for the maintenance and administration of the QPS. Its provisions include:

(a) officers have the powers "of a constable at common law or under any other Act or law"; those powers were for the preservation of the peace – s 3.2(2);

(b) the Commissioner is authorised to do all lawful acts and things as are considered necessary or convenient to discharge the responsibility of the efficient and proper administration, maintenance and functioning of the QPS – s 4.8;

(c) power to subject officers to drug and alcohol testing – Part 5; breach can lead to disciplinary action under Div 4, and interference with the process can be an offence under Div 5;

(d) applicants for employment in the QPS must disclose information about their criminal history and history of any disciplinary action taken against them; the Commissioner can seek that information from other sources – Part 5AA;

(e) if a person engaged by the QPS is charged with an indictable offence the Director of Public Prosecutions is obliged to disclose that to the Commissioner – s 5AA.10;

(f) in certain circumstances the Commissioner does not have to reveal why a prospective employee is decided to be not suitable – s 5AA.12 and s 5AA.13;

(g) there are prohibitions on disclosure of certain information about one person to other persons – s 5AA.14; the schedule to the Act sets out extensive categories of the relevant information, disclosure of which is prohibited;

(h) officers liable to be dealt with for official misconduct[9] or disciplinary action can be stood down or suspended, and have their salary suspended – Part 6; and

(i) Part 10 contains an extensive suite of provisions dealing with the disclosure of information; s 10.2E makes those provisions subject to other Acts that might require or permit disclosure by the Commissioner, or prevent or restrict such disclosure; s 10.1 makes it an offence to disclose information that has come into the possession of an officer (or staff member of the QPS) unless certain conditions are met, including that the disclosure is authorised or permitted under the PSA Act or another Act; other provisions deal with disclosure of criminal histories and disclosures for particular reasons and under particular conditions.

[32] Part 7 is entitled "Internal command and discipline". It makes specific provision for disciplinary action against officers, each of which is subject to a special duty under s 7.2:[10]

> "(2) If any officer or staff member—
>
> (a) knows or reasonably suspects that conduct to which this section refers has occurred; or
>
> (b) is one in respect of whom it can be reasonably concluded that the officer or staff member knew or reasonably suspected that conduct to which this section refers has occurred;
>
> it is the duty—
>
> (c) of the officer or staff member, in the case of conduct that is misconduct, to report the occurrence of the conduct, as

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9 The *Crime and Corruption Act* now refers to corrupt conduct but the meaning is much the same.

10 As it stood at the relevant time.

soon as is practicable, to the commissioner and to the chairperson of the Crime and Misconduct Commission; and

(d) of the officer, in the case of conduct that is misconduct or a breach of discipline, to take all action prescribed by the regulations as action—

(i) to be taken in the circumstances of the case; and

(ii) to be within the authority of an officer of the rank or description to which that officer belongs."

[33] Section 7.4(2) provides that where a prescribed officer considers that an officer's conduct amounts to misconduct or a breach of discipline, the officer is liable to disciplinary action. The "prescribed officer" for the purposes of s 7.4(2) is that person "authorised by the regulations to take disciplinary action in the circumstances of any case in question": s 7.4(1). The term "disciplinary action" is defined in s 1.4 to mean "action taken for misconduct, official misconduct or a breach of discipline".

[34] Section 7.4(3) provides what type of sanction can be imposed:

"(3) Without limiting the range of disciplines that may be imposed by the prescribed officer by way of disciplinary action, such disciplines may consist of—

(a) dismissal;

(b) demotion in rank;

(c) reprimand;

(d) reduction in an officer's level of salary;

(e) forfeiture or deferment of a salary increment or increase;

(f) deduction from an officer's salary payment of a sum equivalent to a fine of 2 penalty units."

[35] Then s 7.4(2A) provides that where an allegation of misconduct has been decided, or where misconduct is proved against an officer, the Commissioner must give a QCAT information notice[11] to the officer and the Commission.

[36] The relevant regulation is the *Police Service (Discipline) Regulations* 1990 (Qld).[12] It contains provisions governing the taking of disciplinary action against an officer under Part 7 of the PSA Act.

[37] Regulation 9 provides the grounds for disciplinary action:

"(1) For the purposes of section 7.4 or part 7A of the Act, the following are grounds for disciplinary action—

(a) unfitness, incompetence or inefficiency in the discharge of the duties of an officers' position;

(b) negligence, carelessness or indolence in the discharge of the duties of an officers' position;

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11 Defined in s 7.4 as a notice complying with the *Queensland Civil and Administrative Tribunal Act*, section 157(2).

12 Referred to as the Discipline Regulation.

(c) a contravention of, or failure to comply with, a provision of a code of conduct, or any direction, instruction or order given by, or caused to be issued by, the commissioner;

(d) a contravention of, or failure to comply with, a direction, instruction or order given by any superior officer or any other person who has authority over the officer concerned;

(e) absence from duty except—

(i) upon leave duly granted; or

(ii) with reasonable cause;

(f) misconduct;

(g) conviction in Queensland of an indictable offence, or outside Queensland of an offence which, if it had have been committed in Queensland would have been an indictable offence."

[38] The disciplines that may be imposed are set out in Reg 10, as follows:

> "Subject to regulations 11 and 12 (and without limiting the range of disciplines that may be imposed by the commissioner or a deputy commissioner pursuant to section 7.4(3) of the Act or regulation 5) the disciplinary sanctions that may be imposed under these regulations are—
>
> (a) cautioning or reprimand;
>
> (b) a deduction from the officer's salary or wages of an amount equivalent to a fine of 2 penalty units;
>
> (c) a reduction in the officer's level of salary or wages (not being a reduction to a level outside that applicable to an officer of that rank);
>
> (d) forfeiture or deferment of a salary increment or increase;
>
> (e) a reduction in the officer's rank or classification;
>
> (f) dismissal from the police service."

[39] It can be observed that Part 7 places particular attention on "misconduct". If misconduct is reasonably suspected or known then it must be reported to the Commissioner of Police and the Chairman of the Commission: s 7.2(2)(c). That reporting obligation does not apply if a breach of discipline alone is involved. If an allegation of misconduct is decided, or proven, the Commission must be given the QCAT s 157(2) notice as well as it being given to the officer. That requirement does not apply to conduct which is just a breach of discipline.

[40] Further, the liability of an officer to disciplinary action is in respect of conduct that could well amount to "official misconduct" under the CM Act. It will be recalled that the definition of "official misconduct"[13] under the PSA Act was that applicable under the CM Act, and was conduct amounting to a criminal offence, or a disciplinary

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13 Subsequently renamed "corrupt conduct".

breach providing grounds for termination. Regulation 9 of the Discipline Regulation includes misconduct and conviction of an indictable offence as grounds for disciplinary action, and, as s 7.4(3) of the PSA Act and Reg 10 of the Discipline Regulation show, the disciplinary sanctions include dismissal.

Discussion

[41] In the recent decision in *O'Keefe v Commissioner of the Queensland Police Service*[14] this Court had occasion to deal with issues that arise here. *O'Keefe* involved a decision to stand or suspend a police officer under the PSA Act. The officers in question sought relief under the *Judicial Review Act*. That Act created an exception from review, for decisions included in a class in Schedule 2 of that Act. The relevant definition was identified in *O'Keefe*:[15]

> "[16] The definitional exception that is presently relevant is a decision which is "included in a class of decisions set out in Schedule 2" to the JR Act. Schedule 2 lists some 16 classes of decisions. Class 3 is headed "**Corruption etc**." and comprises the following:
>
> "(1) Decisions in relation to the investigation of persons for corruption under the *Crime and Corruption Act 2001*.
>
> (2) Decisions in relation to the initiation of matters in the original jurisdiction of QCAT under the *Crime and Corruption Act 2001*."

