SUPREME COURT OF QUEENSLAND

CITATION:	*Flori v Winter & Ors* [2019] QCA 281
PARTIES:	**RICKY ANTHONY FLORI** (appellant) **v** **DAVID BRETT WINTER** (first respondent) **PETER DOYLE** (second respondent) **DIRK PETERSEN** (third respondent) **STATE OF QUEENSLAND** (fourth respondent)
FILE NO/S:	Appeal No 5689 of 2019 SC No 4178 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 106 (Bowskill J)
DELIVERED ON:	3 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2019
JUDGES:	Fraser JA and Buss AJA and Henry J
ORDERS:	**1. Appeal allowed.** **2. The orders made in the Trial Division on 3 and 13 May 2019 be set aside.** **3. Order that the separate question be answered "It is not appropriate to answer the question".** **4. Unless the Court is earlier notified of a consent order about costs, the parties have leave to exchange and lodge with the registry within 14 days of the publication of these reasons submissions in writing, not exceeding three pages, as to the appropriate costs orders.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – PURPOSIVE APPROACH – PARTICULAR CASES – where the appellant commenced proceedings alleging reprisals regarding a letter he wrote to the Crime and Misconduct Commission, which he contended

was a public interest disclosure under s 15 *Whistleblowers Protection Act* 1994 – where the question of whether the letter was capable of being a public interest disclosure was separately determined by reference to whether it disclosed "conduct" that was "official misconduct" under ss 14 and 15 *Crime and Misconduct Act* 2001 – where the appellant contends the primary judge erred by answering that question without regard to whether the appellant held, or could have held, an honest belief on reasonable grounds that he had information which tended to show official misconduct – whether the proper construction of s 15 *Whistleblowers Protection Act* required consideration of whether the appellant held, or could have held, an honest belief on reasonable grounds that he had information that tended to show official misconduct

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR QUESTION – APPEAL FROM DECISION OR DETERMINATION ON SEPARATE QUESTION – where the appellant commenced proceedings alleging reprisals regarding a letter he wrote to the Crime and Misconduct Commission, which he contended was a public interest disclosure under s 15 *Whistleblowers Protection Act* 1994 – where the parties consented to determination of a separate question as to whether the letter was capable of being a public interest disclosure by reference to whether it disclosed "conduct" which was "official misconduct" under ss 14 and 15 *Crime and Misconduct Act* 2001 – where the primary judge held the letter did not disclose "conduct" which was "official misconduct" under those provisions – where the appellant contends the question was inappropriate to answer because it did not account for his honest belief on reasonable grounds that he had information that tended to show official misconduct – whether the primary judge erred in failing to answer the question as "inappropriate to answer" – whether the primary judge erred in dismissing the proceeding on the basis the letter did not disclose "conduct" which was "official misconduct" under ss 14 and 15 *Crime and Misconduct Act* 2001

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – OTHER CASES – where the appellant commenced proceedings alleging reprisals regarding a letter he wrote to the Crime and Misconduct Commission, which he contended was a public interest disclosure under s 15 *Whistleblowers Protection Act* 1994 – where the parties consented to determination of a separate question as to whether the letter was capable of being a public interest disclosure by reference to whether it disclosed "conduct" which was "official misconduct" under ss 14 and 15

Crime and Misconduct Act 2001 – where the primary judge held the letter did not disclose "conduct" which was "official misconduct" under those provisions – where the appellant contends the primary judge erred in concluding the letter did not disclose "conduct" under s 14 *Crime and Misconduct Act* 2001 – whether the letter disclosed conduct that could constitute a breach of trust or misuse of material under s 14 *Crime and Misconduct Act* 2001

Acts Interpretation Act 1954 (Qld), s 14A, s 14B
Crime and Misconduct Act 2001 (Qld), s 14, s 15
Criminal Justice Act 1989 (Qld), s 2.23
Public Interest Disclosure Act 2010 (Qld), s 74
Whistleblowers Protection Act 1994 (Qld), s 14, s 15

Babula v Waltham Forest College [2007] ICR 1026; [2007] EWCA Civ 174, approved
Ellis v Harvey [2004] TASSC 83, cited
Gardem v Edmistone [2018] QDC 118, doubted
Greiner v Independent Commission Against Corruption (1992) 28 NSWLR 125, cited
Nugent v Commissioner of Police (Qld) (2016) 261 A Crim R 383; [2016] QCA 223, cited
Police Service Board v Morris (1985) 156 CLR 397; [1985] HCA 9, cited
R v A2 (2019) 93 ALJR 1106; [2019] HCA 35, followed
R v Reid [2004] QCA 9, cited
Re Bowen [1996] 2 Qd R 8; [1995] QSC 284, cited
Re Newnham [1993] 1 Qd R 502; [1992] QSC 212, cited
Re Watson [1997] 1 Qd R 340, cited

COUNSEL: G J Rebetzke for the appellant
K A Mellifont QC, with S A McLeod, for the respondents

SOLICITORS: Roberts & Kane Solicitors for the appellant
Crown Law for the respondents

[1] **FRASER JA:** The most significant issue in this appeal turns upon the proper construction of subs 14(2) and s 15 of the *Whistleblowers Protection Act* 1994 (Qld).

[2] Chapter 4 of the *Public Interest Disclosure Act* 2010 (Qld) enacts a variety of protections for a person who makes a "public interest disclosure":

(a) A person who makes a public interest disclosure is not subject to civil or criminal liability or liability arising by administrative process for making the disclosure (s 36).

(b) Such a person does not, by making a public interest disclosure, either commit an offence under an Act that restricts disclosure of the information or breach any obligation under an oath, rule of law, practice, or agreement, restricting disclosure of the information (s 37).

(c) In a proceeding for defamation a person who makes a public interest disclosure has a defence of absolute privilege (s 38).

(d) A person must not (amongst other matters) cause detriment to another person because or in the belief that the other person or someone else has made or intends to make a public interest disclosure (s 40(1)(a)). A contravention of that prohibition is called "a reprisal or the taking of a reprisal" (s 40(3)).

(e) It is an indictable offence for a person to take a reprisal (s 41).

(f) A person who takes a reprisal is liable in damages for a tort to any person who suffers detriment as a result, and a court may grant any appropriate remedy that may be granted by a court for a tort, including exemplary damages (s 42).

[3] In 2017 the appellant commenced proceedings in the Trial Division. He alleged that a letter dated 21 February 2010 he had sent to the Crime and Misconduct Commission when he was a police officer was a "public interest disclosure". He claimed that the respondent police officers had taken reprisals against him by causing various detriments to him because of his public interest disclosure, the respondent State was vicariously liable for those contraventions, and the respondents were therefore liable to the appellant for damages for the statutory tort of reprisal.

