SUPREME COURT OF QUEENSLAND

CITATION:	*Loft v Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs* [2018] QSC 96
PARTIES:	**CHRISTOPHER DAVID LOFT** (applicant) **v** **MINISTER FOR LOCAL GOVERNMENT, MINISTER FOR RACING AND MINISTER FOR MULTICULTURAL AFFAIRS** (respondent)
FILE NO/S:	No 2157 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application for a statutory order of review
ORIGINATING COURT:	Supreme Court at Brisbane
ORDERS:	4 May 2018
REASONS:	10 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2018; applicant's supplementary written submissions received on 20 April 2018; respondent's supplementary written submissions received on 30 April 2018
JUDGE:	Burns J
ORDER:	**The orders of the court are that:** **1. The application is dismissed;** **2. The applicant shall pay the respondent's costs of the application to be assessed on the standard basis.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – GENERALLY – where the Governor in Council dismissed the applicant as Mayor of the Fraser Regional Coast Council on the recommendation of the respondent under the *Local Government Act* 2009 (Qld) – where the respondent recommended the applicant's dismissal on the basis of 11 findings of misconduct or inappropriate conduct as well as a complaint regarding the disclosure of an email to a journalist – where the applicant seeks that the decision of the Governor in Council be set aside – where the applicant seeks a declaration that the *Local Government (Fraser Coast*

Regional Council – Dismissal of Councillor) Amendment Regulation 2018 (Qld) is invalid

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS –where the Governor in Council dismissed the applicant as Mayor of the Fraser Regional Coast Council on the recommendation of the respondent under the *Local Government Act* 2009 (Qld) – where the respondent recommended the applicant's dismissal on the basis of 11 findings of misconduct or inappropriate conduct as well as a complaint regarding the disclosure of an email to a journalist – where the complaint regarding disclosure of the email was before the Local Government Remuneration and Discipline Tribunal – whether the respondent failed to take into account that the complaint was "unproven" – whether the respondent was precluded from acting on the complaint because it was before the Tribunal

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – where the Governor in Council dismissed the applicant as Mayor of the Fraser Regional Coast Council on the recommendation of the respondent under the *Local Government Act* 2009 (Qld) – where the respondent recommended the applicant's dismissal on the basis of 11 findings of misconduct or inappropriate conduct as well as a complaint regarding the disclosure of an email to a journalist — where disciplinary findings regarding "previous inappropriate disclosures" by the applicant were taken into account by the respondent – whether the respondent considered whether the disclosed information was confidential – whether the respondent considered whether the applicant knew or ought reasonably to have known that the disclosed information was confidential – whether the respondent improperly took the applicant's "previous inappropriate disclosures" into account – whether the complaint regarding disclosure of the email was wrongly characterised as a breach of s 171(3) of the *Local Government Act* 2009 (Qld) and as amounting to misconduct

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the Governor in Council dismissed the applicant as Mayor of the Fraser Regional Coast Council on the recommendation of the respondent under the *Local Government Act* 2009 (Qld) – where the respondent recommended the applicant's dismissal on the basis of 11 findings of misconduct or inappropriate conduct as well as a complaint regarding the disclosure of an email to a journalist –where the applicant made submissions to the respondent that

the complaint regarding disclosure of the email was "unproven" and before the Tribunal – whether the respondent considered the applicant's submissions – whether the respondent failed to give proper, genuine and realistic consideration to the applicant's submissions – whether the respondent breached the rules of natural justice

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – OTHER CASES – where the Governor in Council dismissed the applicant as Mayor of the Fraser Regional Coast Council on the recommendation of the respondent under the *Local Government Act* 2009 (Qld) – where the respondent recommended the applicant's dismissal on the basis of 11 findings of misconduct or inappropriate conduct as well as a complaint regarding the disclosure of an email to a journalist – where the respondent made a finding that there was a real prospect that the applicant may engage in similar conduct in the future if action was not taken against him – where the respondent made a finding that the applicant's behaviour had damaged and continued to damage the standing of, regard for and confidence of the public in the Council, the position of Mayor of the Council, the position of councillor of the Council and the system of local government generally – whether there was evidence or other material to justify those findings

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the Governor in Council dismissed the applicant as Mayor of the Fraser Regional Coast Council on the recommendation of the respondent under the *Local Government Act* 2009 (Qld) – where the respondent recommended the applicant's dismissal on the basis of 11 findings of misconduct or inappropriate conduct as well as a complaint regarding the disclosure of an email to a journalist – where the respondent formed the belief that the applicant had seriously and continuously breached the local government principles – where the respondent formed the belief that the applicant was incapable of performing his responsibilities – whether the exercise of power dismissing the applicant was so unreasonable that no reasonable person could so exercise the power

Constitution of Queensland 2001 (Qld), s 70, s 71
Judicial Review Act 1991 (Qld), s 18, s 20, s 23, s 24, s 30, s 53
Local Government Act 2009 (Qld), s 3, s 4, s 8, s 9, s 12, s 113, s 114, s 120, s 121, s 122, s 122, s 123, s 124, ss 169 – 175, ss 176 – 182, s 183, s 244
Local Government Electoral Act 2011 (Qld), s 24
Local Government (Fraser Coast Regional Council –

Dismissal of Councillor) Amendment Regulation 2018 (Qld), reg 3

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, cited
Craig v South Australia (1995) 184 CLR 163, cited
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531, cited
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611, cited
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 92 ALJR 248, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525, cited
Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); ex parte Applicant S154/2002 (2003) 201 ALR 437, cited

COUNSEL: S A McLeod with M J Forrest for the applicant
D O'Brien QC with E Longbottom for the respondent

SOLICITORS: F C Lawyers for the applicant
Crown Solicitor for the respondent

[1] In March 2016, the applicant, Christopher David Loft, was duly elected as Mayor (and a councillor) of the Fraser Coast Regional Council for a term of four years.

[2] On 6 February 2018, the respondent Minister recommended to the Governor in Council that the applicant be dismissed from office. That recommendation was made pursuant to s 122 of the *Local Government Act* 2009 (Qld).[1] On 15 February 2018, the Governor in Council decided to give effect to the respondent's recommendation and, in consequence, the applicant was dismissed from office at 10.00 am on the following day. His dismissal was perfected by the passing of the *Local Government (Fraser Coast Regional Council – Dismissal of Councillor) Amendment Regulation* 2018 (Qld).[2]

[3] Subsequently, and as required by s 24 of the *Local Government Electoral Act* 2011 (Qld), a by-election to fill the vacancy created by the dismissal of the applicant was called for 5 May 2018.

[4] The decision of the Governor in Council was based on a number of disciplinary findings that had been made against the applicant as well as on a complaint that the applicant "leaked" an internal email to a journalist (employed by the Australian Broadcasting Corporation) which the respondent found to be made out.

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1 Hereinafter referred to as the LGA.
2 Reg 3.

[5] By an application for a statutory order of review filed on 27 February 2018, the applicant sought a review of the decision of the Governor in Council on various grounds. By s 53 of the *Judicial Review Act* 1991 (Qld),[3] the respondent, as the Minister responsible for the administration of the LGA as well as for tendering advice to the Governor in Council in relation to the decision, is the proper respondent.