[42] The question was whether that decision was a decision in relation to the investigation of persons for corruption under the *Crime and Corruption Act*. Central to that question was whether the decision and investigation was one under the *Crime and Corruption Act*.[16] The police officers contended that the decisions were made under the PSA Act and not the *Crime and Corruption Act* and, further, that the investigation in the context of which each decision was made, was carried out under the PSA Act and not the *Crime and Corruption Act.*

[43] The Court rejected those contentions:[17]

> "[41] In my view, the distinction which the appellants seek to draw in this submission is not a valid one. It takes no account of the statutory responsibilities cast on the Commissioner by the CC Act to deal with complaints about, or information or matter the Commissioner reasonably suspects, involves police misconduct and to deal with complaints about, or information or matter involving, corrupt conduct referred by the CCC.
>
> [42] It will be recalled that the expression "deal with" is defined widely in Schedule 2 of the CC Act. The expression includes investigating the complaint, information or matter, and taking other action, including managerial action, to address the complaint in any appropriate way. I consider that an investigation of a complaint, information or matter involving police misconduct or a referred complaint, information or matter involving corrupt conduct

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14 [2016] QCA 205. (***O'Keefe***)

15 *O'Keefe* at [16].

16 *O'Keefe* at [31].

17 *O'Keefe* at [41]-[43], per Gotterson JA, Morrison and Philip McMurdo JJA concurring. Emphasis in the original; internal footnote omitted.

> undertaken by the Commissioner in order to discharge the applicable statutory responsibility, would constitute an investigation of the person or persons concerned for corruption under the CC Act. It is **under** the CC Act because that Act expressly requires the Commissioner to deal with the complaint by investigating it.
>
> [43] It may be that, in order to discharge these responsibilities in any given case, the Commissioner exercises authorisations or powers conferred by the PSA Act, for example, the comprehensive authorisation conferred by s 4.8(3) to investigate the complaint, information or matter. However, the word "under" does not connote exclusivity of source of a statutory responsibility, authorisation or power. Therefore, the circumstance that the immediate source of the authority or power relied on to conduct the investigation resides in the PSA Act, does not have the consequence that the investigation is not, or is no longer, under the CC Act. It is, and continues to be, an investigation undertaken in the course of dealing with a complaint, information or matter, in discharge of the Commissioner's statutory responsibility under the CC Act."

[44] *O'Keefe* relied upon the decision of the High Court in *Griffith University v Tang*:[18]

> "[89] The determination of whether a decision is "made … under an enactment" involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be "made … under an enactment" if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice."

[45] There are no differences between the CM Act and the *Crime and Corruption Act* that would provide a reason to depart from *O'Keefe* or *Tang*.

[46] The factual findings in paragraph [14] above make it plain that the complaint was sent to the Commission and referred back to the Commissioner of Police, to be dealt with by the Commissioner of Police. By doing so the Commission exercised the powers under s 35(1)(b)-(d), or s 46(2)(b) of the CM Act. Upon that referral the Commissioner of Police had responsibility to deal with the complaint under s 42(5), but under the monitoring role of the Commission: s 46(2)(b) and s 48(1)(c). As *O'Keefe* held, that means the complaint was being investigated by the Commissioner of Police under the CM Act, because the CM Act expressly requires the Commissioner of Police to deal with the complaint by investigating it.

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[18] See *Griffith University v Tang* [2005] HCA 7; (2005) 221 CLR 99 per Gummow, Callinan and Heydon JJ at [89]. (***Tang***)

[47] On that basis the proposed appeal must fail.

Alternative contention

[48] Senior counsel for Mr Flori developed an alternative submission designed to support the construction for which Mr Flori contended. The submission compared the statutory regimes under the Privacy Act and the CM Act, noting the "elaborate … statutory regime [under the CM Act] that governs the obtaining of information, the securing of information, access to information, and disclosure of information". Ultimately, the submission questioned why the legislature would exclude documents from the privacy principles under the Privacy Act when the police were conducting an investigation of misconduct under the CM Act, but not do so when the QPS investigated other offences. The thrust of the submission was that was such an unusual dichotomy that the only reasonable conclusion was that when item 3 of schedule 1 used the phrase "under the *Crime and Misconduct Act 2001*", it meant an investigation truly conducted under the CM Act, and not one referred to the Commissioner of Police, to be dealt with under the powers granted by the PSA Act or the Police Powers and Responsibilities Act.

Privacy Act

[49] The steps in the submission commenced by examining the nature of the information protected under the Privacy Act.

[50] The objects of the Privacy Act, as set out in s 3, are as follows:

> "(1) The primary object of this Act is to provide for—
>
> (a) the fair collection and handling in the public sector environment of personal information; and
>
> (b) a right of access to, and amendment of, personal information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended.
>
> (2) The Act must be applied and interpreted to further the primary object."

[51] Simply expressed, the relevant part of the primary object is to provide a right of access to personal information unless that is contrary to the public interest.

[52] The documents excluded from the scope of the privacy principles under the Privacy Act are, relevantly, those in schedule 1, Item 3, which provides as follows:

> "**Disciplinary actions and misconduct**
>
> A document to the extent it contains personal information arising out of—
>
> (a) a complaint under the *Police Service Administration Act 1990*, part 7; or
>
> (b) a complaint, or an investigation of misconduct, under the *Crime and Misconduct Act 2001*."

[53] Personal information is relevantly defined as "information or an opinion … whether true or not, and whether recorded in a material form or not, about an individual whose

identity is apparent, or can reasonably be ascertained, from the information or opinion": s 12.

[54] The information privacy principles (**IPP**) applicable to personal information are set out in schedule 3. They include:

(a) collection must not be unlawful or unfair: IPP 1;

(b) in certain circumstances the person asked for information must be told the purpose, that the collection of it is authorised by law (if it is), and (if known) who it will be disclosed to: IPP 2;

(c) the information must be relevant to the purpose for which it is collected, complete and up to date: IPP 3;

(d) the collection agency must take steps to protect the information against loss, disclosure or misuse: IPP 4;

(e) persons must be able to find out if an agency has their personal information, the type of information they have, the purpose for which it is used, and how to get access to it: IPP 5;

(f) subject to some exceptions, a person must be given access to their information: IPP 6;

(g) information must be amended to ensure that it is accurate and relevant to the purpose for which it was collected: IPP 7;

(h) before the information can be used the agency must check that it is accurate, complete and up to date: IPP 8;

(i) if it is proposed to use the information, only that part of the information which is directly relevant to the purpose is to be used: IPP 9;

(j) limits are placed on the use of the information: IPP 10; and

(k) limits are placed on the disclosure of information: IPP 11.

[55] Certain entities are exempted from having the privacy principles applied, and others are exempted for certain functions: s 19. The former includes the Legislative Assembly and Commissions of Inquiry, and the latter includes the courts in respect of judicial functions: schedule 2.

[56] However, special provisions were enacted for law enforcement agencies, and (relevantly) the QPS, in s 29:

> "(1) A law enforcement agency is not subject to IPP 2, 3, 9, 10 or 11, but only if the law enforcement agency is satisfied on reasonable grounds that noncompliance with the IPP is necessary for—
>
> (a) if the enforcement agency is the Queensland Police Service—the performance of its activities related to the enforcement of laws; or
>
> (b) if the enforcement agency is the Crime and Misconduct Commission—the performance of its activities related to the enforcement of laws and its intelligence functions; or
>
> …
>
> (2) In this section—
>
> ***intelligence functions*** means the functions mentioned in the *Crime and Misconduct Act 2001*, section 53."

[57] The definition of "*law enforcement agency*" includes the "Queensland Police Service under the *Police Service Administration Act 1990*", and the "Crime and Misconduct Commission under the *Crime and Misconduct Act 2001*": schedule 5.

[58] Therefore the QPS, if it is performing its activities relating to the enforcement of laws and for that purpose considers that IPP 2, 3, 9 10 or 11 should not be observed, is not subject to the relevant IPP. The same applies to the Commission, if it is performing its activities related to the enforcement of laws and its intelligence functions.

[59] However, whilst leaving the QPS and the Commission bound by the other IPPs, the Privacy Act provides for both the QPS and the Commission to deny access to documents. Section 64(1) provides:

> "(1) It is the Parliament's intention that if an access application is made to an agency … for a document, the agency … should decide to give access to the document unless giving access would, on balance, be contrary to the public interest."