[4] The text of the appellant's letter, in which the second and fourth paragraphs are of most relevance in this appeal, is as follows (I have redacted details capable of identifying individuals named in it):

"This is something that I know about a supervisor [at area (1)] it refers to Senior Sergeant [A] and Constable [B]. I have spoken to [A] but he denies everything. *[first paragraph]*

In late 2009 [A] was seen at Red Rooster at [place (1), within area (1)] by Sgt [C] and Sen Const [D] with [B] in the [area (1)] District Duty Officer police car. It was obvious that [B] had her head in [A's] lap giving him a head job *[second paragraph]*

In the last month in the early hours of the morning Const [E] and Sgt [F] from [place (2)] found a car parked in the carpark of the shops in [place (3)] by itself in the early hours of the morning. They checked and it was [B's] car. A very short time later the [area (1)] District Duty Officer police car speed out from behind the shopping centre and left. [B] was in that car. [A] was spotted at [place (4), within area (1)] in plain clothes with [B], both got out of the [area (1)] District Duty Officer police car. He was seen by an officer that was at the academy with him and knew him personally. *[third paragraph]*

On nightwork [A] meets up with [B] to have coffee at the BP at [place (3)] outside his district on a regular basis. He is working at the time and sometimes she comes with him, or just meets him there. *[fourth paragraph]*

[B] is the officer involved in a stupid prank at [place (2)] some time ago where it was swept under the carpet by [a District Duty *[fifth paragraph]*

Officer]. [B] has been seen in the [area (1)] District Duty Officer car on multiple other occasions off duty.

[Place (1) in area (1)] Police believe that special attention is given to [B] by the [area (1)] District Duty Officers and we feel this is wrong by a person who is supposed to be supervising. I can see the headline. Senior police officer receives fellatio in police car" *[sixth paragraph]*

[5] The respondents might be liable for the statutory tort of reprisal created by the *Public Interest Disclosure Act* only if that letter was a "public interest disclosure" for the purposes of that Act. That Act did not commence until after the appellant sent his letter, but a transitional provision, s 74, provides that a public interest disclosure made under the *Whistleblowers Protection Act* before the commencement of s 74 is taken to be a public interest disclosure under the *Public Interest Disclosure Act*.

[6] The version of the *Whistleblowers Protection Act* which was in force when the appellant sent his letter[1] defined "public interest disclosure" to mean "a disclosure of information specified in sections 15 to 20 of the Act made to an appropriate entity and includes all information and help given by the discloser to an appropriate entity". Section 25(1) provides that s 26 specifies appropriate entities to which public interest disclosures may be made. It is not in issue in this appeal that the Crime and Misconduct Commission was an "appropriate entity" when it received the appellant's letter.[2]

[7] Subsection 14(2) of the *Whistleblowers Protection Act* provided that "[a] person has information about conduct or danger specified in sections 15 to 20 if the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger". Section 15 provided:

> "A public officer may make a public interest disclosure about someone else's conduct if—
>
> (a) the officer has information about the conduct; and
>
> (b) the conduct is official misconduct."

(The appellant, as a police officer, was a "public officer" as defined in that Act.)

[8] The word "conduct" as used in the *Whistleblowers Protection Act* was not defined in that or any other Act. The term "official misconduct" in s 15(b) was defined in the *Whistleblowers Protection Act* by the adoption of the definition of the same term in the *Crime and Misconduct Act* 2001 (Qld).[3] Section 15 of the *Crime and Misconduct Act* then defined "official misconduct" as "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." The word "conduct" in that section was defined in s 14

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1 The relevant provisions are in Reprint No. 5D. Except where the contrary is indicated, references to the *Whistleblowers Protection Act* are to that reprint. For the most part, the relevant provisions are in the same form in that reprint as they were in the Bill for the Act and in the Act passed by Parliament on 1 December 1994.

2 *Flori v Winter & Ors* [2019] QSC 106 ("Reasons") at [24].

3 The relevant reprint of that Act, which is now the *Crime and Corruption Act* 2001, is reprint No. 5. Except where the contrary is indicated, references to the *Crime and Misconduct Act* are to that reprint.

of the same Act. For present purposes the relevant provisions are subparagraphs (ii) and (iii) of s 14(b). Section 14(b) provided:

> "(b) for a person who holds or held an appointment—conduct, or a conspiracy or attempt to engage in conduct, of or by the person that is or involves—
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> (i) the performance of the person's functions or the exercise of the person's powers, as the holder of the appointment, in a way that is not honest or is not impartial; or
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> (ii) a breach of the trust placed in the person as the holder of the appointment; or
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> (iii) a misuse of information or material acquired in or in connection with the performance of the person's functions as the holder of the appointment, whether the misuse is for the person's benefit or the benefit of someone else."

[9] In December 2018 a judge in the Trial Division set down for separate determination in the appellant's proceeding the following separate question:

> "Was the letter dated 21 February 2010 sent by the plaintiff to the then known Crime and Misconduct Commission referred to in paragraph 6 of the plaintiff's fourth amended statement of claim filed 18 September 2018 capable of being a public interest disclosure under section 15 of the *Whistleblowers Protection Act 1994*, that is,
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> (a) do the contents of the letter amount to:
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> (i) information about conduct that is conduct within the meaning of s 14(b)(ii) or (iii) of the *Crime and Misconduct Act 2001*? and
>
> (ii) information about conduct that could, if proved, be conduct described in s 15 of the *Crime and Misconduct Act 2001*, that is 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?"

[10] In a judgment published on 3 May this year the primary judge:

(a) accepted that, if the second and fourth paragraphs of the letter described what was capable of being "conduct" as defined in s 14 of the *Crime and Misconduct Act*, that conduct was capable of being "official misconduct" within the meaning of s 15(a) of the same Act because the second paragraph of the letter does describe conduct that could, if proved, be a criminal offence, namely, an offence under s 227(1)(a) of the *Criminal Code* of doing an indecent act in a place to which the public are permitted to have access,[4]

(b) rejected the appellant's contention that the conduct described in the letter was "conduct" as defined in s 14(b)(ii) or (iii) of the same Act and for that reason held that the conduct described in the letter was not

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4 Reasons [59], with reference to [48] – [58].

"official misconduct" as defined in s 15 of the *Crime and Misconduct Act*, and

(c) for that reason, answered the separate question "no".

[11] In consequence of that answer, after a further hearing the primary judge ordered on 13 May this year that the appellant's proceeding be dismissed and that the appellant pay the respondents' costs of the proceeding.

[12] The appellant appeals against the answer to the separate question and the consequential orders. The appellant abandoned two grounds of his appeal. He contends that the primary judge erred by:

(a) (Ground 1): concluding that the contents of the letter dated 21 February 2010 could not amount to information about conduct that is "conduct" within the meaning of s 14(b)(ii) or (iii) of the *Crime and Misconduct Act*.

(b) (Ground 4): answering the question whether the letter was capable of being a "public interest disclosure" under s 15 of the *Whistleblowers Protection Act* by failing to consider whether the appellant held, or could have held, an honest belief on reasonable grounds that he had information that tended to show official misconduct.