[6] The applicant seeks orders setting aside the decision of the Governor in Council by which he was dismissed and a declaration that the *Local Government (Fraser Coast Regional Council – Dismissal of Councillor) Amendment Regulation* is invalid, together with an order that the respondent pay the applicant's costs of the application. The respondent counters that the application should be dismissed with costs.

[7] On 4 May 2018, I dismissed the application and ordered the applicant to pay the respondent's costs of the application to be assessed on the standard basis. What follows are my reasons for doing so.

The legislative scheme

[8] To properly understand the background to the application and the grounds of review, it is useful to commence with a brief overview of the statutory framework under which the challenged decision was made.

[9] Section 70 of the *Constitution of Queensland* 2001 (Qld) provides that there must be a system of local government in Queensland consisting of "a number of local governments". By s 71, a local government is an "elected body that is charged with the good rule and local government of a part of Queensland allocated to the body" and "another Act … may provide for the way in which a local government is constituted and the nature and extent of its functions and powers". The other Act that so provides is, relevantly, the LGA.

[10] The purposes of the LGA are to provide for "the way in which a local government is constituted and the nature and extent of its responsibilities and powers" and "a system of local government in Queensland that is accountable, effective, efficient and sustainable": s 3. To ensure that the system of local government fulfils the second of those purposes, a number of "local government principles" are, by s 4, incorporated in the LGA:

> "**4 Local government principles underpin this Act**
>
> (1) To ensure the system of local government is accountable, effective, efficient and sustainable, Parliament requires—
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> (a) anyone who is performing a responsibility under this Act to do so in accordance with the local government principles; and
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> (b) any action that is taken under this Act to be taken in a way that—
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> (i) is consistent with the local government principles; and
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> (ii) provides results that are consistent with the local government principles, in as far as the results are within the control of the person who is taking the action.

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[3] Hereinafter referred to as the JRA.

(2) The ***local government principles*** are—

(a) transparent and effective processes, and decision-making in the public interest; and

(b) sustainable development and management of assets and infrastructure, and delivery of effective services; and

(c) democratic representation, social inclusion and meaningful community engagement; and

(d) good governance of, and by, local government; and

(e) ethical and legal behaviour of councillors and local government employees."

[11] The LGA goes on to provide that a local government is an elected body that is responsible for the good rule and local government of a part of Queensland (s 8(1)) and that each local government created under the LGA has the power to do anything that is necessary or convenient for the good rule and local government of its local area (s 9). Section 12 then sets out the responsibilities of councillors as well as the Mayor. Unsurprisingly, they include responsibilities on the part of all councillors (including the Mayor) to comply "with all laws that apply to local governments" (s 12(3)(a)(iii)) and to "serve the overall public interest of the whole local government area" (s 12(6)).

[12] Chapter 5 of the LGA is concerned with monitoring and enforcing the laws that apply to local governments.[4] Part 1 allows the Minister on behalf of the State to gather information (including under a direction) to monitor and evaluate whether a local government or a councillor is performing their responsibilities properly or complying with the laws: s 113(1)(a). If the gathered information shows that responsibilities are not being performed properly, or there is non-compliance with the laws, the Minister may take "remedial action" to "improve the local government's or councillor's performance or compliance": s 113(2). Such action may include the giving of directions (s 113), the suspension or revocation of decisions of a local government (s 121), the suspension or dismissal of a councillor (s 122) or the dissolution of the local government (s 123) and consequent appointment of an interim administrator (s 124).

[13] Relevantly, s 122 of the LGA empowers the Minister to suspend or dismiss a councillor if the Minister "reasonably believes that a councillor has seriously or continuously breached the local government principles" (s 122(1)(b)) or "reasonably believes that a councillor is incapable of performing their responsibilities" (s 122(1)(c)). Section 122 is in these terms:

"**122 Removing a councillor**

(1) This section applies if—

(a) the tribunal recommends under section 180 that a councillor be suspended or dismissed; or

(b) the Minister reasonably believes that a councillor has seriously or

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[4] These laws are referred to in the LGA as "Local Government Acts" and are defined in Schedule 4 (Dictionary) to mean "a law under which a local government performs the local government's responsibilities, including for example, (a) [the LGA]; and (b) a local law; and (c) the *Building Act*; and (d) the *Planning Act*; and (e) a planning scheme; and (f) the *Plumbing and Drainage Act*; and (g) the *Water Act* 2000; and (h) the *Water Supply (Safety and Reliability) Act* 2008.

continuously breached the local government principles; or

(c) the Minister reasonably believes that a councillor is incapable of performing their responsibilities.

(2) The Minister may recommend that the Governor in Council—

(a) if the tribunal recommends that a councillor be suspended or dismissed—suspend or dismiss the councillor; or

(b) if the proposal in the Minister's notice under section 120 was to suspend the councillor for a stated period—suspend the councillor for a period that is no longer than the stated period; or

(c) if the proposal in the Minister's notice under section 120 was to dismiss the councillor—suspend or dismiss the councillor.

(3) The Governor in Council may give effect to the Minister's recommendation under a regulation."

[14] However, where the Minister proposes to exercise such a power (or take any other form of remedial action), he or she must comply with s 120 of the LGA:

"**120 Precondition to remedial action**

(1) This section applies if the Minister proposes to exercise a power under this division.

(2) The Minister must give the local government or councillor in question a written notice of the proposal to exercise the power, before the power is exercised, unless—

(a) the local government or councillor asked the Minister to exercise the power; or

(b) if the Minister proposes to exercise a power under section 122 or 123 —the tribunal has made a recommendation under section 180 to suspend or dismiss a councillor; or

(c) the Minister considers that giving notice—

(i) is likely to defeat the purpose of the exercise of the power; or

(ii) would serve no useful purpose.

(3) The notice must state—

(a) the power that the Minister proposes to exercise; and

(b) the reasons for exercising the power; and

(c) any remedial action that the local government or councillor should take; and

(d) a reasonable time within which the local government or councillor may make submissions to the Minister about the proposal to exercise the power.

(4) The reasons stated in the notice are the only reasons that can be relied on in support of the exercise of the power.

(5) The Minister must have regard to all submissions that are made by the local government or councillor within the time specified in the notice.

(6) If—

(a) the Minister receives no submissions from the local government or councillor within the time specified in the notice; or

(b) the submissions from the local government or councillor do not contain reasonable grounds to persuade the Minister not to exercise the power;

the Minister may exercise the power without further notice to the local government or councillor."

[15] Chapter 6 of the LGA contains provisions about persons who are appointed, and bodies that are created, to perform responsibilities under the Act.

[16] Division 5 of Part 2 of Chapter 6 sets out a number of obligations on the part of councillors: ss 169 – 175. Section 171 provides:

"**171 Use of information by councillors**

(1) A person who is, or has been, a councillor must not use information that was acquired as a councillor to—

(a) gain, directly or indirectly, a financial advantage for the person or someone else; or

(b) cause detriment to the local government.

Maximum penalty—100 penalty units or 2 years imprisonment.