[60] In summary, the QPS is bound to observe IPP 1 and 4-8, and thus:

(a) collection of personal information must not be unlawful or unfair: IPP 1;

(b) steps must be taken to protect the information against loss, disclosure or misuse: IPP 4;

(c) persons must be able to find out if the QPS has their personal information, the type of information they have, the purpose for which it is used, and how to get access to it: IPP 5;

(d) the information must be amended to ensure that it is accurate and relevant to the purpose for which it was collected: IPP 7; and

(e) before the information can be used the QPS must check that it is accurate, complete and up to date: IPP 8.

[61] However, the QPS does not have to grant access to its information under the IPPs if:

(a) it decides it is against the public interest to do so: s 64(1);

(b) the QPS is authorised or required under an access law to refuse to give the access to the individual: IPP 6(2)(a); or

(c) the document is expressly excluded from the operation of an access law: IPP 6(2)(b).

[62] Section 7 provides that "Chapter 3 overrides the provisions of other Acts prohibiting the disclosure of personal information (however described)". Chapter 3 begins with s 40, which provides: "Subject to this Act, an individual has a right to be given access under this Act to… (a) documents of an agency to the extent they contain the individual's personal information...". That access can only be achieved by making an application to the relevant agency or the Minister: s 43. It can only relate to documents in existence at the time of the application: s 47. If the disclosure would be of concern to a third party such as an agency, steps must be taken to obtain the views of the relevant third party about, inter alia, whether the information is exempt information or contrary to public interest information: s 56.

The CM Act

[63] The review of the CM Act commenced with s 36, the provision as to complaining about misconduct, pointing out that a complaint may well contain false and inaccurate information. Section 36 provides:

"**Complaining about misconduct**

(1) A person may complain about, or give information or matter involving, misconduct to the commission.

(2) Subsection (1) does not limit to whom a person can complain about misconduct."

[64] A complaint is then dealt with under s 46: see paragraph [27] above. Relevantly it provides under s 46(2)(d) that a complaint about police misconduct notified to the Commission by the Commissioner of Police can be dealt with by allowing the Commissioner of Police to continue to deal with the complaint, subject to the Commission's monitoring role.

[65] If the Commission deals with the complaint itself by way of a misconduct investigation there are a variety of ways in which it can compulsorily obtain information or documents. Of course the production may be of false and inaccurate information.

[66] The Commission can:

(a) enter and search premises, inspect documents, and seize and remove documents: s 73;

(b) obtain information by issuing a notice under s 75;

(c) if a hearing in a misconduct investigation takes place, require production of a document: s 75B;

(d) apply to the Supreme Court for permission to issue and attendance notice, requiring a person to attend at a hearing and produce information or a document: ss 82 and 85;

(e) apply for a search warrant: s 86;

(f) apply to the Supreme Court for a surveillance warrant: s 121; and

(g) compel answers at a Commission hearing: s 192.

[67] The submission then referred to the protections against disclosure offered by the CM Act. Of those referred to, the ones relevant to a misconduct investigation are:

(a) information obtained under a surveillance warrant must not be disclosed except to specific persons: s 130;

(b) answers given, or documents produced, at a Commission hearing, or information that might enable the existence or identity of a witness at a Commission hearing to be ascertained, must not be disclosed: s 202; and

(c) staff and officers of the Commission have an obligation not to disclose certain matters, except in certain circumstances: s 213.

[68] The submission referred to the way in which the CM Act deals with the public interest. Section 332 provides for judicial review of a Commission investigation into official misconduct, if that investigation is being conducted unfairly or the complaint leading to a Commission investigation does not warrant an investigation. That provision only applies to a Commission investigation.

[69] There is provision for a public interest monitor to be involved where a surveillance warrant or covert search warrant is sought: ss 324 and 326. However, the public interest monitor's functions are not to represent the public interest in a general sense

but to: (i) monitor the Commission's compliance with the CM Act in relation to surveillance warrants and covert search warrants; (ii) appear at court hearings to test the validity of an application for such warrants; (iii) gather statistical information about the use and effectiveness of such warrants; and (iv) if appropriate, give reports to the Commission and the Parliamentary Committee about the Commission's non-compliance with the CM Act.

[70] Finally, s 342 grants rights of access to a person authorised in writing by the Commission chairman, and s 343 excuses disclosure where the disclosure of information is to the Commission for the performance of the Commission's functions.

Discussion

[71] The central point of the contention was that when one is considering the function of the Commission in investigating misconduct, the CM Act: (i) has its own peculiar regime conferring special powers upon the Commission to get information and the way it's done, (ii) contains restrictions upon the use of information and obligations to keep it securely; and (iii) has its own regime to give effect to the public interest in an institution like this conducting itself fairly and properly and legally.[19] It was said to be "a complete regime of getting information, keeping it, protecting it, not disclosing it, disclosing it, granting access to it, and informing the use of all of those powers by reference to the public interest".[20]

[72] The submission was that s 7 of the Privacy Act had the effect that it overrode any provision of the CM Act that would otherwise prohibit the disclosure of personal information, but that result would be nonsensical:

> "So what we see from section 7 is that if the [Privacy Act] has effect upon an agency, it will override the provision of any statute governing that agency which would otherwise prohibit the disclosure of personal information and it overrides it by imposing a system of applications for access. Now, one can see, therefore, why, having regard to the content of the Crime and Misconduct Act and the regime for the performance of investigations and the powers and all the rest of it, it would be entirely inapposite for section 7 of the Privacy Act to apply – to override all of those provisions. It just wouldn't make any sense."

[73] Section 7 provides in fairly plain words that the Privacy Act "overrides the provisions of other Acts **prohibiting** the disclosure of personal information".[21] It only affects provisions which prohibit disclosure, not those which regulate disclosure in other ways, such as permitting the holder of information to deny access if to do so would be against the public interest.

[74] It is difficult to understand how s 7 has any application here. The provisions under which the QPS or the Commission can form the view that denial of access is reasonably necessary (s 29 and s 64(1) of the Privacy Act) are not provisions "**prohibiting** the disclosure of personal information". They merely give the QPS and the Commission the power to deny access in certain circumstances.

[75] The submission referred to privacy principles, such as that requiring a person to be told the purpose for requiring the information, and continued:[22]

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19 Appeal transcript 1-10 line 45 to 1-11 line 3.
20 Appeal transcript 1-11 lines 34-36.
21 Emphasis added.
22 Appeal transcript 1-10 lines 5-11.

> "… these provisions, which are all provisions empowering the Commission to get information under compulsion, really entirely override that principle and render it completely inapplicable.
>
> There cannot be any overlaps of the Privacy Information Act principles and this regime of compulsory acquisition of information that might be false or inaccurate in parts."

[76] In my respectful view, that analysis proceeds on a false premise, namely that the privacy principles might have otherwise applied but were overridden by the CM Act provisions. It is the Privacy Act itself, item 3 of schedule 1, which specifically exempts documents "arising out of … a complaint, or an investigation of misconduct, under the [CM Act]". As Mr Flori's contentions accepted: "Undoubtedly, an investigation of misconduct by the Commission itself giving rise to documents containing personal information does not give rise to a right of access under [the Privacy Act]."

[77] The next aspect of the contention was that "the powers, the protections, the duties, and the system of giving effect to the public interest in making decisions about the exercise of those powers and the performance of those duties do not apply at all to the police, who are not given any of those powers and have none of those duties imposed upon them by that [the CM Act]".[23] However, the QPS were free to act secretly in so far as its law enforcement functions were concerned, subject to two things. The first was that any request for access to information would be dealt with under the Privacy Act, which would prevent disclosure if it was contrary to the public interest. The second was that s 29 of the Privacy Act limited the application of the privacy principles, effectively at the discretion of the Commissioner of Police, if the QPS "is satisfied on reasonable grounds that noncompliance with the IPP is necessary for … the performance of its activities related to the enforcement of laws".

