SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of The Queensland Police Service v O'Keefe & Ors* [2015] QSC 335
PARTIES:	**COMMISSIONER OF THE QUEENSLAND POLICE SERVICE** (applicant) **v** **CHRISTOPHER LAWRENCE O'KEEFE** (first respondent) **NATHAN IRWIN** (second respondent) **BARRY WELLINGTON** (third respondent) **JOSEPH REGINALD HILDRED** (fourth respondent) **STEPHEN FLANAGAN** (fifth respondent)
FILE NO:	BS 5741 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	14 August 2015
JUDGE:	Martin J
ORDER:	**Each of the respondents is not entitled to make a request for a statement of reasons under s 32 of the *Judicial Review Act* 1991 in respect of their standing down or suspension (as the case may be) by the applicant.**
CATCHWORDS:	POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND – where the respondents were stood down or suspended from duty – where the respondents sought a statement of reasons under s 32 of the *Judicial Review Act* 1991 (JRA) – where the applicant seeks orders under s 39 of the JRA that the respondents are not entitled to make such a request – whether the decision to stand down or suspend the respondents is a

	decision in relation to the investigation of persons for corruption under the *Crime and Commission Act* 2001
	Crime and Corruption Act 2001, s 15, Schedule 2 *Judicial Review Act* 1991, s 31(b), s 32, s 39, Schedule 2 *Police Service Administration Act* 1990, s 6.1(a), s 6.1(b)
	Hatfield v Health Insurance Commission (1987) 15 FCR 487 *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 *Rucker v Stewart* [2013] QSC 182 *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510
COUNSEL:	JM Horton QC with AS Marinac for the applicant PJ Davis QC for the respondents
SOLICITORS:	Public Safety Business Agency for the applicant Police Union Legal Group for the respondents

[1] Each of the respondents is a member of the Queensland Police Service. Each of them has been stood down or, in the case of Mr O'Keefe, suspended, from the Service. Those actions were taken by the applicant (the Commissioner) under s 6.1(a) or s 6.1(b) of the *Police Service Administration Act* 1990 (PSAA). Each respondent has sought a statement of reasons, under the *Judicial Review Act* 1991 (JRA), for those actions.

[2] In this application, the Commissioner seeks orders under s 39 of the JRA that the respondents are not entitled to make such a request.

[3] The Commissioner submits that the decisions he made fell within an exception under the JRA.

The issues

[4] The Commissioner submits that a decision to stand down or suspend a police officer under s 6.1 of the PSAA is a "decision in relation to the investigation of persons for corruption under the *Crime and Corruption Act*" for the purposes of the exception in s 31(b) of the JRA.

[5] Consideration of that argument requires consideration of s 6.1 of the PSAA.

The *Police Service Administration Act* 1990

[6] Section 6.1 of the PSAA provides a power to stand down or suspend:

> "**6.1 Power to stand down and suspend**
>
> (1) If—

(a) it appears to the commissioner, on reasonable grounds that—

(i) an officer is liable to be dealt with for corrupt conduct; or

(ii) an officer is liable to disciplinary action under section 7.4; or

(iii) the efficient and proper discharge of the prescribed responsibility might be prejudiced, if the officer's employment is continued; or

(b) an officer is charged with an indictable offence; or

(c) an officer is unfit for reasons of health to such an extent that the officer should not be subject to the duties of a constable;

the commissioner may—

(d) stand down the officer from duty as an officer and direct the person stood down to perform such duties as the commissioner thinks fit; or

(e) suspend the officer from duty.

(2) The commissioner may at any time revoke a standing down or suspension imposed under subsection (1)."

The term "corrupt conduct" bears the same meaning in the PSAA as it has in the *Crime and Corruption Act* 2001 (CCA).[1]

The exception

[7] Part 4 of the JRA deals with reasons for decisions. Section 31 defines the decisions to which Part 4 applies in this way:

"**31 Decision to which part applies**

In this part—

decision to which this part applies means a decision that is a decision to which this Act applies, but does not include—

(a) a decision that includes, or is accompanied by a statement, giving the reasons for the decision; or

(b) a decision included in a class of decisions set out in schedule 2."

[8] The Commissioner submits that his decisions come within clause 3(1) of Schedule 2 of the JRA. That subclause provides:

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1 Section 1.4 PSAA

"Decisions in relation to the investigation of persons for corruption under the *Crime and Commission Act* 2001".

[9] The word "corruption" as used in that subclause is defined in Schedule 2 of the CCA to mean:

"Corrupt conduct or police misconduct".

[10] "Corrupt conduct" is defined in s 15 of the CCA as follows:

"**15 Meaning of *corrupt conduct***

(1) ***Corrupt conduct*** means conduct of a person, regardless of whether the person holds or held an appointment, that—

(a) adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of—

(i) a unit of public administration; or

(ii) a person holding an appointment; and

(b) results, or could result, directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that—

(i) is not honest or is not impartial; or

(ii) involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or

(iii) involves a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment; and

(c) is engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person; and

(d) would, if proved, be—

(i) a criminal offence; or

(ii) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment.