(2) Subsection (1) does not apply to information that is lawfully available to the public.

(3) A councillor must not release information that the councillor knows, or should reasonably know, is information that is confidential to the local government.

Note—

A contravention of subsection (3) is misconduct that is dealt with by the tribunal."

[17] Division 6 of Part 2 of Chapter 6 deals with complaints about the conduct and performance of councillors: ss 176 – 182. These provisions are intended to ensure that "appropriate standards of conduct and performance are maintained" (s 176(1)(a)) and that "a councillor who engages in misconduct or inappropriate conduct is disciplined" (s 176(1)(b)). Two species of conduct are contemplated: "misconduct", to be dealt with either by the Regional Conduct Review Panel[5] or the Local Government Remuneration and Discipline Tribunal;[6] and "inappropriate conduct", to be dealt with by the Mayor or the Chief Executive of the Department: s 176(2).

[18] "Misconduct" is defined by s 176(3):

"(3) ***Misconduct*** is conduct, or a conspiracy or attempt to engage in conduct, of or by a councillor—

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5 Constituted under Part 4 of Chapter 6 of the LGA.

6 Established under s 183 of the LGA.

(a) that adversely affects, or could adversely affect, (either directly or indirectly) the honest and impartial performance of the councillor's responsibilities or exercise of the councillor's powers; or

(b) that is or involves—

(i) the performance of the councillor's responsibilities, or the exercise of the councillor's powers, in a way that is not honest or is not impartial; or

(ii) a breach of the trust placed in the councillor; or

(iii) a misuse of information or material acquired in or in connection with the performance of the councillor's responsibilities, whether the misuse is for the benefit of the councillor or someone else; or

(iv) a failure by the councillor to comply with a direction to leave a meeting of the local government or its committees by the chairperson presiding at the meeting; or

(v) a refusal by the councillor to comply with a direction or order of the regional conduct review panel or tribunal about the councillor; or

(c) that is a repeat of inappropriate conduct that the mayor or the department's chief executive has ordered to be referred to the regional conduct review panel under section 181(2); or

(d) that contravenes section 171(3) or 173(4)."

[19] "Inappropriate conduct" is defined by s 176(4):

"(4) ***Inappropriate conduct*** is conduct that is not appropriate conduct for a representative of a local government, but is not misconduct, including for example—

(a) a councillor failing to comply with the local government's procedures; or

(b) a councillor behaving in an offensive or disorderly way in a meeting of the local government or any of its committees."

[20] The Tribunal is responsible for hearing and deciding the most serious complaints of misconduct by a councillor: s 176(7). If, after hearing a complaint of misconduct, the Tribunal decides that the councillor engaged in misconduct, it may make any order or recommendation that it considers appropriate in view of the circumstances relating to the misconduct: s 180(4). This could include recommending to the Minister that the councillor be suspended (s 180(5)(g)) or dismissed (s 180(5)(h)), in which case the power of the Minister under s 122 to recommend to the Governor in Council that the councillor be suspended or dismissed, as the case may be, will be enlivened: s 122(2)(a).

[21] Lastly, s 181 further provides for disciplinary action for inappropriate conduct. It is in these terms:

"**181 Inappropriate conduct**

(1) Subsections (2) and (3) apply if, under section 176C(3) or 177(4), a complaint is referred to the mayor or the department's chief executive to take

disciplinary action against a councillor for inappropriate conduct.

(2) The mayor or department's chief executive may make either or both of the following orders that the mayor or department's chief executive considers appropriate in the circumstances—

(a) an order reprimanding the councillor for the inappropriate conduct;

(b) an order that any repeat of the inappropriate conduct be referred to the regional conduct review panel as misconduct.

(3) If the mayor or the department's chief executive makes 3 orders under subsection (2) about the same councillor within the 1 year, the mayor or the department's chief executive must refer the repeated inappropriate conduct by the councillor to a regional conduct review panel or the tribunal.

(4) If the mayor or the department's chief executive refers repeated inappropriate conduct by the councillor to a regional conduct review panel or the tribunal under subsection (3) —

(a) the matter is taken to be a complaint about misconduct; and

(b) the panel or tribunal must conduct a hearing of the complaint; and

(c) sections 178 to 180 apply for the hearing of the complaint; and

(d) the repeated inappropriate conduct by the councillor is taken to be misconduct.

(5) If inappropriate conduct happens in a meeting of the local government or its committees, the chairperson of the meeting may make any 1 or more of the following orders that the chairperson considers appropriate in the circumstances—

(a) an order that the councillor's inappropriate conduct be noted in the minutes of the meeting;

(b) an order that the councillor leave the place where the meeting is being held (including any area set aside for the public), and stay out of the place for the rest of the meeting;

(c) if the councillor fails to comply with an order made under paragraph (b) to leave a place—an order that the councillor be removed from the place."

Background

[22] On 25 January 2018, the respondent issued a notice to the applicant under s 120 of the LGA. By it, the applicant was notified that the respondent proposed to exercise his power under s 122(2)(c) of the LGA to recommend to the Governor in Council that the applicant be dismissed as Mayor and councillor.[7]

[23] The notice contained lengthy reasons for the respondent's "proposed action",

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7 There had been an earlier s 120 notice. It was issued to the applicant by the respondent's ministerial predecessor on 5 December 2017. Under it, the proposed remedial action was a suspension of the applicant for six months. The applicant made submissions in response to the notice on 12 December 2017, but nothing further was heard by him about it until he received the subject notice in the following month. That later notice was expressed to supersede the earlier notice. Nothing was said to turn on this. See Transcript, 1-9.

commencing with a summary of the disciplinary findings that had been made against the applicant:

"*Findings of Inappropriate Conduct and Misconduct*

5. You have been the subject of 11 findings of inappropriate conduct or misconduct.

Finding No 1

6. On 25 July 2016, the Director-General, Department of Infrastructure, Local Government and Planning (**DILGP**) made orders against you under sections 181(2)(a) and (b) of the *LGA:*

   (a) reprimanding you for inappropriate conduct for a breach of the Council's *Councillor Code of Conduct* when you publicly criticised Councillors at a Council meeting on 4 May 2016; and

   (b) that any repeat of the inappropriate conduct be referred to a Panel as misconduct.

Finding No 2

7. On 5 December 2016, the Director-General, DILGP, made orders against you under sections 181(2)(a) and (b) of the *LGA*:

   (a) reprimanding you for inappropriate conduct for a breach of the Council's *Councillor Code of Conduct* when you publicly criticised Councillors in an open letter distributed to undisclosed media outlets on or about 28 November 2016; and

   (b) that any repeat of the conduct be referred to a Panel as misconduct.

Finding No 3

8. On 28 March 2017, the Director-General, DILGP made orders against you under sections 181(2)(a) and (b) of the *LGA*:

   (a) reprimanding you for inappropriate conduct for failure to comply with the Council's *IT Systems Usage Management Policy* (**IT Policy**) when you directed a Council officer to provide you with access to another officer's email mailbox without the officer's knowledge or approval; and

   (b) any repeat of a failure to comply with the Council's IT Policy be referred to a Panel as misconduct.