[78] The question was posed in this way, referring to the exemption granted in schedule 1 item 3 of the Privacy Act:[24]

> "Is there any reason why subparagraph (b) of item 3 of schedule 1 should be read so that it applied to police investigating misconduct when … the exclusion doesn't apply to police investigating offences. And the investigation of the offence involves the same invocation of powers in each case under the Police Powers and Responsibilities Act. And the fact that the investigation of an offence had its genesis in a complaint and a referral is said to make a difference."

[79] Senior counsel for Mr Flori posed the answer to that question:[25]

> "In our submission, one cannot find in either the Privacy Act or the Crime and Misconduct Act any rationale for drawing a distinction between the performance of the police in investigating an offence in accordance with its general function and … an identical investigation investigating an offence in the performance of its function in investigating misconduct when it's referred back to it."

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23 Appeal transcript 1-12 lines 30-34.
24 Appeal transcript 1-13 lines 26-32.
25 Appeal transcript 1-13 lines 32-36.

[80] This exchange was the prelude for the submission as to the proper construction of schedule 1 item 3, that is, an investigation of misconduct under the CM Act means what it says, namely the investigation is undertaken pursuant to the regime in the CM Act by the invocation of powers under that Act, subject to the strictures in that Act, and the limitations in that Act.

[81] The submissions drew attention to the difference said to exist between the two parts of schedule 3 item 1, namely that (a) excluded a complaint under the PSA Act whereas (b) included both a complaint and an investigation of corruption under the CM Act.

[82] However the exclusion is in respect of personal information "arising out of" those matters.

[83] In schedule 2 of the CM Act the phrase "misconduct investigation" is defined as an investigation conducted by the Commission in the performance of its misconduct function.

[84] The CM Act provides what the misconduct function is: ensuring a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way.

[85] Section 35 provides how the Commission performs its misconduct function. Relevantly, it is by:

(a) assessing complaints;

(b) referring a complaint to a relevant public official, to deal with it;

(c) monitoring under s 47(1);

(d) monitoring under s 48(1); and

(e) dealing with the complaint, by itself or in cooperation with a unit of public administration (such as the QPS).

[86] Where the Commission deals with the complaint itself, that is done under s 35(1)(e). That is different from referring the complaint to be dealt with by a public official under s 35(1)(b). The definition of a "public official" includes the Commissioner of Police, but excludes anyone at the Commission, as the Commission is not a unit of public administration for the purpose of the CM Act: s 20(2)(a).

[87] Where the Commission refers a complaint to the Commissioner of Police, it is to be dealt with "in the way the Commissioner of Police considers most appropriate, subject to the commission's monitoring role": s 42(5).

[88] That the Commissioner of Police is the person to decide the most appropriate way of dealing with the complaint, emphasises the distinction between an investigation conducted by the Commission itself, and one conducted by the Commissioner of Police on a referral under s 35(1)(b). That distinction is not weakened by the fact that the Commission may decide to exercise its monitoring role under ss 47(1) or 48(1) of the CM Act, as s 35(1) provides for the Commission to exercise its misconduct function "by doing 1 or more of" the ways set out.

[89] The distinction is reinforced by the fact that one way of the Commission's performing its misconduct function is by "assuming responsibility for, and completing, an investigation" by itself: s 35(1)(g). In that event the Commission has the power to direct that the Commissioner of Police stop his/her investigation, and if so directed, the Commissioner must stop: s 47(3) and s 48(3).

[90] The CM Act contains many provisions which use the phrase "misconduct investigation", and therefore deal with matters pertaining only to an investigation conducted by the Commission itself:

(a) s 73 - the power to enter and search official premises, and seize documents;

(b) s 75 - the power to give a notice to discover information;

(c) s 75B - the power to require immediate production at a hearing;

(d) s 111 - the general power to seize evidence;

(e) s 157(1) in Part 8 - additional powers granted with the court's approval;

(f) s 187 - refusal to produce a document or thing;

(g) s 191 - refusal to answer questions at a hearing; and

(h) s 196 (Chap 4, Pt 2, Subdivision 2) - claims to privilege.

[91] The CM Act also contains other provisions which use a cognate phrase, such as "misconduct being investigated by the commission":

(a) s 86(1)(a) - applications for search warrants;

(b) s 121 - applications for surveillance warrants;

(c) s 216 - notice that a complaint will not be investigated, or further investigated, by the Commission; and

(d) s 332 - judicial review of the Commission's investigations into official misconduct.

[92] There are a number of provisions that are derivatives of the ones mentioned above, and therefore apply only to an investigation conducted by the Commission.

[93] These references show more than just the clear distinction between an investigation conducted by the Commission and one conducted by the Commissioner of Police on a referral under s 35(1)(e). They demonstrate that where the Legislature intended to refer to an investigation conducted by the Commission itself, there was a well-used and clear method of doing so. Further, when the Privacy Act was enacted, the distinction between the two types of misconduct investigations, and they way of delineating them, was well known. Of course it is true that they are different statutes but the schedule to the Privacy Act expressly refers to the CM Act in the relevant part of item 3, and the context is an investigation into misconduct, so the Legislature was plainly aware of the two statutes, and what they provided in that respect.

[94] Schedule 1, item 3 of the Privacy Act does not use words which match those referred to above, either with the phrase "misconduct investigation" as understood in the CM Act, or any cognate phrase. It would have been easy to say so, if it had been intended to refer only to an investigation conducted by the Commission. The words used do not compel the conclusion that it was intended to refer only to an investigation conducted by the Commission itself, and not also to one conducted by the Commissioner of Police under a referral pursuant to s 35(1)(e).

[95] Further, the powers of the Commission, referred to in paragraphs [66]-[70] above, are all applicable to an investigation by the Commission itself. They are not available when the Commissioner of Police is dealing with a complaint left with the Commissioner under s 46(2)(d), referred to the Commissioner under s 35(1)(b), or given to the Commissioner under s 46(2)(e).

[96] In the face of these powers the Privacy Act nonetheless exempts information arising out of a Commission's investigation of misconduct.

[97] Merely because the Commission has exercised its power to have the Commissioner of Police conduct the investigation, rather than itself, why would one conclude that:

(a) such an investigation was less sensitive than if conducted by the Commission;

(b) the need to protect the integrity of the investigation was any less than that of one conducted by the Commission; or

(c) the public interest in having personal information exempted under schedule 1 item 3 was any different from that under an investigation conducted by the Commission.

[98] Thus, even if (contrary to the conclusion in *O'Keefe*) it could be argued that an investigation conducted by the Commissioner of Police upon a referral under any of s 35(1)(b), s 46(2)(d) or s 46(2)(e), was not one "under the [CM Act]", there is no rational reason that I can discern as to why the Legislature would wish to take a more relaxed approach to the disclosure of information arising out of such an investigation.

[99] Nor is there, in my view, any rational reason why an investigation by the Commissioner of Police under the PSA Act should be treated any differently.

[100] There are reasons why the Legislature might take a different view where the investigation was other than under Part 7 of the PSA Act, for example into offences generally. In such cases the person the subject of the investigation is not normally a member of the QPS. There would be strong public interest reasons for denying such a person access to information arising out of the investigation, under ss 29 or 64(1) of the Privacy Act. Others caught up in the investigation (such as witnesses or those involved in the administration of the investigation) would fall into a different category. A denial of access to such persons on those public interest grounds is still possible, for example where disclosure might jeopardise the ongoing investigation, but not as clearly as in the case of the target.