(2) Without limiting subsection (1), conduct that involves any of the following could be corrupt conduct under subsection (1)—

(a) abuse of public office;

(b) bribery, including bribery relating to an election;

(c) extortion;

(d) obtaining or offering a secret commission;

(e) fraud;

(f) stealing;

(g) forgery;

(h) perverting the course of justice;

(i) an offence relating to an electoral donation;

(j) loss of revenue of the State;

(k) sedition;

(l) homicide, serious assault or assault occasioning bodily harm or grievous bodily harm;

(m) obtaining a financial benefit from procuring prostitution or from unlawful prostitution engaged in by another person;

(n) illegal drug trafficking;

(o) illegal gambling."

[11] "Police misconduct" is defined in schedule 2 of the CCA to mean:

"… conduct, other than corrupt conduct, 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."

[12] I return to cl 3 of Schedule 2 of the JRA. In order to be covered by the exception, the decision must be:

(a) in relation to

(b) the investigation of persons

(c) for corruption under the *Crime and Commission Act* 2001.

[13] Each part of that description must be considered.

"in relation to"

[14] I turn, first, to the meaning of "in relation to". The respondents rely on the decision of Davies J in *Hatfield v Health Insurance Commission*[2]. In that case, the legislation being considered was the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (ADJR)

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[2] (1987) 15 FCR 487.

which contains a similar exclusion to the JRA. Section 13(11) of the ADJR provides that the section does not apply to a decision included in any of the classes of decision set out in Schedule 2 of the Act. Schedule 2(e) specifies:

> "(e) decisions **relating to** the administration of criminal justice, and, in particular—
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> (i) decisions **in connection with the investigation,** committal for trial or prosecution of persons for any offences against a law of the Commonwealth or of a Territory;
> …" (emphasis added)

[15] The relevant circumstances in *Hatfield* were summarised by Davies J in this way:

> "The decision in question had some connection with the investigation of a person or persons for an offence or offences against a law of the Commonwealth. The decision arose out of an inquiry into Dr Hatfield's entitlement to the medical benefits claimed. That inquiry encompassed an inquiry into possible criminal action. In the course of that enquiry, warrants were obtained pursuant to the *Crimes Act*. As a result of consideration of documents obtained pursuant to those warrants as well as to other information held, Mr McAnulty decided to refer to the Director of Public Prosecutions the question of the prosecution of Dr Hatfield and possibly of other persons and of the recovery from Dr Hatfield of medical benefits previously paid. At the same time Mr McAnulty decided that the currently held claims and future claims for item 793 benefits in respect of referrals from the Edelsten Group would not be paid.
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> Thus, the material obtained pursuant to warrants issued in the course of that investigation formed part of the material which Mr McAnulty took into account in arriving at his decision. Moreover, one part of the reasoning process was common to all the decisions taken and that was the crucial point that Dr Hatfield was a member of the Edelsten Group."[3]

[16] His Honour then went on:

> "However, the terms 'decisions relating to the administration of criminal justice' and 'decisions in connection with the investigation … of persons for any offences against a law of the Commonwealth' are **not to be interpreted as encompassing all decisions found to have any connection whatever with the administration of criminal justice or the investigation of persons for offences**. In *Collins and Dunn v Minister for Immigration and Ethnic Affairs (No 3)* (1982) 5 ALN No 3, Lockhart J held that a decision by the Minister for Immigration and Ethnic Affairs on a reconsideration of his earlier decision to deport a person from Australia was not a decision in connection with the "conduct of proceedings in a civil court' (see par (f) of Sch 2) notwithstanding that there were proceedings on foot under the *Administrative*

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3 Ibid at 491-2.

Decisions (Judicial Review) Act challenging the Minister's earlier decision. Lockhart J held that the nexus between the reconsideration and the judicial review proceedings was essentially only temporal. Likewise, in *Murphy v KRM Holdings Pty Ltd* (1985) 8 FCR 349, Fox, Beaumont and Pincus JJ held that the seizure by customs officials of goods imported into Australia and believed on reasonable grounds to be forfeited was not a decision falling within pars (e) and (f) of Sch 2. At 354 Pincus J, with whose reasons Beaumont J agreed, said:

> 'It follows that decisions taken in connection with the investigation or prosecution of persons for offences under s 234(1) of the *Customs Act 1901* (Cth) are within par (e)(i) of Sch 2 of the Judicial Review Act. Nevertheless, on the particular facts of this case, **the subparagraph should be held inapplicable, as it was by the learned primary judge. That is so because the most that was proved was that there would have been no seizure had the department not been satisfied that there was evidence of commission of an offence under s 234(1). No doubt a prosecution may follow on from the seizure. It was not said, however, nor is it necessarily the case, that the seizures had to do with the process of investigation; they may equally well have simply had the purpose of reducing into possession the goods claimed to be forfeited**. It does not appear to be necessary or desirable to attempt to lay down a rule as to the sort of connection between a seizure and an investigation which is necessary to be shown in order to bring the matter within par (e)(i) of Sch 2. To dispose of the present matter**, it is enough to say that there was not sufficient evidence to establish the requisite connection.** In other factual situations, seizures of goods unlawfully imported may well be so connected with investigation of offences as to fall within the relevant subparagraph.'