(c) (Ground 5): failing to answer the question "inappropriate to answer".

(d) (Ground 6): dismissing the proceeding on the basis of the answer given to the question posed for separate determination.

Ground 4 raises the determinative question. The resolution of that ground determines the fate of grounds 5 and 6.

Grounds 4 – 6: Construction of the *Whistleblowers Protection Act* and consequential orders

[13] It is a premise of the separate question that s 15 of the *Whistleblowers Protection Act* authorises a public interest disclosure only of information about conduct which is "official misconduct" as that term is defined. Consistently with the form of the question, the parties' arguments in the Trial Division assumed that it was irrelevant whether or not the appellant's letter contained a disclosure about what he honestly believed on reasonable grounds was information that tended to show official misconduct. That accords with what the respondents submit is the correct construction of s 14(2) and s 15 of the *Whistleblowers Protection Act*; it is only if the information disclosed asserts conduct that is "official misconduct" that it is relevant to consider whether the public officer making the disclosure honestly believes on reasonable grounds that the person has information that tends to show the conduct.

[14] Consistently with the form of the separate question and the parties' arguments the primary judge held that:[5] the issue was whether "the conduct disclosed in the letter amounts to "official misconduct" as defined" in s 15 of the *Crime and Misconduct Act*; in deciding whether the conduct was "conduct" which "could, if proven" be a criminal offence or a disciplinary breach of the kind described in s 15 of that Act, the content of the letter was determinative; and the question was "not whether the

5 Reasons [20].

conduct might be "conduct", or "could, if proved" fall within s 15(a) or (b) [of the *Crime and Misconduct Act*] if more information was known or disclosed."[6]

Should the Court entertain appeal ground 4?

[15] The appellant contends that the question whether disclosure of information is a "public interest disclosure" under the *Whistleblowers Protection Act* is not determined by reference to the content of the disclosure but by reference to the whistleblower's honest belief on reasonable grounds described in s 14(2) of that Act and whether (as is not in issue in this appeal) the disclosure is communicated to an "appropriate entity" under s 25 of that Act. If that contention is correct, the proceeding upon the separate question miscarried because the parties did not litigate the relevant issue, the correct response to the separate question was that it was inappropriate to answer it, and the appellant's proceeding should not have been dismissed.

[16] The respondents object to the appellant being permitted to agitate ground 4. They argue that it cannot be said that the primary judge erred in answering the question, or in dismissing the proceeding upon the basis of the answer to the question, because the appellant's arguments do not identify any error in the primary judge's reasoning. Instead, those arguments raise new issues. It was common ground in the Trial Division that if the letter was not a public interest disclosure the appellant's proceeding must fail, the parties had agreed upon the form of the separate question when it was set down for determination, the appellant did not appeal from the order setting down that question for separate determination, and the appellant did not submit to the primary judge that it was inappropriate to answer the question.

[17] As counsel for the appellant acknowledged, counsel who appeared for the appellant in the Trial Division conceded that acceptance of the respondents' arguments upon the separate question would put an end to the appellant's claim. That is reflected in the primary judge's observation that it was common ground that the appellant's proceeding must fail if his letter was not a public interest disclosure made under the *Whistleblowers Protection Act*.[7] The appellant's counsel submitted, however, that the appellant withdrew this concession at a hearing after the primary judge had answered the separate question. It is correct that, after the primary judge had published the answer to the separate question and the reasons for that answer, the appellant appeared for himself in the subsequent hearing and submitted that the answer was not determinative of the whole proceeding. That submission was rejected. That is unsurprising in light of the earlier concessions by the appellant's counsel and the fact that the answer to the separate question contradicted the essential element of the appellant's claim that the appellant's letter was a public interest disclosure under s 15 of the *Whistleblowers Protection Act*.

[18] The respondents' submission that appeal ground 4 is inconsistent with the way in which the appellant conducted the proceeding in the Trial Division is plainly correct. As the respondents submit, whilst the State applied for the determination of a separate question and the appellant initially opposed that application,[8] at the hearing of the application the appellant articulated a differently expressed question

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6 The primary judge cited statements by Andrews SC DCJ in *Gardem v Edmistone* [2018] QDC 118 at [202] and [206].

7 Reasons [2].

8 Respondent plaintiff's submissions 6 December 2018, para 4(a).

for separate determination, the parties' legal representatives then discussed the matter, and thereafter the order for separate determination of the question answered by the primary judge was made with the parties' agreement.[9] Consistently with that agreement, at the hearing of the separate question, counsel who then appeared for the appellant acknowledged that the appellant had agreed upon the separate question being determined, he withdrew a submission that there was insufficient material for the primary judge to determine the question,[10] and thereafter he did not submit that it was inappropriate for the primary judge to answer the separate question.

[19] In the particular circumstances of this appeal it is nevertheless appropriate to adjudicate upon appeal ground 4. It raises only a question of statutory construction. There is no suggestion that this new point could possibly have been met by the respondents calling evidence at the hearing of the separate question. Accordingly, it is open to hold that it is expedient and in the interests of justice to adjudicate upon the point.[11] A factor favouring that course is my conclusion that, in the way in which the separate question was litigated in the Trial Division, the question should have been answered "yes" and the appellant's proceeding should not have been dismissed: see [50] – [60] of these reasons. It is in the interests of justice that further proceedings upon the appellant's claim be determined with reference to what is held to be the correct construction of s 14(2) and s 15 of the *Whistleblowers Protection Act*.

The construction question: the arguments

[20] The appellant argues that the word "specified" in s 14(2) is apt to refer to the various kinds of conduct and dangers described in ss 15 to 20. It follows that the meaning of s 15, read together with s 14(2), is that a public officer may make a public interest disclosure about what the public officer honestly believes on reasonable grounds is information that tends to show the official misconduct. The appellant argues that a construction of s 15 of the *Whistleblowers Protection Act* pursuant to which s 14(2) applies only to the "conduct" in s 15(a), excluding reference to its characterisation as "official misconduct", should be rejected because it is inconsistent with s 14(2), not reconcilable with s 14(4) and the definition of "public interest disclosure", and inapt to achieve the objects of that Act or the purposes articulated in material extrinsic to the Act.

[21] The respondents contend that the separate question was premised upon the correct construction. They argue that the meaning given by s 14(2) to "information about conduct" applies to s 15 only in relation to the requirement in paragraph (a) that the officer has "information about the conduct", and the question whether "the conduct" referred to in s 15(a) amounts to "official misconduct" is to be determined only by reference to that which is disclosed as a public interest disclosure. The respondents submit that, as is made clear by the word "and" between paragraphs (a) and (b) in s 15, those paragraphs describe two separate elements, each of which must be satisfied for a public interest disclosure under that section. It follows, the respondents submit, that whether the conduct about which the officer has information is official misconduct is to be decided upon an objective analysis of the information disclosed about the alleged conduct. The correct approach, the respondents submit, is to commence with an analysis of what is disclosed to

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9 Transcript 6 December 2018 at 1 – 29, 1 – 30, and 1 – 34.