[101] An investigation into police officers under part 7 of the PSA Act occurs in the context of the position of police officers within the QPS, and involves considerations such as those referred to in the High Court decision in *Police Service Board v Morris*.[26] There, albeit in the context of whether a police officer could maintain a claim to refuse to answer on the basis of privilege against incrimination, this was said of the police force:

> "It is essential to bear in mind that the Act and Regulations here are dealing with a disciplined force, the members of which voluntarily undertake the curtailment of freedoms which they would otherwise enjoy. It is in that context that it may be necessary to draw the implication that the privilege is excluded by a provision designed to further the effectiveness of an organization based upon obedience to command. To admit of exceptions, such as the privilege against self-incrimination, without the possibility of having regard to the circumstances in which they might have to be applied, may be alien to the nature and purposes of the organization which the legislation seeks to regulate."[27]

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26 (1985) 156 CLR 397. (***Morris***)

27 *Morris* at 409 per Wilson and Dawson JJ.

and

> "The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means - the primary and usual means - of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency. It cannot be thought that the Police Regulations intend a police officer to be able to cloak with his silence activities that are prejudicial to the achievement of these purposes. To permit, under a claim of privilege, a subordinate officer to refuse to give an account of his activities whilst on duty when an account is required by his superior officer would subvert the discipline of the police force."[28]

[102] A service such as the QPS involves a sacrifice of certain rights on the part of individual officers, who thereby become part of a disciplined armed force, able to commit acts that would otherwise be categorised as offences, and committed to the enforcement of the criminal law for the benefit of the community. Those special factors, acknowledged in *Morris*, provide a reason why the Legislature decided that the access that others might enjoy, to personal information arising in the course of an investigation into misconduct, is curtailed when it involves officers of the QPS.

[103] That conclusion is reinforced when one considers, as the consideration of the PSA Act and the Discipline Regulation in paragraphs [32]-[40] above reveals, that the investigation could well comprehend disciplinary action involving official misconduct leading to possible dismissal from the QPS.

[104] In my respectful view, the matters referred to above provide a sound basis to reject the alternative contention. Once the meaning of the words in item 3(b) is understood, it is no answer to ask why the Legislature provided a more limited exemption in item 3(a). Further, there are reasons why the Legislature did so.

Conclusion

[105] For the reasons given above I would dismiss the appeal.

[106] I would propose the following orders:

1. Grant leave to appeal against the decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal, given on 30 October 2015.
2. Dismiss the appeal.
3. The appellant to pay the respondent's costs of this appeal.

[107] **PHILIP McMURDO JA:** In early 2012 there was a complaint to police that undue force had been used in the arrest of a man at the Surfers Paradise police station. The event was captured on CCTV footage which found its way to the media and was published. The police commenced an investigation into who was responsible for the

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28 *Morris* at 412 per Brennan J.

release of the footage and the applicant, a serving police officer, was suspected. A search warrant was obtained and executed at the applicant's house on 16 March 2012. As a result, the police service came into possession of information which was personal to the applicant. That information was recorded by police in a document called an Executive Briefing Note, which was distributed to certain other officers. A few days later an article was published in the Gold Coast Bulletin which disclosed the personal information.

[108] The applicant complained that his information had been disclosed to the journalist and that the Queensland Police Service had thereby breached the *Information Privacy Act* 2009 (Qld) (the IPA), in that it had breached certain information privacy principles prescribed under that Act. He claimed compensation for that breach by a proceeding which he brought in the Queensland Civil and Administrative Tribunal. In a written decision, a Senior Member of QCAT found that a member or members of the police service did disclose the information to a journalist and that this resulted from a failure by the police service to take reasonable steps to safeguard the information. Consequently, it was found, there would have been a breach of privacy principle 4 of the IPA, except that, as the Senior Member reasoned, none of the privacy principles applied to information obtained by the police service in an investigation of this kind.

[109] The IPA exempts certain entities and documents from the application of the privacy principles. In 2013, the relevant exemption was expressed within cl 3 of sch 1 the IPA as follows:

> "3 Disciplinary actions and misconduct
>
> A document to the extent it contains personal information arising out of—
>
> (a) a complaint under the *Police Service Administration Act 1990*, part 7; or
>
> (b) a complaint, or an investigation of misconduct, under the *Crime and Misconduct Act 2001*."

[110] The Senior Member concluded that the relevant information was contained within a document, namely the briefing note, which arose out of an investigation of misconduct under what was then called the *Crime and Misconduct Act* 2001 (Qld). That Act has since been amended and renamed the *Crime and Corruption Act*. Here what must be considered is the Act as it was in 2012, which I will call the CMA.

[111] The Appeal Tribunal of QCAT dismissed an appeal by the applicant, agreeing with the Senior Member that the privacy principles did not apply because of that exemption. In this court, the applicant seeks leave to appeal that decision, pursuant to s 149(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).[29] The proposed appeal is on a question of law, namely the proper construction of cl 3 of sch 1 of the IPA. The merit of the appeal has been fully argued. For the reasons that follow, leave should be granted but the appeal should be dismissed.

The IPA

[112] The objects of the IPA, as set out in s 3, are to provide for:

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[29] The Appeal Tribunal having been constituted by two members, including a judicial member (Horneman-Wren SC DCJ).

> "(a) the fair collection and handling in the public sector environment of personal information; and
>
> (b) a right of access to, and amendment of, personal information in the government's possession or under the government's control …".

The first of those objects is intended to be achieved by the provisions of chapter 2 of the IPA, by which certain privacy principles (IPPs) as set out in schs 3 and 4, are to be complied with by government "agencies".[30] It is common ground that the Queensland Police Service and what was at the relevant time called the Crime and Misconduct Commission[31] (CMC) were agencies in this sense. By s 27 an agency must comply with the IPPs, subject to certain qualifications, such as those applying to "law enforcement agencies".[32]

[113] The second object of the IPA is the subject of its chapter 3. Subject to the many qualifications which are set out in that chapter, an individual has a right to be given access to documents of an agency or a minister to the extent that they contain personal information of the individual[33] and to have such information amended if it is inaccurate, incomplete, out of date or misleading.[34] The present case does not call for a detailed consideration of the scheme within chapter 3. But some matters may be noted about its applicability or otherwise to information held by the police service or the CMC. By s 67 of the IPA, an agency may refuse access to a document under chapter 3 in the same way and to the same extent that the agency could refuse access to the document under the *Right to Information Act* 2009 (Qld), were the document to be the subject of an access application under that Act. By s 47(3) of that Act, access to a document may be refused to the extent that the document comprises "exempt information", which includes information which "could prejudice the investigation of a contravention or possible contravention of the law", which in turn includes (what in 2012 was called) "misconduct or possible misconduct under the *Crime and Misconduct Act 2001*".[35]

[114] Returning to chapter 2, there were two relevant qualifications upon the operation of the IPPs to the police service and the CMC. The first resulted from s 29 of the IPA, which exempted those agencies from the operation of some of the IPPs in the performance of some of their activities. Section 29 relevantly provided as follows:

> "29 Special provision for law enforcement agencies
>
> (1) A law enforcement agency is not subject to IPP 2, 3, 9, 10 or 11, but only if the law enforcement agency is satisfied on reasonable grounds that noncompliance with the IPP is necessary for—
>
> (a) if the enforcement agency is the Queensland Police Service—the performance of its activities related to the enforcement of laws; or
>
> (b) if the enforcement agency is the Crime and Misconduct Commission—the performance of its

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30 Schedule 4 sets out the so called National Privacy Principles and need not be considered here.
31 Now called the Crime and Corruption Commission.
32 IPA s 29.
33 IPA s 40.
34 IPA s 41.
35 s 48 and sch 3, cl 10 of the *Right to Information Act*.

> activities related to the enforcement of laws and its intelligence functions; or
>
> …
>
> (2) In this section—
>
> *intelligence functions* means the functions mentioned in the *Crime and Misconduct Act 2001*, section 53."

As I will discuss, the CMC had statutory functions, distinct from its concern with misconduct, which "related to the enforcement of laws", as well as its intelligence functions under s 53 of the CMA.

[115] The second relevant qualification to the operation of the IPPs was that by sch 1 of the IPA, they were not to apply to certain kinds of documents. I have set out above cl 3 of sch 1. It was common ground in this court that the only relevant exemption might have been that for a document to the extent that it contained personal information "arising out of an investigation of misconduct under the CMA".