The words of Pincus J which are of greatest import were: 'It was not said, however, nor is it necessarily the case, that the seizures had to do with the process of investigation …' His Honour was pointing to the fact that **par (e) uses the words 'relating to' not primarily with respect to matters which are peripheral to the administration of criminal justice or to the investigation of persons for offences but to matters which form part of the process of the administration of justice and of the investigation of persons for offences**.

In my opinion par (e) refers to decisions which are part of the administration of justice and part of the investigation of persons for offences and also, I would accept, to decisions that are ancillary or incidental thereto or made in assistance thereof. The paragraph does not, however, encompass decisions which are not made in the course of the administration of justice or the investigation of persons for offences but which are simply connected in an indirect manner therewith. Decisions of the latter type do not have the necessary relationship."[4] (emphasis added)

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[4] Ibid at 492-3.

[17] The reasoning of Davies J is, with respect, consistent with decisions of high authority. For example, in *O'Grady v Northern Queensland Co Ltd* [5], Toohey and Gaudron JJ held that the phrase ''in relation to'' is an expression of ''broad import,'' although its precise ambit is confined by the context in which it appears[6]. In the same case, McHugh J said:

> ''The prepositional phrase 'in relation to' is indefinite. But, subject to any contrary indication derived from its context or drafting history, it requires no more than a relationship, whether direct or indirect, between two subject matters.''[7]

[18] The importance of context was emphasised by French CJ and Hayne J in *Travelex Ltd v Commissioner of Taxation* [8]:

> "[25] It may readily be accepted that 'in relation to' is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ. It may also be accepted that 'the subject matter of the inquiry, the legislative history, and the facts of the case' are all matters that will bear upon the judgment of what relationship must be shown in order to conclude that there is a supply "in relation to" rights."

[19] The context of the exception in cl 3 of Schedule 2 of the JRA is not as easy to discern as in some instances where there is a progression of like concepts in, for example, a particular part of a statute. In the confines of Schedule 2 there are a number of disparate topics covered. Some of them relate to criminal or quasi-criminal matters. In those cases, though, there is a thread which joins them and that thread is the preservation of appropriate secrecy and confidentiality. Clause 1, for example, excludes decisions in relation to the investigation of persons for offences. Clauses 4 and 5 exclude decisions made under specific sections of the CCA. And cl 5A excludes decisions about fitness etc. under the *Weapons Act* 1990 if they were made on the basis of criminal intelligence.

"the investigation of persons"

[20] In order to determine if the decisions to stand down were made "in relation to the investigation of persons …" it is now necessary to consider the issue of whether it has been established that there were such investigations. The respondents argue that there is no evidence of any investigations of the respondents for corruption under the CCA. There is, in each of the stand down letters, a reference to an investigation. But, say the respondents, there is no evidence as to the nature of those investigations.

[21] In each of the "stand down" letters the Commissioner (through his delegate) informs the recipient that:

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5 (1990) 169 CLR 356.
6 Ibid at 374.
7 Ibid at 376.
8 (2010) 241 CLR 510.

> "It has been brought to my notice by the Acting Chief Superintendent, Ethical Command (the Chief Superintendent) that investigations have been conducted into allegations that you:
>
> …"

[22] It would defeat the intention of cl 3(1) if, in order to be relieved of giving reasons, the decision-maker had to reveal the nature or extent of investigations which had been or were being or were to be undertaken. If the Commissioner is relieved of the obligation to give reasons for standing someone down then it would be contrary to the purpose of cl 3(1) to require that the investigations which founded, at least in part, the decision to stand down be exposed.

"for corruption under the *Crime and Commission Act* 2001"

[23] In the case of each respondent (and also Mr O'Keefe's suspension) the allegations made fall within the definition of "corrupt conduct" or "police misconduct" as set out above. This concerns the third step in the process referred to in [12] above.

The decision to stand down

[24] The nature of a decision to stand down was considered by Jackson J in *Rucker v Stewart*[9]:

> "[19] ... A power to stand down is a familiar interim process in the case of an unresolved complaint against a person who is employed in an organisation. The purpose of the power is to create a holding position during the period of the resolution of the complaint. It is completely counter-intuitive to suggest that such a power is engaged only after the determination of the matter. That would undermine the purpose of the power."

[25] The power afforded the Commissioner to stand down a police officer may be exercised for a number of reasons and, in these cases, it has been identified as having been used after receipt of information about investigations encompassing matters which come within the definition of corruption under the CCA. Those decisions are "in relation" to those investigations because they are, at the least, "ancillary or incidental thereto or made in assistance thereof".[10]

[26] The decision of the Commissioner, in each case, falls within the exception provided for in cl 3(1) of Schedule 2 of the JRA.

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9 [2013] QSC 182.

10 *Hatfield* at 493.

Orders

[27] Each of the respondents is not entitled to make a request for a statement of reasons under s 32 of the JRA in respect of their standing down or suspension (as the case may be) by the applicant.