10 Transcript 28 February 2019 at 1 – 31 and 1 – 32.

11 *Water Board v Moustakas* (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ).

ascertain whether or not it asserts that which is official misconduct and, if it does, then to decide whether or not the public officer making the disclosure "has information about the conduct" (s 15(a)); only in that last step is it relevant to apply the provision in s 14(2). The respondents submit that this is the literal meaning of those provisions and that meaning is supported by an aspect of the extrinsic material upon which the appellant relies.

The construction question: consideration

[22] The method of construing a statute was recently restated by Kiefel CJ and Keane J, with whose reasons Nettle and Gordon JJ agreed, in *R v A2*.[12] The task is to ascertain the intended meaning of the statutory text. The construction exercise must focus upon a consideration of the statutory words in their context. The context includes surrounding statutory provisions, other aspects of the statute and the statute as a whole, any mischief in the pre-existing state of law the statute was designed to address, and an evident purpose of the statute. Under the *Acts Interpretation Act* 1954 (Qld) an interpretation of a provision of an Act that will best achieve its purpose is to be preferred to any other interpretation,[13] and consideration may be given to extrinsic material, including a report of a Royal Commission, Law Reform Commission or similar body that was laid before the Legislative Assembly, an explanatory note or memorandum relating to the Bill, and the speech made to the Legislative Assembly by the member when introducing the Bill. The extrinsic material may be considered to provide an interpretation of an ambiguous or obscure provision, to provide an interpretation that avoids a manifestly absurd or unreasonable result of the ordinary meaning of the provision, or in any other case to confirm the interpretation conveyed by the ordinary meaning of the provision.[14]

[23] In Part 1 of the *Whistleblowers Protection Act*, s 3 provides that the "principal object" of the Act is to promote the public interest by protecting persons who disclose "unlawful, negligent or improper conduct affecting the public sector" and dangers to public health or safety or to the environment. In Part 2, s 7(1) describes the Act as providing a scheme that in the public interest gives special protection to "disclosures about unlawful, negligent or improper public sector conduct" or dangers to public health or to the environment. Section 7(2) refers to "balancing mechanisms" being provided because the "protection is very broad". The intention of the balancing mechanisms is set out in five sub-paragraphs, one of which is to "make it easier to decide whether the special protection applies to a disclosure" (s 7(2)(b)). Section 7(3) states that the scheme "gives protection only to a ***public interest disclosure*****,** which is a particular type of disclosure defined by reference to the person who makes the disclosure, the type of information disclosed and the entity to which the disclosure is made (the ***appropriate entity***)". Section 8(1) provides:

> "Under section 15, a public officer may disclose ***official misconduct*****,** an expression defined in the *Crime and Misconduct Act 2001*."

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12 [2019] HCA 35 at [31] – [37] (Kiefel CJ and Keane J) and at [148] (Nettle and Gordon JJ). Those reasons are not inconsistent with the reasons upon this topic of Bell and Gageler JJ at [124] and of Edelman J at [163].

13 *Acts Interpretation Act* s 14A.

14 *Acts Interpretation Act* s 14B.

[24] One of the purposes of the requirement that public interest disclosure be made to appropriate entities is described in s 10(2)(b) as being to ensure that "unfair damage is not caused to the reputations of persons against whom disclosures are made by inappropriate publication of unsubstantiated disclosures." That purpose is reflected in s 55 in Part 6 of the Act, referred to in s 12(2)(a), which makes it an offence for a public officer to disclose confidential information gained through involvement in the Act's administration except in narrowly defined circumstances.[15]

[25] The protection given for public disclosures by the *Whistleblowers Protection Act* is summarised in s 11:

> "(1) Under part 5, division 2, a person is declared not to be liable, civilly, criminally or under an administrative process, for making a public interest disclosure.
>
> (2) Under part 5, divisions 3 to 5, causing or attempting or conspiring to cause ***detriment*** to any person because of a public interest disclosure is declared to be a ***reprisal*** and unlawful, both under the civil law of tort and the criminal law.
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> (3) Under part 5, division 6—
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> (a) public sector entities must establish reasonable procedures to protect their officers from reprisals; and
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> (b) public officers with existing rights to appeal against, or to apply for a review of, disciplinary action, appointments, transfers or unfair treatment are permitted to use these rights against reprisals; and
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> (c) public service employees are given an additional right to appeal to the chief executive of the Public Service Commission to be relocated to remove the danger of reprisals.
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> (4) Under part 5, division 7, the industrial commission, or, if the industrial commission does not have jurisdiction, the Supreme Court, may grant injunctions against reprisals."

[26] I earlier set out s 14(2) of the Whistleblowers *Protection Act*. Section 14 provided:

> "(1) The types of information that may be disclosed by a public interest disclosure, and who may make the disclosure, are specified in sections 15 to 20.
>
> (2) A person has information about conduct or danger specified in sections 15 to 20 if the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger.
>
> (3) If information is about an event, it may be about something that has or may have happened, is or may be happening, or will or may happen.

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[15] Consistently with that statutory purpose and the provisions giving effect to it, the appellant's letter is redacted in these reasons, and it was redacted in a similar way in the trial judge's reasons, to remove details identifying the police officers alleged to have engaged in the described conduct.

(4) If the information is about someone else's conduct, the information may be about conduct in which the other person has or may have engaged, is or may be engaging, or is or may be intending to engage.

(5) The information need not be in a form that would make it admissible evidence in a court proceeding.

Example –

The information may take the form of hearsay."

[27] For ease of reference I will again set out the text of s 15:

> "A public officer may make a public interest disclosure about someone else's conduct if—
>
> (a) the officer has information about the conduct; and
>
> (b) the conduct is official misconduct."

[28] Amongst the provisions to which s 14(2) refers, ss 15, 16, 17(1), and 20 are identical or substantially identical apart from the descriptions of the conduct in paragraph (b) in each provision: (s 15(b)) "official misconduct"; (s 16(b)) "maladministration that adversely affects anybody's interests in a substantial and specific way"; (s 17(1)(b)) "negligent or improper management directly or indirectly resulting, or likely to result, in a substantial waste of public funds"; and (s 20(b)) "a reprisal".[16]

[29] The respondents' construction is consistent with the punctuation of the sentence in s 15, the division of the second and third clauses of that sentence into separate paragraphs, the separation of those clauses by the word "and", and the substantial identity between the expression in s 14(2) "has information about conduct … specified in sections 15 to 20" and the expression in s 15(a) "has information about the conduct". Taken together, those features support the respondents' construction that the honest belief on reasonable grounds described in s 14(2) concerns only the public officer's "information about the conduct" identified in paragraph (a) of s 15.