[116] The police service contended, as it had successfully in QCAT, that its investigation of whether the applicant had wrongly disclosed the CCTV footage of the incident at the police station was an investigation of misconduct under the CMA. The applicant's argument was that an investigation of misconduct under the CMA could refer only to an investigation by the CMC, rather than one by the police service. It is necessary then to go to the CMA and its provisions for the investigation of misconduct.

The CMA

[117] By s 4 of the CMA, the express purposes of the CMA were to combat and reduce the incidence of major crime and to improve the integrity of, and to reduce the incidence of misconduct in, the public sector. To those ends, the CMC was given several functions. By s 23, the CMC had what was called its "prevention function", meaning that the CMC was to assist in the prevention of major crime and misconduct.

[118] By pt 2 of chapter 2, the CMC was given its "crime function", which was to investigate any "major crime referred to it" by a so called reference committee as constituted under that Act. Its crime function included the gathering of evidence for the prosecution of persons for offences and the recovery of the proceeds of major crime.[36]

[119] By pt 4 of chapter 2 the CMC was given so called "research functions" and "intelligence functions".[37] The intelligence functions required the CMC to build up a database of information, acquired by it from any source, including the police service, for the CMC's use in any of its functions.[38]

[120] By pt 3 of chapter 2, the CMC was given its misconduct functions as described in section 33 which then provided:

> "33 Commission's misconduct functions
>
> The commission has the following functions for misconduct (its *misconduct functions*)—

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36 CMA s 25 and s 26.
37 CMA s 52 and s 53.
38 CMA s 54.

(a) to raise standards of integrity and conduct in units of public administration;

(b) to ensure a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way, having regard to the principles set out in section 34."

Section 20 defined a "unit of public administration" to include the police service.

[121] The term "misconduct" was defined to mean "official misconduct or police misconduct". "Official misconduct" was defined as conduct that could, if proved, be a criminal offence or "a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment."[39] "Police misconduct" was defined as conduct of a police officer, other than official misconduct, that was disgraceful, improper or unbecoming of a police officer, showed unfitness to be or continue as a police officer or which did not meet the standard of conduct to be reasonably expected.[40]

[122] Section 34 specified certain principles to be applied by the CMC in performing its misconduct functions. The first of them was that the CMC and units of public administration should work cooperatively in preventing or dealing with misconduct. Another was that the CMC had an overriding responsibility to promote public confidence in the integrity of units of public administration and the way in which misconduct within a unit was "dealt with".

[123] By s 35, the CMC was to perform its misconduct functions by doing one or more of the matters there specified. They included the assessment of matters or complaints involving misconduct made or notified to the CMC, referring complaints about misconduct to a relevant official within a unit of public administration to be dealt with by that person, performing the CMC's "monitoring role" (as provided for under s 47 and s 48), "dealing with" complaints about official misconduct by itself or in cooperation with a unit of public administration, investigating and otherwise dealing with particular cases of misconduct and assuming responsibility for, and completing, an investigation being undertaken within a unit of public administration. The "dealing with" of a complaint included the investigation of the suggested misconduct.[41]

[124] Division 4 of chapter 2 relevantly defined the several responsibilities of the CMC and the Commissioner of Police with respect to the misconduct of police officers. The CMC had the "primary responsibility" for dealing with official misconduct[42] and the Commissioner of Police had the "primary responsibility" for dealing with police misconduct.[43] The CMC was also responsible for monitoring how the Commissioner of Police dealt with police misconduct.[44]

[125] In discharging its responsibility for official misconduct, the CMC could itself deal with the relevant matter or complaint[45] or refer that complaint to the Commissioner of Police,[46] who would then become responsible for dealing with it. In that event, the

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39 CMA s 15.
40 CMA sch 2.
41 Definition of "deal with" in sch 2 of the CMA.
42 CMA s 45(1).
43 CMA s 41(1).
44 CMA s 45(2).
45 CMA s 46(2)(a).
46 CMA s 46(2)(b).

work of the Commissioner of Police would be subject to the CMC's monitoring role, as described in s 48. In that role, the CMC might, for example, require the Commissioner to report to the CMC about a particular investigation into official misconduct or to undertake a further investigation into that conduct.[47] And the CMC could also assume responsibility for and complete that investigation.[48]

[126] The CMC also had a monitoring role where the Commissioner was investigating police misconduct. By s 47, it was empowered to assume responsibility for and complete an investigation which was being undertaken by the Commissioner.

[127] It can be seen that by this statutory scheme the misconduct of a police officer could be investigated by the CMC or the Commissioner of Police and that a particular investigation might at different times be undertaken by one or the other. As was discussed in *Lee v Crime and Corruption Commission & Anor*,[49] the monitoring role of what is now called the Crime and Corruption Commission, as expressed in the relevantly identical terms of the present s 47 and s 48, controls the exercise of the powers of the Commissioner of Police in investigating the misconduct of police officers, consistently with the principle expressed in s 34 that the Commission has an overriding responsibility to promote public confidence in the way in which corruption (previously called misconduct) is dealt with.[50]

The investigation of the applicant

[128] The applicant's house was searched under a warrant obtained under the *Police Powers and Responsibilities Act* 2000 (Qld). Immediately after that search, a police officer in the Ethical Standards Command prepared and distributed to certain other police officers the Executive Briefing Note.

[129] The search warrant had been obtained because of a complaint by an acting chief superintendent of police made under s 7.2 of the *Police Service Administration Act* 1990 (Qld). By that provision, it was the duty of a police officer who knew or reasonably suspected any "misconduct" by another officer to report the occurrence of that conduct to the Commissioner of Police and to the Chairman of the CMC. The term "misconduct" was defined in terms which corresponded with the definition of "police misconduct" in the CMA. On 16 February 2012, a chief superintendent assessed that complaint as one of suspected misconduct and appointed another police officer to investigate it. At the same time the complaint was referred to the CMC. On 23 February 2012, the CMC referred the complaint back to the police service for investigation, with a direction that it report to the CMC on its findings and recommendations prior to any action being taken.

[130] Those facts were within an affidavit (of the chief superintendent who had received the complaint) which was part of the evidence before the Senior Member of QCAT. The affidavit described the referral by the CMC as being made under s 41(2) of the CMA. As the reasons of the QCAT Appeal Tribunal set out, the CMC had assessed the complaint under s 35 of the CMA as an allegation which, if proved, could amount to official misconduct. Consistently with that assessment, the search warrant was sought and issued in relation to two offences: misconduct in relation to a public office under

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47 CMA s 48(1)(c).
48 CMA ss 48(1)(c), (d).
49 [2016] QCA 145.
50 [2016] QCA 145 at [67].

s 92A of the *Criminal Code* and fraud under s 408C(1)(a)(i) of the *Code*. Whether there was a basis for suspecting an offence of either kind does not arise here. What is relevant is that the search warrant was executed and the information was obtained in the course of an investigation of conduct which was suspected official misconduct.

[131] The briefing note was thereby a document which contained personal information arising out of an investigation and the subject of that investigation was misconduct as described in the CMA. The critical question is whether, in the terms of cl 3 of sch 1 of the IPA, this was "an investigation of misconduct *under* the [CMA]".

The reasoning of the Appeal Tribunal

[132] The Appeal Tribunal (Horneman-Wren SC DCJ and Member Browne) accepted the submission for the applicant that the briefing note was not a document containing personal information arising out of a complaint itself, either under the CMA or the *Police Service Administration Act*.

[133] It then considered the applicant's argument that although the information arose out of an investigation, it was not one which was "carried out" under the CMA, but instead was "carried out" under the *Police Powers and Responsibilities Act*. There was an alternative submission for the applicant that the investigation was undertaken under the *Police Service Administration Act* and not the CMA. And there was a further argument for the applicant that relied on the definition of the term "misconduct investigation" in sch 2 of the CMA as "an investigation conducted by the [CMC] in the performance of its misconduct function." As to that argument, the term "misconduct investigation" was not used in cl 3 of sch 1 of the IPA.