Finding No 4

9. On 7 June 2017, the Regional Conduct Review Panel (**Panel**) sustained an allegation of misconduct and found that you used your position to attempt to influence an employee of a Council-controlled entity to covertly give you financial information, thereby breaching the trust placed in you to uphold the requirements of section 4(2)(e) of the *LGA*. The Panel ordered that you provide written apologies to nominated parties and apologise to the first full meeting of the Council after 30 June 2017 for breaching the trust placed in you as an elected officer of the council.

Finding No 5

10. On 7 July 2017, the Panel found that you had been issued with three orders

for inappropriate conduct made under section 181(2) of the Act within one year (i.e. between 25 July 2016 and 28 March 2017) which constituted repeated inappropriate conduct amounting to misconduct by virtue of sections 181(3) and (4) of the Act. The Panel, in handing down its orders on 26 July 2017 made the following observations:

> 'The Panel takes the view that, in arriving at an appropriate sanction, aspects of deterrence, both personal and general are important considerations and that it must be brought home to the Mayor, as an elected councillor, he has to ensure that his actions and conduct associated with his office are transparent and that he is accountable and answerable for those in the public interest.
>
> Cr Loft's conduct reflects a disregard by the Mayor of the importance of upholding appropriate standards of conduct and the impact of such conduct on the council's culture cannot be ignored by the Panel. If non-compliance with local government standards of conduct appears to be tacitly condoned at the most senior level of the council, the Panel believes it sends an inappropriate message to staff that compliance with codes of conduct is optional. Such conduct makes it most difficult for action to be taken against other Council staff members and other councillors should they breach the standard. As Mayor, Cr Loft has the responsibility for "setting the tone at the top" and therefore must ensure his conduct is beyond reproach.'

11. The Panel ordered that you undertake counselling, make an apology to an open meeting of Council and pay a fine of $1500.

Finding No 6

12. On 14 August 2017, the Local Government Remuneration and Discipline Tribunal (**Tribunal**) held that the following allegations were established:

    (a) that between 5 April 2016 and 28 July 2016, you improperly disclosed to an external party, namely Brian Downie, the following:

        (i) the terms of the contract of employment of the Chief Executive Officer (**CEO**) relating to termination, i.e. clause 8 and 23;

        (ii) that the CEO had accrued 44 weeks annual leave in circumstances in which her contract of employment, by clause 14, limited accrued annual leave to 10 weeks;

        (iii) that the CEO had refused to follow your instructions in relation to preparation of the Council budget and had advised Council staff not to cooperate with you, (misuse of authority - unauthorised disclosure of information).

    (b) that between 5 April 2016 and 25 July 2016, you improperly disclosed the CEO's employment contract to an external party, namely, Jason Loft (misuse of authority - unauthorised disclosure of information).

13. The Tribunal ordered that you pay a monetary penalty of $1000 and make an apology, in accordance with s 180(5)(b) of the *LGA*, at the next Council Meeting you attend to the effect that you should not have disclosed confidential information concerning the then CEO's contract of employment to persons who were not engaged in a professional capacity when developing

options and strategies to deal with the subject matter of the information disclosed.

Finding No 7

14. On 8 September 2017, the Director-General, DILGP, determined that you had failed to comply with the Council's *Code of Conduct for Councillor*s when, on 10 December 2016, you sent an email to journalists at the ABC and the *Fraser Coast Chronicle* that were, or could be perceived to be, critical of Council reports and staff is about inappropriate conduct. The Director-General made orders reprimanding you for the inappropriate conduct and that any repeat of the inappropriate conduct, namely using the media to make negative personal or other comments about Councillors or staff or comments that could be interpreted as such and/or which are reasonably likely to undermine public confidence in the Council, be referred to the Panel as misconduct.

Finding No 8

15. On 27 September 2017, the Director-General, DILGP, determined that you had failed to comply with the local government's procedures, specifically the Council's *Code of Conduct for Councillors* (which stipulates, inter alia, that a Councillor must respect fellow Councillors, Council staff and the public), in that you on two occasions (3 November 2016 and 1 December 2016) made statements to the media criticising Ms Lisa Desmond in her capacity as then Council's CEO. The Director-General made orders reprimanding you for the inappropriate conduct and that any repeat of the inappropriate conduct, that being to make negative comments about Council staff in the public arena in contravention of the Council's code, be referred to the Panel as misconduct.

Finding No 9

16. On 1 November 2017, the Director-General, DILGP, determined that you failed to comply with the *Councillors Code of Conduct* when, on or about 30 November 2016, you made critical comments about Councillors George Seymour and Stuart Taylor to the ABC and failed to comply with the Council's *Public Interest Disclosure Policy* when, instead of lodging an alleged public interest disclosure in accordance with the PID Act, you announced it publicly in a Council meeting on 1 December 2016. The Director-General reprimanded you for inappropriate conduct in failing to comply with the Council's *Public Interest Disclosure Policy* and in publicly criticising Councillors Seymour and Taylor, contrary to the Council's *Code of Conduct for Councillors* (which provides, inter alia, that Councillors must (without limiting fair and reasonable debate) ensure that their conduct does not reflect adversely on the reputation of the Council, respect fellow Councillors, Council staff and the public by treating them honestly and fairly refrain from harassing, bullying or intimidating fellow Councillors, Council staff or members of the public refrain from using the media to make negative personal reflections on other Councillors and staff, or comments that could be interpreted as such) and ordered that any repeat of the inappropriate conduct be referred to the Tribunal as misconduct.

Finding No 10

17. On 7 November 2017, the Director-General, DILGP, determined that you had engaged in inappropriate conduct in that you publicly criticised the CEO in breach of the *Code of Conduct for Councillors* in nine instances numbered 1.1, 1.3 (two instances), 1.4, 1.8 (two instances), 1.9 (Facebook comment of

7/3/16), 1.10 and 1.11 (Facebook comment of 10/1/16).

18. The Director-General, DILGP, reprimanded you for your inappropriate conduct in publicly criticising the council's CEO and thereby failing to comply with the Council's *Code of Conduct for Councillors*, adopted 23 May 2012 (replaced 9 November 2016), which provides, inter alia, that councillors must respect the democratic process and publicly represent Council decisions without criticism, regardless of personal views, and avoid public criticism of other Councillors and staff. In addition, The Director-General ordered that any repeat of the inappropriate conduct, that being public criticism of employees of the Council, be referred to the Tribunal as misconduct.

19. The Director-General, DILGP also referred this further finding of inappropriate conduct to the Tribunal, as deemed misconduct under sections 181(3) and (4) of the LGA.

Finding No 11

20. On 20 November 2017, the Panel upheld three further allegations of misconduct against you, namely:

    (a) you made statements to the Council and on Channel 7 News which were misleading and false in that you stated you had been advised by the Director-General of DILGP to sack Ms Lisa Desmond (former) CEO of the Council;

    (b) repeated inappropriate conduct - deemed misconduct on the basis of three orders of inappropriate conduct made within the one year (5 December 2016, 28 March 2017 and 8 September 2017); and

    (c) repeated inappropriate conduct - deemed misconduct on the basis of three orders of inappropriate conduct made within the one year (28 March 2017, 8 September 2017 and 27 September 2017).