[30] Close attention to the statutory text considered in context demonstrates, however, that the respondents' construction does not reflect the intended meaning of those provisions.

[31] The respondents' construction requires departures from the ordinary meanings of ss 14(2) and 15 (and correspondingly also ss 16, 17(1), and 20). As to s 14(2), upon the respondents' construction the undefined term "the conduct" in paragraph (a) of s 15 does not connote conduct of any particular description, but the reference in s 14(2) to conduct "specified" in s 15 is naturally understood as a reference to the conduct identified in paragraph (b) of s 15 by the defined term "official misconduct". As to s 15, "the conduct" mentioned in paragraph (b) is the same conduct mentioned in paragraph (a), being (under s 14(2)) what the disclosing person honestly believes on reasonable grounds is tended to be shown by information to be conduct in which (under s 14(4)) the other person has engaged or may have engaged. The respondents' construction therefore treats paragraph (b) of s 15 as providing that **if** the other person engaged in "the conduct" **it would be**

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16 Sections 18 and 19 concern cases in which a public officer or anybody has information relating to certain dangers. The form of those provisions differs significantly from the form of ss 15, 16, 17(1), and 20.

"official misconduct". That meaning would be conveyed by a provision to the effect that "the conduct, if it occurred, would be official misconduct", rather than by the statutory text "the conduct is official misconduct".

[32] Those departures from the ordinary meaning of the statutory text result from the respondents' construction that the belief described in s 14(2) relates only to the undefined "conduct" mentioned in the introductory text and in paragraph (a) of each of ss 15, 16, 17(1), and 20, rather than to the particular kind of conduct described in paragraph (b) of each provision.

[33] The construction propounded by the appellant avoids those textual anomalies and gives effect to the principal object of the *Whistleblowers Protection Act* expressed in s 3(1) of that Act. Upon that construction, in each of ss 15, 16, 17(1) and 20 paragraph (b) defines the word "conduct". Section 14(2) is concerned with, relevantly, a person having "information about conduct ... specified in [s 15]". In s 14(2), the words "specified in [s 15]" refer to the "conduct" that is specified in s 15. The "conduct" that is specified in s 15, for the purposes of s 14(2), is someone else's "conduct" that is "official misconduct". "Official misconduct" is a species or subset of "conduct". The effect of s 8(1) and s 15, read with s 14(1) and s 14(2), is to authorise a public officer who has information about someone else's "conduct" to make a public interest disclosure in respect of that information if the public officer honestly believes, on reasonable grounds, that the public officer has information that tends to show that the other person's "conduct" is "official misconduct".

[34] Upon that view, s 14(2) applies according to its ordinary meaning to attract the application of s 15 in a case in which a public officer discloses what the public officer honestly believes on reasonable grounds is information that tends to show someone else's "official misconduct", that being the relevant category of "conduct" in which that other person has engaged or may have engaged in terms of s 14(4). The same approach is applicable in relation to each of ss 16, 17(1) and 20.

[35] The appellant's construction avoids surprising results of the respondents' literal construction. One such result is that a prospective whistleblower would be faced with the task of deciding the legal question whether information does, upon an objective analysis, reveal conduct that would be "official misconduct" within s 15, as defined in the complex provisions of ss 14 and 15 of the *Crime and Misconduct Act*. Similar difficulties would be encountered in relation to the other categories of public interest disclosures. That would tend to discourage whistleblowing, contrary to the evident object of the *Whistleblowers Protection Act*. In *Babula v Waltham Forest College*[17] Wall LJ, Thomas and Thorpe LLJ agreeing, reached a similar conclusion with reference to broadly analogous statutory provisions in the *Employment Rights Act* 1996, the meaning of which had been the subject of conflicting decisions. Wall LJ considered that the purpose of the relevant section was to encourage responsible whistleblowing and it would be unrealistic and work against the statutory policy to "expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence".

[36] Another surprising result of a construction which incorporates the essential elements of the respondents' argument is suggested by paragraph 7.33 of the report quoted in

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17 [2007] ICR 1026 at 1045 [80].

[38] of these reasons. It may be illustrated by positing a case in which the public officer discloses information about someone else's acts or omissions but does not disclose other information known to the officer which affects how those acts or omissions should be characterised. For example, a police officer might know that another police officer has engaged in conduct that amounts to an offence which is "official misconduct" upon an objective analysis but also know that the conduct was part of a sanctioned operation by that other police officer that was designed to provide evidence of offences by others. Upon the appellant's construction, the disclosing officer could not obtain the protection afforded to a public interest disclosure under s 15 because that officer could not honestly believe on reasonable grounds that he or she has information that tends to show official misconduct. Upon the respondents' construction, however, the disclosing officer would honestly believe on reasonable grounds that he or she has information that tends to show that the other person engaged in the disclosed conduct and, upon the objective analysis of the disclosed conduct required by the respondents' construction, it would amount to "official misconduct".

[37] The appellant's construction derives powerful support from extrinsic material to which his counsel referred; the *Electoral and Administrative Review Commission Report on Protection of Whistleblowers* dated October 1991 (the "EARC Report"), the report dated 8 April 1992 of the *Parliamentary Committee for Electoral and Administrative Review* ("the Parliamentary Committee Report"), the Explanatory Notes for the *Whistleblowers Protection Bill*, and the second reading speech in the Legislative Assembly. Conversely, the respondents' construction is inconsistent with that material.

[38] One of EARC's functions is to provide reports to the Chairman of the Parliamentary Committee, the Speaker of the Legislative Assembly, and the Premier with a view to achieving and maintaining (amongst other matters) "honesty, impartiality and efficiency in … public administration of the State [and] Local Authority administration".[18] The EARC Report refers to statements in the Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct ("the Fitzgerald Report") recommending protection for whistleblowers upon the footing that "[h]onest public officials" are a major potential source of information needed to reduce public maladministration and misconduct.[19] The EARC Report discusses EARC's recommended protections in terms which are reflected in the appellant's construction of ss 14(2) and 15 of the *Whistleblowers Protection Act*:

> "7.31 Moreover, the public interest in the exposure and correction of illegal or improper conduct is just as well served by an allegation which proves on investigation to be accurate, but which was made purely out of spite, malice or revenge, rather than made with the dominant motive of furthering the public interest. The requirement that disclosures be reasonably based will do more to further the public interest than one which requires a whistleblower to act out of the proper motives, but doesn't require him or her to check the facts. Again, the Commission endorses the comment of Profession Finn that:

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18 See paragraph 1.1 of the EARC Report and 2.9(1) of the *Electoral and Administrative Review Act* 1989.

19 EARC Report paragraph 1.6.

> *"Given that the object of reporting is to have misconduct etc. revealed and remedied, the particular motive of the [whistleblower] – be it altruistic or spiteful – should be a completely irrelevant matter. If the [whistleblower] has made a [disclosure] which would otherwise qualify him or her for protection, that protection should not be lost because of the reasons which inspired the [disclosure]"* (Finn 1991, P.66).