[134] The Tribunal rejected the argument that the investigation must be one "carried out" under the CMA, as being supported by neither the text of cl 3 of Sch 1 nor "the broader context of the [CMA]". The Tribunal said that the insertion of the words "carried out" would alter the subject matter of the exclusion in cl 3, such that the exclusion would apply according to whether the *means* by which the investigation was carried out were under the CMA. In that respect, the Tribunal correctly identified a flaw in the applicant's argument, in that it confused the legal basis for the investigation with the legal basis for a power (the power of search and seizure under a warrant) which was exercised in the course of the investigation.

[135] The Tribunal then cited *Griffith University v Tang*,[51] *Australian National Airlines Commission v Newman*[52] and the decision of this court in *Colbran & Ors v State of Queensland*.[53] In *Tang*, the question was whether certain disciplinary decisions of the university were decisions to which the *Judicial Review Act* 1991 (Qld) would apply as decisions of "an administrative character made … under an enactment".[54] Gummow, Callinan and Heydon JJ said that for that Act, a decision was "made under an enactment" where a decision was expressly or impliedly required or authorised by the enactment and where the decision itself conferred, altered or otherwise affected legal rights or obligations.[55]

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51 (2005) 221 CLR 99.
52 (1987) 162 CLR 466.
53 [2007] 2 Qd R 235; [2006] QCA 565.
54 *Judicial Review Act* 1991 (Qld), s 4.
55 (2005) 221 CLR 99, 128 [78]-[80].

[136] In *Newman*, the question was whether proceedings instituted against the appellant by the respondent, claiming as an employee that the appellant had not properly maintained its premises and provided a safe system of work, were subject to a limitation period which applied to actions against the appellant "arising out of anything done or purporting to have been done" under the *Australian National Airlines Act* 1945 (Cth). It was held that the limitation period did not apply because it did not affect an action which complained of things done without a need for a statutory authority conferred by that Act.

[137] In *Colbran*, the State was sued for damages from the execution of a pest eradication programme which resulted in damage to the plaintiffs' coffee trees. By s 28 of the *Plant Protection Act* 1989 (Qld), it was provided that liability would not attach on account of any act or thing "done or omitted to be done pursuant to this act" or "done or omitted to be done *bona fide* for the purposes of this Act …". Jerrard JA said that the ordinary meaning for a statutory provision giving an immunity for acts done or permitted to be done "pursuant to" the statute was that "it describes acts or omissions which affect the rights and interests of others, done under or pursuant to an authority given by the statute; those being acts or omissions directly or expressly required or authorised by the Act."[56]

[138] Upon the reasoning in those cases, the Tribunal concluded that:

> "… what [was] required for the exclusion created by item 3 to apply is for the investigation out of which the information arose to itself be 'expressly or impliedly required or authorised' by the [CMA]."

In the Tribunal's view this investigation of the applicant was so authorised, because the investigation could not have been done "without reliance upon the [CMA] to do it."

The character of this investigation

[139] The present case was argued in this court on the same day as *O'Keefe & Ors v Commissioner of the Queensland Police Service*.[57] The question in *O'Keefe* was whether the appellants were entitled to statements of reasons pursuant to s 32 of the *Judicial Review Act*. The answer depended upon whether the relevant decisions were, in each case, "in relation to the investigation of persons for corruption under the *Crime and Corruption Act* 2001". By sch 2 of the *Judicial Review Act*, such a decision is exempted from the requirement to provide a statement of reasons.

[140] That phrase was relevantly identical to that in the present case. The only differences were the references to the Crime and Corruption Commission instead of the CMC and to "corruption" instead of "misconduct". In *O'Keefe*, the relevant decisions were that the appellant police officers be stood down or suspended arising from investigations of their conduct. Although it was the Act in its present terms which was there considered, the statutory scheme as I have described it, was relevantly the same. In particular, there was the same allocation of responsibilities for dealing with suspected misconduct (corruption).

[141] In that case the ultimate question then became whether these were decisions which had been made in relation to investigations of the relevant kind, namely "the investigation of persons for corruption under the *Crime and Corruption Act* …". That question was answered in the affirmative. The reasoning of Gotterson JA is directly applicable to the present case:

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56 [2007] 2 Qd R 235, 249 [46].

57 [2016] QCA 205.

"[40] On the footing that the investigation of persons for corruption must be under the CC Act, the appellants submit that only an investigation carried out by the CCC in exercise of powers conferred on it by the CC Act, can satisfy that requirement. In oral submissions, senior counsel for the appellants said:

> "Whereas we submit that on a proper construction, it is only investigations into corruption, which would include policed misconduct, it is only investigations which are done under the *Crime and Corruption Act*. And there's a distinction, we submit, between an investigation which is done under the *Crime and Corruption Act*, being one done by the Commission in exercise of powers under that Act, and one done by the Commissioner exercising powers under the *Police Service Administration Act*."

Counsel completed the submission with the proposition that an investigation of persons for corruption under the PSA Act is not an investigation under the CC Act. Hence, a decision in relation to such an investigation could not fall within Item (1).

[41] In my view, the distinction which the appellants seek to draw in this submission is not a valid one. It takes no account of the statutory responsibilities cast on the Commissioner by the CC Act to deal with complaints about, or information or matter the Commissioner reasonably suspects, involves police misconduct and to deal with complaints about, or information or matter involving, corrupt conduct referred by the CCC.

[42] It will be recalled that the expression 'deal with' is defined widely in Schedule 2 of the CC Act. The expression includes investigating the complaint, information or matter, and taking other action, including managerial action, to address the complaint in any appropriate way. I consider that an investigation of a complaint, information or matter involving police misconduct or a referred complaint, information or matter involving corrupt conduct undertaken by the Commissioner in order to discharge the applicable statutory responsibility, would constitute an investigation of the person or persons concerned for corruption under the CC Act. It is under the CC Act because that Act expressly requires the Commissioner to deal with the complaint by investigating it.

[43] It may be that, in order to discharge these responsibilities in any given case, the Commissioner exercises authorisations or powers conferred by the PSA Act, for example, the comprehensive authorisation conferred by s 4.8(3) to investigate the complaint, information or matter. However, the word 'under' does not connote exclusivity of source of a statutory responsibility, authorisation or power. Therefore, the circumstance that the immediate source of the authority or power relied on to conduct the investigation resides in the PSA Act, does not have the consequence that the investigation is not, or is no longer, under the CC Act. It is, and continues to be, an investigation undertaken in

> the course of dealing with a complaint, information or matter, in discharge of the Commissioner's statutory responsibility under the CC Act."

(The PSA Act referred to in those passages is the *Police Service Administration Act* 1990).

[142] That reasoning identifies the relevant nexus between the investigation and (in this case) the CMA, in that the CMA expressly required the Commissioner of Police to deal with the complaint. By investigating this complaint, the Commissioner was discharging his express responsibility under the CMA. In that way the investigation here was an investigation under the CMA.

[143] That characterisation is fortified by the CMC's monitoring role. The CMA did more than require the Commissioner of Police to deal with the complaint which had been referred back to him: it also governed the ongoing conduct of the investigation, by subjecting it to the supervision and ultimate control of the CMC. Because the CMC was able to assume control of and complete an investigation of this kind, a document containing personal information could be passed on from the police to the CMC. It would be a curious operation of the IPA if IPPs applied to the document in the hands of the police but not to the same document in the hands of the CMC.

[144] For these reasons, the investigation in the present case fell within the text of cl 3 of sch 1 of the IPA, as an investigation of misconduct under the CMA. The question then is whether the context and purpose of that provision suggests a different meaning.

The context and purpose of the relevant exclusion

[145] It is necessary to shortly describe the content of the IPPs. By IPP 1, an agency must not collect personal information except for a lawful and relevant purpose and must not collect it in a way which is unfair or unlawful. IPP 2 applies to the collection by an agency of personal information for inclusion in a document or generally available publication. It applies only if the agency asks the individual for the information. In those circumstances IPP 2 requires the agency to take steps to ensure that the individual is aware of the purpose of the collection of the information and legal requirement or authority for its collection. In the same circumstances, IPP 3 requires the agency to take steps to ensure that the information collected is relevant, complete and up to date. It also requires the agency not to unreasonably intrude into the personal affairs of the individual.