21. The Panel have yet to hand down a penalty in relation to those findings. On 27 November 2017, however, you made submissions on penalty in relation to these findings. In those submissions you stated:

> *'I believe my duty of care to staff and the community is a higher authority than the code of conduct. I cannot sit by and be a "passive criminal" constrained by a code of conduct, and I believe the hierarchy of rules is important. The code is important but not as important as the ultimate duty of care to my staff and my community.*
>
> *So what should be my penalty?*
>
> *I think I have been penalized enough for my actions in the past as this series of complaints, added to the complaints of the past are really one complaint'.*" [Underlining, bolding and italicised text in original]

[24] Next came what will be referred to as the ABC Complaint. That is the complaint concerning a "leaked" email to which reference was earlier made (at [4]). It was dealt with in the reasons in the following way:

"*Further complaint re ABC disclosure*

22. In addition to these findings, there has been a recent complaint (6 September 2017) received from Mr Ken Diehm, the current CEO of the Council, to the Director General which relates to articles published in the *Fraser Coast Chronicle* on 5 September 2017 about you hiring a private investigator to investigate the former CEO and other Councillors (**Article**).

23. The Article quoted from an email from Councillor Stuart Taylor to the Mayor on 30 January 2017 in which the Councillor questioned your conduct (**30 January Email)**. Councillor Taylor requested the CEO investigate whether the 30 January Email referred to in the Article was provided to any third parties. A search of Council's records showed that you sent the email to a Mr Dominic Cansdale who works as a journalist for the ABC via email on 31 January 2017.

24. The complaint was supported by the Article and the email from you to Dominic Cansdale dated 31 January 2017.

25. In light of:

    (a) the search of the Council's records revealing that you forwarded the 30 January Email to an ABC journalist; and

    (b) your previous inappropriate disclosures,

    I am satisfied that you leaked the 30 January Email and that such disclosure was a breach of s 171(3) of the *LGA* which is misconduct under the *LGA*." [Bold text in original]

[25] Reference was then made in the reasons to the applicant's response to the earlier s 120 notice:

> "27. Further, in your response dated 12 December 2017 to the Initial Show Cause Notice issued to you dated 5 December 2017 by the Honourable Mark Furner MP, former Minister for Local Government, you stated:
>
> - in relation to Finding 3 *"in light of further information now available relevant to this finding, if this matter was to be dealt with now, it is likely that this finding would be different"*;
> - in relation to Finding 7 and findings by Ray Burton and Ken Diehm contain "*what can fairly be described as alarming findings which tend to demonstrate that matters were more dysfunctional than initially thought and Mayor Loft's concerns were in fact not baseless*"
> - in relation to Finding 8 "*subsequent events in numerous reports/findings have exposed several matters of concern in relation to the performance of the CEO in question …*"
> - In relation all allegations of misconduct and/or inappropriate conduct, "*arose during the period of time in which the CEO in question was employed by FCRC and the actions/conduct of Mayor Loft were ultimately borne out of a desire and intention to protect the interests of staff and other FCRC stakeholders from inappropriate behaviour by the CEO in question*". [Italicised text in original]

[26] Then, under the heading, "Serious and Continuous Breaches", this appears:

> "28. Based on Findings 1 to 11 and the complaint in relation to the ABC disclosure, I reasonably believe that:

(a) you have seriously breached the local government principles, namely transparent and effective processes and decision-making in the public interest, good governance of, and by, local government and ethical and legal behaviour of Councillors;

(b) further, you have continuously breached the local government principles, namely transparent and effective processes and decision-making in the public interest, good governance of, and by, local government and ethical and legal behaviour of Councillors; and

(c) further, you are incapable of discharging your responsibilities as Councillor and Mayor in that you are incapable of providing high quality leadership to the local government and the community (section 12(3)(b) of the *LGA*)." [Italicised text in original]

[27] Lastly, under the heading, "Dismissal", the following appears:

"29. It is apparent to me from Findings 1 to 11 and the complaint in relation to the ABC disclosure that you have engaged in repeated behaviour in breach of the local government principles over a lengthy period of time.

30. The

(a) repeated behaviour over an extended period of time;

(b) the fact that you engaged in some of this behaviour after you had already been reprimanded for your conduct;

(c) the fact that you engage in some of this behaviour in circumstances where you must have known that you were breaching the local government principles and the Council's *Code of Conduct for Councillors* (because you had already been reprimanded for such conduct being in breach of the local government principles and the Council's *Code of Conduct for Councillors*); and

(d) the content of your submissions dated 27 November 2017 and 12 December 2017 (particularly those parts extracted above),

suggest to me that you do not truly understand your responsibilities and obligations as Mayor and a Councillor under the *LGA*, that you are not truly remorseful for your previous actions and that there is a real prospect that you may engage in similar conduct in the future if action is not taken against you now.

31. Further, I am of the view that your behaviour has damaged, and continues to damage, the standing of, regard for and confidence of the public in, the Council, the position of Mayor of the Council, the position of Councillor of the Council and the system of local government generally.

32. I am of the opinion that, in the circumstances, dismissal would appear to be the appropriate response to your behaviour. It appears to me necessary to do so to:

(a) uphold the importance of the principles enshrined in the *LGA*;

(b) protect the constituents of the Fraser Coast region from the prospect of further inappropriate conduct or misconduct by you;

(c) to restore the standing of, regard for and confidence of the public in, the Council, the position of Mayor of the Council, the position of

> Councillor of the Council and the system of local government generally; and
>
> (d) act as a general deterrent to other Councillors, thereby maintaining the expected standard of conduct of Councillors." [Italicised text in original]

[28] The applicant was given seven days to make "any submission [he wished] to make in relation to [the] proposed action". By letter dated 1 February 2018, the applicant's solicitors made a number of submissions by way of response although, as part of those submissions, it was contended that insufficient time had been given to the applicant to do so. An extension of time was requested. That request was refused, but, by the time when notification of that refusal was communicated to the applicant's solicitors (8 February 2018), the respondent had two days earlier recommended to the Governor in Council that the applicant be dismissed.

[29] By letter dated 15 February 2018 from the respondent, the applicant was advised that his submissions dated 1 February 2018 had been considered but, in the respondent's opinion, "did not contain reasonable grounds to persuade [the respondent] not to recommend [the applicant's] dismissal to the Governor in Council". The applicant was then informed that the respondent had decided under s 122(2) of the LGA to recommend to the Governor in Council that the applicant be dismissed and that the Governor in Council had, under the *Local Government (Fraser Coast Regional Council – Dismissal of Councillor) Amendment Regulation* 2018 given effect to the respondent's recommendation. Lastly, the applicant was advised that his dismissal would take effect from 10.00 am on 16 February 2018 and that the office of Mayor would become vacant at that time.