7.32 The test of eligibility for protection which the Commission proposes is contained within each of clauses 10, 11, 12 and 13 of the draft Bill, which impose a requirement that a person disclose information "*that the person honestly believes on reasonable grounds tends to show*" a matter which falls within one (or more) of the categories of public interest disclosure.

7.33 This is basically an objective test requiring that the information disclosed be objectively capable of giving rise to an honest belief that the information provides evidence of a matter falling within the recommended categories of public interest disclosure. The test also imports a subjective element, that of an honest belief. This may import some elements of a good faith requirement, but it has been inserted primarily to cover the instance of a person who discloses part only of the information available to him or her, that part being objectively capable of giving rise to an honest belief in the existence of a matter falling within the categories of public interest disclosure, whereas the information withheld would negative that inference. It is designed to deter persons from mischievously seeking to subject another to the emotional distress of an investigation, when the first mentioned person could not reasonably have an honest belief that illegal or improper conduct had occurred in the light of all the information available to him or her."

[39] Chapter 11 of the EARC Report summarises EARC's recommendations. One of the recommended categories of protected disclosures (in para 11.10(d)) is "conduct that constitutes official misconduct within the meaning of the *Criminal Justice Act*". (The definition of "official misconduct" in s 2.23 of the *Criminal Justice Act*, which was repealed and replaced by the *Crime and Misconduct Act*, is set out in para 3.25 of the same report. The *Criminal Justice Act* did not include a separate definition of "conduct" but its definition of "official misconduct" is to similar effect as the definition in the *Crime and Misconduct Act*.) Importantly, the EARC Report describes as the "two main conditions of eligibility for protection under the recommended scheme":

> "(a) with one exception (noted at para 11.11), a disclosure of information must be made to a proper authority which is in turn bound to observe confidentiality, at least until such time as the disclosure is found to be justified after investigation; and

(b) the person making a disclosure must honestly believe on reasonable grounds that the information disclosed tends to show a matter falling within one or more of the recommended categories of public interest disclosure."

[40] Similarly, paragraph 11.15 of the EARC Report makes the point that, because (with one exception) protection was to be available only for disclosures made to a proper authority, "the scheme can afford to encourage the disclosure of information which ought to be investigated further in the interests of exposing and correcting illegal or improper conduct, rather than information which constitutes an objectively accurate disclosure of illegal or improper conduct."

[41] In Part 2 of the draft *Whistleblowers Protection Bill* 1992 prepared by EARC, which is an appendix to the EARC Report, cl 9 provides that the object of the Part containing that provision is to set out the various kinds of disclosures that may be made under the Act. In the same part, each of cls 10 – 13 commences, "[i]f a person has information that the person honestly believes on reasonable grounds tends to show". Thereafter each clause describes a category of conduct or danger in respect of which the clause provides that "the person may disclose the information to" a "proper authority" or, in the case of cl 13 (which refers to a serious, specific and immediate danger to the health or safety of the public) to "any person". For example, the original source of s 15 of the *Whistleblowers Protection Act*, cl 10 of the draft Bill, provides:

> "If a person has information that the person honestly believes on reasonable grounds tends to show that another person has engaged, is engaging, or proposes to engage, in conduct constituting –
>
> (a) an offence; or
>
> (b) official misconduct;
>
> the person may disclose the information to a proper authority."

[42] The role of the Parliamentary Committee identified in the introduction to its report was to examine the reports of EARC and report to the Legislative Assembly on any matter appearing in or arising out of such reports. Paragraph 3.1.2 of the Parliamentary Committee Report sets out in 14 dot points what is stated to be the "general thrust of EARC's recommendations", and paragraph 3.1.3 concludes that, "[i]n general, the Committee is satisfied that EARC's recommendations are appropriate and will provide protection to persons making public interest disclosures in Queensland". The same paragraph adds that further discussion is required in relation to a number of issues, the Committee's recommendations regarding those issues are summarised in Appendix E, and that, "in all other respects the Committee endorses EARC's recommendations and the provisions of the draft Bill." The balance of the report, including Appendix E, do not advert to matters that have any bearing upon the construction question in issue in this appeal.

[43] It is submitted for the respondents that the third of the 14 dot points in paragraph 3.1.2 of the Parliamentary Committee Report supports the respondents' construction:

> "To protect "public interest" disclosures made to "proper authorities" of –

- [the report here describes three categories of public interest disclosures]
- conduct that constitutes official misconduct within the meaning of the *Criminal Justice Act* 1989
- [the report here describes two other categories of public interest disclosures]"

[44] The respondents' point is that the recommendation concerning "official misconduct" does not advert to the protection of public interest disclosures made to proper authorities for people who believe that they have information that constitutes official misconduct. The same point might be made about each other category of public interest disclosures described in the same dot point. It is evident, however, that this part of the report merely described the categories of public interest disclosures recommended by EARC. It is the sixth dot point in the same paragraph which refers to the directly relevant recommendation by EARC. That dot point states that "to attract protection, disclosures be made in circumstances in which the whistleblower honestly believes, on reasonable grounds, that the information disclosed tends to show a matter falling within one or more of the recommended categories of public interest disclosure…" That aspect of EARC's recommendations was plainly endorsed by the Parliamentary Committee.

[45] The Explanatory Notes for the *Whistleblowers Protection Bill* 1994 explain why the legislation was necessary by reference to the recommendation made in 1989 in the Fitzgerald Report "that legal protection be given to honest public officials who expose wrongdoing" and refer to the EARC Report. The notes about sub cl 14(2) and cl 15 of the Bill accord with the appellant's construction of the corresponding sections of the *Whistleblowers Protection Act*:

> "Sub clause 14(2) establishes a test concerning the degree of accuracy required of disclosures and the state of mind of the whistleblower. A disclosure of information made under clauses 15-20 must be made on the basis that the person making the disclosure honestly believes on reasonable grounds that the information tends to show conduct referred to in the relevant disclosure category. For example, a person purporting to make a disclosure under clause 17 would be protected if it could be demonstrated that he or she honestly believed on reasonable grounds that the information disclosed tended to show negligent or improper management resulting in a substantial waste of public funds.
>
> The legislation does not require that the information disclosed be objectively accurate but does require that it be objectively capable of giving rise to a belief that the information provided evidence of a matter falling within the public interest disclosure category.
>
> The "reasonable" test, recommended by EARC, is intended to discourage purely speculative allegations while also recognising that in making a disclosure a whistleblower may not be aware of all facts relevant to the allegation made and that the disclosure may be based on less than perfect knowledge and information."
>
> …

> "*Clause 15* allows a public officer to make disclosures to appropriate public sector entities (including the CJC) about official misconduct as defined in the Bill's Dictionary (see note under Dictionary)."