[146] IPP 4, the breach of which was complained of in the present case, requires an agency having control of a document which contains personal information to ensure that the document is protected against loss, and unauthorised access, use, modification or disclosure as well as against any other misuse.

[147] By IPP 5, an agency having control of documents containing personal information must take reasonable steps to ensure that a person can find out whether the agency has control of any such documents, the type of personal information contained within them, the main purposes for which the personal information is used and what an individual should do to obtain access to a document containing personal information about the individual.

[148] By IPP 6, an agency having control of a document containing personal information must give an individual the subject of the information access to the document if sought by the individual. But that is qualified by cl 6(2), which provides that an

agency is not required to give an individual access to a document if the agency is authorised or required under "an access law" to refuse to give the access to the individual. An access law is defined by the IPA to mean a law of the State that provides for access by persons to documents.[58]

[149] IPP 7 requires an agency having control of a document containing personal information to take all reasonable steps, including about the making of an appropriate amendment, to ensure that the information is accurate, relevant, complete, up to date and not misleading. By IPP 8, before an agency "uses" personal information contained in a document under its control, it must take steps to ensure that the information is accurate, complete and up to date. By IPP 9 an agency must use only the parts of the personal information which are directly relevant to fulfilling its purpose. By IPP 10, an agency having control of a document containing personal information that was obtained for a particular purpose must not use the information for another purpose except in certain specified circumstances. And by IPP 11, an agency having control of a document containing personal information must not disclose that to an entity except in certain specified circumstances.

[150] Two things may be noted about the content of the IPPs. The first is that there is nothing in any of these principles which would make the principles appropriate for information within a document arising from an investigation *by police* of misconduct, but not so appropriate for such an investigation by the CMC. Yet, as the applicant's argument accepts, the exemption in cl 3 of Sch 1 would clearly apply to an investigation by the CMC. The second is that many of these principles would appear to be inappropriate to information within a document arising from an investigation of misconduct by either agency. For example, some are premised upon the individual having a right of access to the document.

[151] Therefore the content of the privacy principles does not provide a context which favours the interpretation for which the applicant argued.

[152] An important contextual feature, according to the applicant's argument, is the absence of a similar exemption from the operation of the principles in the circumstance of a police investigation of criminal offending, as distinct from misconduct under the CMA. It was submitted that there is no apparent basis for imposing the principles upon the police service for most of their investigative work, but not for the investigation of misconduct.

[153] The short answer to that argument is that a distinction between the investigation of criminal activity and the investigation of misconduct is plainly employed within the IPA, not only for the police service but also for the CMC. An investigation by the CMC of misconduct was within the exemption in cl 3 of sch 1. But the applicability of the privacy principles to the performance of other functions of the CMC was treated differently. I have referred to s 29 of the IPA which merely qualifies the operation of some of the IPPs upon a law enforcement agency. In particular, it qualified their operation to the CMC in the "performance of its activities related to the enforcement of laws and its intelligence functions."[59] It thereby affected the operation of some, but not all of the IPPs in the performance of the CMC's so called major crime function. Section 29 imposed an identical qualification upon the operation of those

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58 As I have discussed at [113], there are provisions of the *Right to Information Act* which apply to access to documents under the regime in chapter 3 of the IPA, by which the CMC and the police service could not have been required to give access to this briefing note.

59 IPA s 29(1)(b).

principles to the police service in the performance of its activities related to the enforcement of laws.[60]

[154] It can be seen then that the privacy principles had an identical operation to each agency, in relation to information obtained from the investigation of criminal activity. The evident intent of the Parliament was not to distinguish between these two agencies, but rather to distinguish between the two subject matters of an investigation, namely those investigations conducted as a law enforcement agency and the investigation of misconduct under the CMA. In this way, the identical treatment of the work of the police service and the CMC within s 29 provides a contextual indication which is against the applicant's argument.

[155] There was then a further argument for the applicant about the statutory context, which was that cl 3 of sch 1 had to be understood in the context of the extensive provisions for the collection, management, use and distribution of information which were prescribed within the CMA. The argument was that there was a comprehensive and self-contained statutory scheme within the CMA, for which the intrusion of the principles would be inapt and problematic. The unstated premise of this argument was that there was no corresponding legislative scheme for information gathered by the police service in investigating the misconduct of its officers, so that this difference explained why the police service, unlike the CMC, should be subject to the privacy principles.

[156] For this argument reliance was placed upon the following provisions of the CMA:

- s 73, which empowered the CMC to authorise the entry and search of premises and the seizure and removal of relevant documents;
- s 75, by which information could be obtained from a person under compulsion by providing a notice for its provision;
- s 75B, by which the presiding officer at a commission hearing could require a witness to produce a document;
- s 86, by which the CMC could apply to a judge for the issue of a search warrant;
- s 89, by which the existence of a search warrant should itself be confidential if the search warrant so provides;
- s 119C, by which the CMC could apply to a judge for a so called monitoring order, directing a financial institution to give information about a named person;
- s 119H, by which the existence and operation of a monitoring order was not to be disclosed by the financial institution;
- s 121, by which an application could be made to a judge for a warrant authorising the use of a surveillance device in order to obtain information;
- s 130, by which information obtained using a surveillance warrant, which had not been disclosed in a proceeding in open court, was not to be disclosed except to certain persons or agencies;
- s 192, by which a witness at a CMC hearing could be required to answer a question put by the presiding officer;

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60 IPA s 29(1)(a).

- s 202, by which information as to the existence or identity of a witness or evidence at a commission hearing was not to be disclosed without the commission's written consent;
- s 213, by which certain information was to be kept confidential;
- s 329, by which the chairperson of the CMC was required to notify a Parliamentary committee of improper conduct of a commission officer;
- s 332, by which the CMC's investigation into official misconduct could be subject to judicial review on the ground that the investigation was being conducted unfairly;
- part 5 of chapter 6, which provided for the appointment of the public interest monitor and the monitor's functions.

[157] However the CMA also contained extensive provisions which applied to the collection and use of information in the performance of the CMC's major crime and intelligence functions, and yet the privacy principles (subject to s 29 of the IPA) then applied. For example, there were similar provisions applying to those functions of the CMC such as:

- s 72, a provision corresponding to s 73
- s 74, a provision corresponding to s 75
- s 190, a provision corresponding to s 192.

Further, several of those provisions identified in the applicant's argument were not limited to the CMC's misconduct function, but instead were equally applicable to its major crime function, being s 75B, s 86, s 89, s 202, s 213, s 329 and pt 5 of chapter 6. And the applicant's reliance upon s 119C and s 119H, which dealt with monitoring orders, was misplaced because those provisions, being within pt 5A of chapter 3 of the Act, applied only for the purposes of the CMC's powers under the *Criminal Proceeds Confiscation Act* 2002 (Qld).[61]

[158] Consequently it far from appears that there was such a comprehensive scheme within the CMA, applying only to information obtained by the CMC in its misconduct function, which effectively covered the field in which the privacy principles could operate. Rather, most of the provisions identified by the applicant's argument applied, or had a counterpart which applied, to the CMC in the performance of its major crime function. And in that role, as a law enforcement agency, the IPA treated the CMC and the police service alike.

[159] In my conclusion there is nothing in the context of the IPA or the wider context of the CMA which supports the applicant's construction of the relevant exemption. The reasoning in *O'Keefe* applies to this provision also. Once it is recognised that the investigation of this misconduct was in discharge of the duty imposed by s 41(2) of the CMA and was subject to the supervision of the CMC under that Act, it can be seen that this was an investigation of misconduct under that Act. The Appeal Tribunal of QCAT was correct in deciding that the privacy principles did not apply.

Orders

[160] I would order as follows:

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61 s 119B.

(1) Grant leave to appeal against the decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal, given on 30 October 2015.

(2) Dismiss the appeal.

(3) The appellant to pay the respondent's costs of this appeal.