The challenge to the decision of the Governor in Council

[30] As earlier mentioned, several grounds of review were advanced on behalf the applicant, but each turned on the respondent's treatment of the ABC Complaint. As such, it may be observed that there was no challenge to the respondent's reliance on any of the disciplinary findings nor any suggestion that they were incapable of supporting the impugned decision. Rather, it was argued that the respondent's consideration of the ABC Complaint was affected by error and that, having found that complaint to be made out and, further, having relied on it in part to found his recommendation, the decision of the Governor in Council should be set aside for invalidity and a declaration made that the *Local Government (Fraser Coast Regional Council – Dismissal of Councillor) Amendment Regulation* is invalid.

The court's jurisdiction

[31] The provision under which the decision under review was made – s 122 of the LGA – can be found in Part 1 of Chapter 5 of the LGA. Another provision in that Part is s 114. It provides as follows:

> "**114 Decisions under this part are not subject to appeal**
>
> A decision of the Minister under this part is not subject to appeal.
>
> *Note—*
>
> See section 244 for more information."

[32] Section 244 of the LGA then provides:

> "**244 Decisions not subject to appeal**
>
> (1) If a provision of this Act declares a decision to be not subject to appeal, that means the decision—
>
> (a) can not be appealed against, challenged, reviewed, quashed, set aside, or called into question in any way (including under the Judicial Review Act, for example); and
>
> (b) is not subject to any writ or order of a court on any ground.
>
> *Examples–*
>
> 1 A person may not bring any proceedings for an injunction to stop conduct that is authorised by the decision.
>
> 2 A person may not bring any proceedings for a declaration about the validity of conduct that is authorised by the decision.
>
> (2) A ***decision*** includes—
>
> (a) conduct related to making the decision; and
>
> (b) a failure to make a decision.
>
> (3) A ***court*** includes a tribunal or another similar entity."

[33] On the face of these provisions, it might be thought that the application at hand is incompetent. However, it is now well-established that provisions such as these cannot oust the supervisory jurisdiction of the Supreme Court, including as it does the jurisdiction to review an exercise or purported exercise of power for jurisdictional error in executive decision making.[8] Indeed, any attempt to oust the court's jurisdiction in that regard would be beyond the power of the Queensland Parliament.[9]

[34] It follows that, in order to succeed, the applicant must not only point to the existence of a reviewable error; he must go further to establish that the relevant error goes to jurisdiction. As to this, in *Craig v South Australia*,[10] the High Court had this to say:

> "If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."[11]

[35] Subsequently, in *Minister for Immigration and Multicultural Affairs v Yusuf*,[12] McHugh, Gummow and Hayne JJ (with whom Gleeson CJ agreed) discussed the passage from *Craig* extracted immediately above:

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8 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 580-581.

9 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248, 257-258.

10 (1995) 184 CLR 163.

11 Ibid, per Brennan, Deane, Toohey, Gaudron and McHugh JJ at 179.

12 (2001) 206 CLR 323.

> "'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law."
>
> …
>
> … If the Tribunal identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material in such a way as affects the exercise of its powers, that will very often reveal that it has made an error in its understanding of the applicable law or has failed to apply that law correctly to the facts it found. …"[13] [Citations omitted]

[36] Here, the respondent accepts that, if the court is satisfied that one or more of the grounds of review relied on by the applicant has been established, each of those grounds constitutes jurisdictional error for the purposes of the supervisory jurisdiction of this court. However, what the respondent does not accept is that the court has power to grant the relief sought by the applicant pursuant to ss 30(1)(a) and 30(1)(c) of the JRA, that is to say, to set aside the decision of the Governor in Council and make a declaration of invalidity in relation to the *Local Government (Fraser Coast Regional Council – Dismissal of Councillor) Amendment Regulation* 2018. That submission is based on the plain words of ss 114 and 244 of the LGA providing, as a combined reading of them does, that the decision is "not subject to appeal" and cannot be set aside under the JRA nor be the subject of a declaration about the validity of conduct that is authorised by the decision.[14] Nevertheless, the respondent rightly accepts that the legislature cannot exclude the power of this court to exercise its supervisory jurisdiction over jurisdictional error, including by the granting of declaratory relief,[15] and the inherent power to do so is of course preserved by statute.[16] Moreover, because the decision of the Governor in Council was an essential precursor to the exercise of power under s 122(2)(c) to give effect by regulation to the respondent's recommendation that the applicant be dismissed, if the decision was infected by jurisdictional error so as to be invalid, then the Governor in Council was not empowered under the LGA to give effect to the decision. In such circumstances, the respondent concedes, a declaration could be

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13 At 351-352. And see *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 573; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 643-644, 647-648.

14 The operation of these provisions is not affected by the JRA: see s 18(2)(a) of the JRA.

15 See *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525, per McMurdo P at 537-538, per Chesterman JA at 543-544 and per White JA at 553-554.

16 *Civil Proceedings Act* 2011 (Qld), s 10(2).

made by the court that both the decision and the regulation were invalid and of no effect. These submissions and concessions should be accepted.

[37] That explained, I turn to the individual grounds of review advanced on behalf of the applicant.

Ground 1

[38] The first ground of review concerned the respondent's refusal to grant the extension of time sought by the applicant's solicitors in their letter of 1 February 2018. This ground was abandoned.[17]

Ground 2

[39] By the second ground of review, it was claimed that the decision involved an improper exercise of power (ss 20(2)(e) and 23(b) of the JRA) in that: (1) the respondent failed to take into account relevant considerations, namely, that the ABC Complaint was "unproven" and was still to be determined by the Tribunal; and (2) because that complaint was still before the Tribunal, the respondent was precluded from forming his own view about the substance of the complaint or, indeed, from acting on the complaint.

[40] As appears from the relevant part of the s 120 notice (extracted above at [24]), on 6 September 2017 a written complaint was received by the Director-General of the Department from the CEO of the Council, the substance of which was that it was alleged that the applicant had sent an email he received from another councillor on 30 January 2017 to a journalist employed by the ABC. An article which appeared in the *Fraser Coast Chronicle* on the previous day referred to, and quoted extensively from, the email. The subject-matter of the article was the alleged hiring by the applicant of a private investigator to investigate the previous CEO of the Council. The complaint from the CEO took the form of a letter with a number of attachments. In the body of the letter, the CEO recorded that "a search of Councillor records shows that [the applicant] distributed [the councillor's] email to a … journalist for the ABC", and a copy of the email was attached to the letter. The gravamen of the complaint was that the applicant had engaged in misconduct within the meaning of s 176(3)(d) of the LGA by contravening the provision of the LGA (s 171(3)) which prohibits councillors from releasing information that the councillor knows, or should reasonably know, is information that is confidential to the local government.

[41] On 16 October 2017, the Director-General wrote to the applicant to advise him that a "complaint of purported misconduct had been referred to the Local Government Remuneration and Discipline Tribunal pursuant to s 176C(4)(b) of the LGA". On 19 December 2017, the applicant was invited to provide a response to the complaint, and this he did through his solicitors on 31 January 2018. They did not concede that the applicant's conduct amounted to misconduct within the meaning of s 176(3) of the LGA.

[42] On 14 February 2018, the Tribunal decided to dismiss the ABC Complaint because, in the Tribunal's view, it was "misconceived and lacking in substance". Of course, by then, the respondent had eight days earlier decided to recommend to the Governor in

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17 Applicant's Outline of Submissions, par 32.