[46] The *Whistleblowers Protection Bill* 1994 included clauses in the form of ss 14 – 20 of the *Whistleblowers Protection Act* as it was enacted. Provisions in the same form remained in the version of that Act in force when the appellant sent his letter. The passage quoted from the Explanatory Notes in the preceding paragraph makes it plain that the changes from the relevant provisions of the draft *Whistleblowers Protection Bill* 1992 prepared by EARC which were made in the *Whistleblowers Protection Bill* 1994 did not reflect any change in policy. The description in the first quoted paragraph of the Explanatory Notes of the effect of sub cl 14(2) in relation to cls 15 – 20 corresponds with the descriptions in the EARC Report and the Parliamentary Committee Report of the requirement that a person disclose information the person believes on reasonable grounds tends to show a matter falling within the relevant public interest disclosure category. It appears that the introduction of cl 14 in the *Whistleblowers Protection Bill* 1994 was merely a drafting device designed to avoid the repetition of statements to the same effect of that provision in each of cls 15 – 20.

[47] The *Whistleblowers Protection Bill* and the Explanatory Notes were presented to the Legislative Assembly on 19 October 1994.[20] In the second reading speech, the then Premier referred to the history of the Bill and outlined its key features. After referring to "the types of disclosures that can be made under this Bill", the Premier referred to the Bill enabling public officers to disclose official misconduct as defined by the *Criminal Justice Act*. He observed that to attract the protections in the Bill, disclosures must be made to appropriate public sector authorities and that:

> "Any balanced whistleblower scheme must take into account a variety of competing interests. These include the need to expose a wrongdoing, the need to protect the whistleblower and the need to give proper – and I stress "proper" – consideration to the rights of those named in the disclosures. It must be emphasised that the Bill does not require that the disclosures be substantiated in order to attract the protections. It is sufficient for the disclosure to have been made honestly and on reasonable grounds."

Those descriptions of the Bill accord with the more detailed statements to the same effect in the other extrinsic material.

[48] It remains to refer to a decision of Andrews SC DCJ mentioned by the primary judge, *Gardem v Edmistone*.[21] Andrews SC DCJ, like the primary judge and the judge who set down the separate question for determination in this matter, did not have the benefit of the arguments about the construction question or the extrinsic material which I have discussed and his Honour's reasons do not analyse the effect upon s 15 of s 14 of the *Whistleblowers Protection Act*. The case is not a persuasive authority upon the construction question in issue in this appeal.

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20 In the second reading speech, Hansard, 19 October 1994, p 9689, at 9690 and 9691.

21 [2018] QDC 118 at [202] and [206].

[49] Ground 4 should be upheld. The consequence of that conclusion is that the separate question should have been answered "inappropriate to answer" and the primary judge's order dismissing the proceeding should be set aside.

Ground 1: a breach of the trust placed in the police officers as police officers or a misuse of material acquired in connection with A and B's performance of their functions as police officers: Crime and Misconduct Act, s 14(b)(ii) and s 14(b)(iii)

[50] In [19] of these reasons I mentioned that a factor in favour of this court adjudicating upon the new point raised on appeal by ground 4 is my conclusion that, in the way in which the separate question was litigated in the Trial Division, the separate question should have been answered "yes" and the appellant's proceeding should not have been dismissed. The following are my reasons for that conclusion. It therefore should clearly be understood that this section of my reasons should not be construed as an endorsement of the construction of the *Whistleblowers Protection Act* with reference to which the separate question was argued and answered in the Trial Division.

[51] In that respect the appellant's case at the hearing of the separate question was that the conduct of A and B described in each of the second and fourth paragraphs of the letter was a "public interest disclosure" because it disclosed information about those police officers' conduct which was "official misconduct" as defined in s 15 of the *Crime and Misconduct Act* in that:

> (a) the conduct was:
>
> > (i) a breach of the trust placed in A and B as police officers (s 14(b)(ii)); or
> >
> > (ii) a misuse of "material" (the police car mentioned in the letter) "acquired … in connection with the performance of" A and B's functions as police officers (s 14(b)(iii)), and
>
> (b) the conduct "could, if proved" be:
>
> > (i) a criminal offence (s 15(a)); or
> >
> > (ii) a disciplinary breach providing reasonable grounds for terminating A and B's services as police officers (s 15(b)).

[52] The element in (b) was satisfied by the primary judge's finding that, if the second and fourth paragraphs of the appellant's letter described what was capable of being "conduct" as defined in s 14 of the *Crime and Misconduct Act*, that conduct was capable of being "official misconduct" within the meaning of s 15(a) of the same Act because the second paragraph of the letter does describe conduct that could, if proved, be a criminal offence, namely, an offence under s 227(1)(a) of the *Criminal Code* of doing an indecent act in a place to which the public are permitted to have access.[22] The appellant's case failed because the primary judge found that neither (i) nor (ii) of (a) was satisfied.

[53] It is necessary to address only the primary judge's rejection of the appellant's case in (a)(i). In that respect the primary judge held that the appellant's letter did not

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22 Reasons [59], with reference to [48] – [58].

describe a breach of trust by A and B as police officers (under s 14(b)(ii) of the definition of "conduct" in the *Crime and Misconduct Act*) for the following reasons:

(a) With reference to *Re Watson*,[23] *Greiner v Independent Commission Against Corruption*,[24] *Re Newnham*,[25] and a dictionary definition of "trust" as "the obligation or responsibility imposed on someone in whom confidence is placed or authority is vested, or who has undertaken to carry out a particular duty or role",[26] the primary judge concluded that s 14(b)(ii) required for its application "some relation between the conduct, and the performance of the functions or exercise of the powers conferred on the police officer (or other holder of a relevant appointment)".[27]

(b) That relation was not apparent in the conduct described in the second or fourth paragraphs of the letter. Whilst the conduct in the second paragraph of the letter, at its highest, might amount to "police misconduct" defined in Schedule 2 to the *Crime and Misconduct Act* as comprehending conduct that was "improper or unbecoming a police officer" or that does not meet "the standard of conduct the community reasonably expects of a police officer", it did not involve a breach of the trust placed in A and B as police officers. The conduct had no connection with their role as police officers or the exercise of their functions or powers, and the fact that they were using the car for a reason unrelated to their professional duties at the time of their sexual act was not sufficient to raise their "misconduct" to the level of "official misconduct".[28]

(c) There was no basis for a conclusion that the conduct described in the fourth paragraph of the letter – of a police officer who may or may not have been on a break during night work meeting with another police officer, who may or may not have been on duty to have coffee at a service station outside their district – could be said to involve a breach of trust placed in them as police officers.[29]

[54] The respondents' arguments endorse the primary judge's analysis. For the following reasons, which substantially accept some of the many arguments advanced for the appellant upon this issue, I respectfully prefer a different view.