Council that the applicant be dismissed and, on the following day (15 February 2018), the Governor in Council decided to accept that recommendation with effect on the following day. It follows that, at the time when the respondent recommended dismissal, the outcome of the complaint before the Tribunal was not known. However, as discussed below (at [45] and [46]), even had the Tribunal's decision been known to the respondent at the time of his recommendation, neither the respondent nor the Governor in Council would have been bound by it. It therefore matters not that, as events transpired, the Governor in Council decided to accept a recommendation that was partly based on a finding of misconduct which the Tribunal was not prepared to make.

[43] That made clear, the applicant's contention that the respondent failed to take into account that the ABC Complaint was "unproven" and still before the Tribunal does not withstand scrutiny. First, a Ministerial Briefing Note prepared on 25 January 2018 by the Executive Director of the Department formed part of the material before the respondent at the time when he made his recommendation. It referred to the ABC Complaint and noted that it was "currently with the Tribunal". Second, the submissions made on behalf of the applicant by his solicitors on 1 February 2018 included a submission that the ABC complaint was "unproven". Third, there is a clear demarcation in the s 120 notice between the disciplinary findings and the ABC Complaint, and the language employed by the respondent leaves no room for doubt that he was well-aware that the ABC Complaint was yet to be determined by the Tribunal. More than that, it is plain that the respondent proceeded on the basis that, unlike the 11 disciplinary findings that had already been made and then summarised in the notice, he needed to be satisfied that the conduct underlying the ABC complaint occurred and that it amounted to misconduct within the meaning of the LGA before it could be taken into consideration by him.

[44] In support of the proposition that the respondent was precluded from forming his own view about, or relying on, the ABC Complaint, the applicant argued that is the function of the Tribunal, and not the respondent, to determine whether the complaint amounted to misconduct under the LGA. In support of that argument, reliance was placed on a number of provisions of Division 6 of Chapter 6 of the Act, dealing as it does with "complaints about the conduct and performance of councillors": s 176(1). Particular reliance was placed on:

(a) s 176(1)(b), which provides that the provisions of Division 6 are to "ensure" that a "councillor who engages in misconduct or inappropriate conduct is disciplined";

(b) s 176(2)(a), which provides that misconduct is to be "dealt with by the regional conduct review panel or tribunal";

(c) s 176(3)(d), which includes conduct that contravenes s 171(3) in the definition of "misconduct";

(d) s 183, which establishes the Tribunal and assigns to it the "responsibilities mentioned in section 176"; and

(e) the note to s 171(3), which provides that a contravention of s 171(3) "is misconduct that is dealt with by the tribunal".

[45] I cannot accept the construction of the LGA advanced on behalf of the applicant. The provisions of Chapter 6 on which the applicant relied cannot be read in isolation; they must be read in the context of the whole Act and, relevantly to this argument, the

provisions of Chapter 5 which, as earlier discussed (at [12] – [14]), are concerned with monitoring and enforcing the laws that apply to local governments. It is clear that, under those provisions, the Minister on behalf of the State has an important role to play in the monitoring and evaluation of local governments and individual councillors. Where either falls short in the performance of their responsibilities or in their compliance with the laws that apply to local governments, the Minister may take remedial action. In this regard, s 122 of the LGA could not be any clearer; where the Minister forms the reasonable belief that a councillor has "seriously or continuously breached the local government principles" or is "incapable of performing their responsibilities", he or she may recommend to the Governor in Council that the councillor be suspended or dismissed. That is something which is quite independent of any recommendation that the Tribunal may or may not make under s 180 of the LGA.

[46] True it is that s 176(2)(a) of the LGA provides that misconduct is to be "dealt with by the regional conduct review panel or tribunal" and that a contravention of s 171(3) falls within the definition of "misconduct" for that purpose, but in circumstances where s 176(2)(b) provides that "inappropriate conduct" is to be dealt with by the Mayor or the Chief Executive of the Department, the former provision is doing no more than delineating the functions of the Panel and the Tribunal on the one hand and the Mayor and the Chief Executive on the other. Likewise, the note to s 171(3) makes it clear that a contravention of that provision is misconduct that is to be dealt with by the Tribunal (rather than by the Panel), but that does not mean that the same conduct may not be considered by the Minister under s 122 of the LGA. To the point, none of the provisions relied on by the applicant can sensibly be thought to constrain the power conferred on the Minister by s 122. Provided the Minister forms one of the beliefs specified in that provision on reasonable grounds, he is entitled to make a recommendation to the Governor in Council, and that will be so regardless of whether the relevant belief is formed with respect to conduct that would qualify under the LGA as "inappropriate conduct", "misconduct" or a breach of the broader "local government principles". If the Minister reasonably believes that the councillor has "seriously or continuously" breached the local government principles or is incapable of performing his or her responsibilities, the Minister may act.

[47] It follows that this ground of review cannot be sustained.

Ground 3

[48] The complaint advanced as the third ground of review was that, in determining that the ABC Complaint was made out, that the applicant's conduct breached s 171(3) of the LGA and that this was "misconduct under the LGA", the decision involved an improper exercise of power (ss 20(2)(e) and 23(a) of the JRA) because the respondent took an irrelevant consideration into account, namely the applicant's "previous inappropriate disclosures". This was also said to amount to an error of law within the meaning of s 20(2)(f) of the JRA. In addition, it was contended that the respondent erred by making no finding that the information (the subject of the ABC Complaint) was "confidential" or that the applicant knew, or should reasonably have known, that the information bore that character. It was submitted that, absent those findings, there was no basis upon which the respondent could have concluded that the applicant had contravened s 171(3).

[49] The proposition underlying the first of those two complaints is that the respondent was not entitled to have regard to the feature that the applicant had previously been found to

have made "inappropriate disclosures" when determining whether the ABC Complaint was made out and, in particular, whether the applicant thereby contravened s 171(3). That, of course, is just another way of saying that the respondent was not permitted to engage in propensity reasoning. However, whilst the exclusionary rules applying to similar fact evidence in criminal proceedings might still be thought to have some limited operation in civil cases,[18] albeit an operation more dependent on concepts of relevance rather than prejudice,[19] there is no warrant for thinking that such rules would also apply to an executive decision of the kind under review, and especially not where none of the other rules of evidence can be said to apply. Decision-making of that kind "is of a different nature from decisions to be made on civil litigation conducted under common law procedures".[20] To the point, the existence of "previous inappropriate disclosures" is something that could be taken into account by the respondent provided it was logically probative of a fact in issue.

[50] Before relying on the conduct making up the ABC Complaint, the respondent first needed to be satisfied that the email which the applicant received from the other councillor was sent by him to the journalist and that it contained information that the applicant knew, or should reasonably have known, was confidential to the Council. The respondent was entitled to consider the "previous inappropriate disclosures" when deciding whether he was satisfied about these matters. In this regard, it is to be observed that Finding No 6 concerned the disclosure by the applicant of confidential information (i.e., details concerning the contract of employment of the CEO of the Council) to two separate people between 5 April 2016 and 28 July 2016. Otherwise, Findings Nos 2, 7 and 11 each involved the inappropriate dissemination by the applicant of information to the electronic and print media, the last of which concerned statements made by the applicant to *Channel 7 News* which were found by the Panel to be "misleading and false".

[51] As to the second complaint, it is readily apparent from the relevant part of the contents of the s 120 notice (extracted at [24] above) that the respondent turned his mind to whether the information contained in the email was confidential and whether the applicant knew, or should reasonably have known, that it was. Quite apart from anything else, the use of the word, "leaked" and the express finding that "such disclosure was a breach of s 171(3) of the *LGA* which is misconduct under the *LGA*" puts that beyond doubt. Furthermore, on the material before the respondent, it could not be disputed that the applicant sent the relevant email to the journalist; a copy of the email formed part of that material and a "search of the Council's records" revealed that the applicant forwarded it. The email had been sent to the applicant by another councillor. That other councillor had not authorised the applicant to forward the email to anyone. Neither the email nor the information contained in it were in the public domain. It was therefore open to the respondent to regard the email and the information in it as "confidential" within the meaning of s 171(3) of the LGA and to be satisfied that the applicant either knew or should reasonably have known that.

[52] This ground of review also fails.

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18 *Cross on Evidence*, par [21280].

19 Ibid, par [21285].

20 *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); ex parte Applicant S154/2002* (2003) 201 ALR 437, 450.

Ground 4

[53] By the fourth ground of review, the applicant contended that a breach of the rules of natural justice happened in relation to the making of the decision (s 20(2)(a) of the JRA), in that the respondent failed to give "proper, genuine and realistic consideration" to the submissions made on the applicant's behalf by his solicitors on 1 February 2018 to the effect that the ABC Complaint had been referred to the Director General on 6 September 2017 and was "unproven".

[54] In support of this ground, the applicant argued that the letter from the respondent to the applicant of 15 February 2018 failed to acknowledge that the ABC Complaint was before the Tribunal or the fact that the applicant had, through his solicitors' submissions of 1 February 2018, made the point that the complaint was "unproven". The problem with this argument is that the relevant letter from the respondent expressly acknowledged the submissions that had been made on the applicant's behalf and went further to state that they had been "considered" by him. The respondent then went on to state that he had formed the view that the submissions "did not contain reasonable grounds to persuade [him] not to recommend [the applicant's] dismissal to the Governor in Council". In any event, for the reasons earlier expressed (at [43]), it cannot be said that the respondent failed to take into account that the ABC Complaint was "unproven" and still before the Tribunal at the time when he made his recommendation to the Governor in Council.

[55] There is no substance in this ground of review.

Ground 5

[56] By the fifth ground of review, the applicant complained that there was no evidence or other material to justify particular findings, within the meaning of ss 20(2)(h) and 24(b) of the JRA. The impugned findings were: (1) that there was a real prospect that the applicant may engage in similar conduct in the future if action was not taken against him now; and (2) that the applicant's behaviour had damaged and continues to damage the standing of, regard for and confidence of the public in, the Council, the position of Mayor of the Council, the position of councillor of the Council and the system of local government generally.

[57] In support of this ground, the applicant argued that the material before the respondent "referred only to past conduct by the applicant", the most recent of which was submitted to be the conduct underlying Finding 7 and that occurred on 10 December 2016. Thus, it was argued that the impugned findings were "no more than mere speculation".

[58] It is true that considerable reliance must have been placed by the respondent on the disciplinary findings. They concern conduct that spanned a seven-month period commencing on 4 May 2016 and ending on 10 December 2016. Taken as a whole, it includes six findings of inappropriate conduct for breaches of the *Councillors' Code of Conduct* (Finding Nos 1, 2, 7, 8, 9, and 10), one finding of inappropriate conduct for failure to comply with the Council's *IT Systems Usage Management Policy* (Finding No 3), one finding of misconduct for breaching the trust placed in the applicant to uphold the requirements of s 4(2)(e) of the LGA (Finding No 4), one finding of misconduct for repeated inappropriate conduct (Finding No 5), one finding of misconduct for misuse of authority (Finding No 6) and one finding of misconduct for repeated inappropriate

conduct and making statements to the Council and media that were false and misleading (Finding No 11).

[59] Given such a significant disciplinary history, involving as it does such repeated and significant disciplinary breaches, it was open to the respondent to make both of the impugned findings. The number of breaches, their nature and the period over which they occurred are all matters that the respondent could legitimately take into account in deciding whether, to put it broadly, the applicant was fit to continue in office. So, too, is the feature that, despite being dealt with for previous breaches, the applicant continued to engage in inappropriate conduct or misconduct until, it seems, 10 December 2016.

[60] But the applicant's past disciplinary history was not all that the respondent relied on. The applicant's submissions on penalty with respect to Finding No 11 which were made on 27 November 2017 and his response dated 12 December 2017 to the superseded s 120 notice contain a number of statements that the respondent was entitled to regard as concerning. These were incorporated in the subject s 120 notice and expressly referred to in paragraph 30(d). They include statements as to the applicant's belief that his "duty of care to staff and the community is a higher authority than the code of conduct..."; that he "cannot sit by and be a 'passive criminal' constrained by a code of conduct"; that certain of the findings of inappropriate conduct and misconduct "would be different" in "light of further information now available"; and that the concerns which motivated his conduct "were in fact not baseless". These were relatively recent statements and, again, it was open to the respondent to rely on them when making both of the impugned findings. As the respondent found, their making supports the conclusion that the applicant did "not truly understand" his responsibilities and obligations as Mayor and councillor under the LGA and that there was "a real prospect that [the applicant] may engage in similar conduct in the future if action is not taken" against him. Those conclusions were not speculative; they were open on the material before the respondent. Nor was it speculation to find that that the applicant's behaviour "has damaged, and continues to damage, the standing of, regard for and confidence of the public in, the Council, the position of Mayor of the Council, the position of Councillor of the Council and the system of local government generally"; the applicant's disciplinary history coupled with the statements made in November and December 2017 are sufficient to support such a finding. This ground of review cannot succeed.

Ground 6

[61] The final ground of review contended that the exercise of the power to dismiss the applicant was so unreasonable that no reasonable person could so exercise the power (ss 20(2)(e) and 23(g) of the JRA) in that the decision was "devoid of evident or intelligible justification and any reasonable decision maker, having regard to the nature of the conduct relied upon by the respondent, would not have concluded that dismissal … was warranted".[21]

[62] At the hearing, the applicant's counsel rightly accepted that this ground of review could not be made out unless the second or third ground of review was upheld.[22] Those grounds of review have not been upheld and, in any event, it is not the role of this court to review the merits of the decision. Of course, where the decision is so unreasonable

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21 Originating application, par 6.

22 Transcript, 1-35, 36.

that no reasonable decision-maker could have arrived at it[23] or may properly be regarded as "legally unreasonable",[24] the court may interfere, but neither can be said of the decision that is here under review.

[63] The final ground of review fails.

Conclusion

[64] None of the grounds of review were made out, let alone to the extent necessary to establish some jurisdictional error on the part of the respondent.

[65] It followed that there was no alternative other than to dismiss the application, with costs.

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23 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

24 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [72].