[55] As the primary judge noted, there was no detailed consideration of the question in *Re Newnham*[30] and it was observed in *Greiner v Independent Commission against Corruption*[31] only that the similar phrase "breach of public trust" <u>included</u> the misuse of office or the powers of an office for a purpose for which they were not given.

[56] *Re Watson* concerned the meaning of the expression "a breach of the trust placed in a person by reason of his holding the appointment" in the definition of "official

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23 [1997] 1 Qd R 340 at 344 (Thomas J).
24 (1992) 28 NSWLR 125 at 165 (Mahoney JA).
25 [1993] 1 Qd R 502.
26 Oxford English Dictionary online.
27 Reasons [31], with reference to [26] – [30].
28 Reasons [35].
29 Reasons [36].
30 [1993] 1 Qd R 502.
31 (1992) NSWLR 125 at 165.

misconduct" in s 32 of the *Criminal Justice Act* 1989, from which the definition in the *Crime and Misconduct Act* was derived. Mr Watson was found guilty of two charges of official misconduct and a misconduct tribunal ordered that he be dismissed from the Queensland Police Service. The charges were that Mr Watson misused his police service revolver, first, by taking the loaded revolver from its holster and pointing it at a female police officer and, secondly, in the course of a visit by Mr Watson and another police officer to a third police officer's unit, pointing the loaded police revolver at the third police officer and cocking it. Thomas J rejected a submission that the conduct of the police officer did not reveal any breach of trust placed in him by reason of his membership of the Queensland Police Service. Thomas J's reasons for that conclusion are contained in the following passage:[32]

> "Police officers are vested with considerable powers and it is a matter of public importance, and I think public trust, that police officers do not abuse those powers. Among the exceptional powers of police officers is the right to carry arms, and of course their display of public power must be protected by disciplined conduct and training respecting the use of such arms whether in the public eye or not. Counsel did not suggest that there are any directly applicable judicial statements, but reference was made to general observations of Demack J in *Re Bowen* [1996] 2 Qd R 8 and of Brennan J in *Police Service Board v Morris* (1985) 156 CLR 397, 412. In the latter case Brennan J observed that—
>
> > "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."
>
> The words "breach of the trust placed in the person by reason of his holding the appointment" is not a term of art, and should be given its ordinary meaning. When a police officer assaults a member of the public or abuses his powers, the natural response of both the public and, when the occasion arises, the sentencing court, is to describe such conduct as damaging the public trust that is placed in the force. I was by way of example referred to the sentencing remarks of Judge Skoien (*R v Cannon* 28 May 1991) which include such an observation and a finding that the offender had betrayed the public trust that he had sworn to serve. The relevant words in s 32 do not require that the breach be committed in the face of the public. It seems to me that the privilege of having arms is a particularly sensitive one which calls for serious personal discipline, and that breach of such discipline is capable of amounting to a breach of the trust placed in a police officer by reason of his position. The threatening of a fellow police officer with a service firearm is in my view capable of involving such a breach of trust."

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32 [1997] 1 Qd R 340 at 344.

[57] It is notable that Thomas J considered that the conduct of a police officer was appropriately described as damaging the public trust placed in the police force not only when a police officer "abuses his powers", but also when a police officer "assaults a member of the public". That view finds support both in the quoted passage of Brennan J's reasons in *Police Service Board v Morris* and in *Re Bowen*. The latter case involved a challenge to a penalty imposed upon a police officer for three charges of official misconduct, which concerned the officer's disclosure of confidential information, his false denial to an officer of the Criminal Justice Commission that he had made that disclosure, and his conduct in furnishing a signed witness statement to the same effect. Demack J observed of the second charge that when the officer lied "he did something which erodes public confidence in the police service, and which also affects the trust other members of the police service have in each other."[33] Demack J made similar observations about the third charge.

[58] Brennan J also observed in *Police Service Board v Morris* that "[t]he 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" as well as "upon their assiduous performance of duty and upon the judicious exercise of their powers". [34] With reference to the ordinary meaning of "trust" reflected in the definition in [53](a) of these reasons, the responsibilities imposed upon police officers are reflected in the statutory functions of the Queensland Police Service which, as the appellant submits, include the prevention of crime, the detection of offenders and bringing of offenders to justice, and upholding the law generally;[35] as Morrison JA observed in *Nugent v Commissioner of Police (Qld)*[36] a police officer owes the duties of a constable at common law[37] to maintain the King's peace for the benefit of the citizenry, bringing to justice those by whom it is infringed. Those distinctive responsibilities of police officers explain why various forms of serious misconduct by police officers, including serious offences, have been treated by courts in various contexts as a "breach of trust" within the ordinary meaning of that expression: for example, in addition to Thomas J's remark in *Re Watson* about an assault upon a member of the public by a police officer and Demack J's observations in *Re Bowen*, similar remarks were made in *R v Reid*[38] and *Ellis v Harvey*.[39]

[59] For present purposes it is sufficient to observe that a serious criminal offence committed by a police officer that is apt to undermine public confidence in the integrity of that police officer is appropriately described as "a breach of the trust placed in" that person as a member of the police force. The appellant's letter asserted conduct of that kind, at least in so far as it asserted conduct by two police officers the primary judge found could, if proved, amount to the criminal offence of doing an indecent act in a place to which the public are permitted to have access, which offending, the second paragraph of the letter conveys, was observed by two members of the public who were police officers and involved A using a police car apparently entrusted to him for use in the discharge of his duties as a senior police officer.

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33 [1996] 2 Qd R 8 at 11.
34 (1985) 156 CLR 397 at 412.
35 *Police Service Administration Act* 1990, s 2.3(c), (d), (e).
36 (2016) 261 A Crim R 383 at [62] see also per McMurdo P at [3].
37 *Police Service Administration Act* 1990, s 3.2.
38 [2004] QCA 9 at 5 (Davies JA, McMurdo P and McPherson JA agreeing).
39 [2004] TASSC 83 at [14] (Evans J).

[60] Upon the premise explained in [50] of these reasons, it follows that the separate question should have been answered "yes" and the appellant's proceeding should not have been dismissed upon the basis that at least the second paragraph of the letter, which the primary judge held described conduct that could, if proved, be the criminal offence under s 227(1)(a) of the *Criminal Code* of doing an indecent act in a place to which the public are permitted to have access, did amount to information about a breach of the trust placed in A and B as police officers, within the meaning of s 14(b)(ii) of the *Crime and Misconduct Act*.

Proposed orders

[61] The appeal should be allowed, the orders made in the Trial Division on 3 and 13 May 2019 should be set aside, and it should be ordered that the answer to the separate question is "It is not appropriate to answer the question". As requested by the parties, I would order that, unless the Court is earlier notified of a consent order about costs, the parties have leave to exchange and lodge with the registry within 14 days of the publication of these reasons submissions in writing, not exceeding three pages, as to the appropriate costs orders.

[62] **BUSS AJA:** I agree with Fraser JA.

[63] **HENRY J:** I agree with Fraser JA.