INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Local Government Association of Queensland Ltd v Queensland Services Industrial Union of Employees and Ors* [2017] ICQ 002
PARTIES:	**LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND LTD** (appellant) **v** **QUEENSLAND SERVICES INDUSTRIAL UNION OF EMPLOYEES** (respondent)
FILE NO/S:	C/2017/8
PROCEEDING:	Appeal
DELIVERED ON:	7 July 2017
HEARING DATE:	18 May 2017
MEMBER:	Martin J, President
ORDER/S:	**1. The application to adduce additional evidence is refused.** **2. The appeal is allowed.** **3. The part of the decision of the Full Bench extending the Locality Allowance to Cherbourg Aboriginal Shire Council, Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council, Napranum Aboriginal Shire Council and Torres Strait Island Regional Council be set aside.** **4. The part of the decision of the Full Bench extending an additional one week of annual leave to Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council and Torres Strait Island Regional Council be set aside.** **5. The matter is remitted to the Commission to proceed according to law.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the appellant's objections to the respondent's submissions at first instance did not address the extension of a locality allowance and annual leave – where the appellant did not file submissions or evidence objecting to those submissions – where the appellant submits it did not have the opportunity to do so – where the appellant submits the extension of the locality allowance and annual leave will have

substantial financial impacts – where the appellant applies to adduce additional evidence on the impact of the locality allowance and annual leave extension – whether the application to adduce additional evidence should be granted

INDUSTRIAL LAW – QUEENSLAND – AWARDS – AMENDMENT, VARIATION OR RECISSION – where the Minister gave the Full Bench of the Queensland Industrial Relations Commission a Consolidated Request pursuant to s 140C of the *Industrial Relations Act* 1999 for the variation of an award – where appellant contends that the Full Bench exceeded the intent of the Consolidated Request and therefore acted in excess of its jurisdiction – where the appellant also submits that the Full Bench failed to take into account relevant considerations under ss 140D and 843 – whether the Full Bench erred in law

LEGISLATION: *Industrial Relations Act* 1999

Workers' Compensation and Rehabilitation Act 2003

CASES: *Cameron v Q-Comp* (C/2011/22)

Carlton v Blackwood [2015] ICQ 029

Cunningham and Others (Flower and Hart) v William Hamilton Hart (2009) 190 QGIG 126

In the Matter of a Proposed Local Government Industry Award – State 2015 [2016] ICQ 6

In the matter of the making of Modern Awards - Queensland Local Government Industry Award - State 2017 [2017] QIRC 009

LGAQ v Grace [2016] QSC 194

Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

Regan v WorkCover Queensland (2003) 174 QGIG 1009

Smith v Mackay Business Brokers Pty Ltd (2004) 176 QGIG 317

Svenson v Q-COMP (2006) 181 QGIG 629

APPEARANCES: S Blaney for the Local Government Association of Queensland Ltd
N Henderson for the Queensland Services Industrial Union of Employees

J Harding for the Australian Workers Union of Employees Queensland

[1] The Local Government Association of Queensland ("LGAQ") appeals from that part of the decision of a Full Bench of the Queensland Industrial Relations Commission[1] by which the Full Bench extended locality allowances to the Cherbourg Aboriginal Shire Council, the Mapoon Aboriginal Shire Council, the Northern Peninsula Area Regional Council, the Napranum Aboriginal Shire Council and the Torres Strait Island Regional Council and an additional week of annual leave to the Mapoon Aboriginal Shire Council, the Northern Peninsula Area Regional Council, and the Torres Strait Island Regional Council (where relevant – "the affected councils").

[2] The LGAQ also applies for an order allowing it to adduce additional evidence on the hearing of the appeal. In order to avoid unnecessary costs, I permitted the LGAQ to call the evidence it sought to rely on (and allowed cross-examination of it), on the basis that, if this application were unsuccessful, the evidence would be ignored for the purposes of the appeal.

Proceedings leading up to this appeal

[3] The history of these proceedings was recited in the Full Bench's decision:

> "[1] On 31 October 2015 a differently constituted Full Bench of the Queensland Industrial Relations Commission ('the Commission') made orders, relying upon the award modernisation process contained in Part 8 of Chapter 5 of the *Industrial Relations Act* 1999 ('the Act'), varying the *Queensland Local Government Industry Award - State* 2014 ('the Award').
>
> [2] The history of the proceedings before the previous Full Bench is set out in their decision1 which is repeated below:
>
> > '[1] Part 8 of Chapter 5 'Modernisation of awards' as well as Chapter 5A, 'Modern awards', were inserted into the *Industrial Relations Act* 1999 (the Act) by Act No. 61 of 2013. The amending Act thereby introduces a regime which permits the Minister to request the Queensland Industrial Relations Commission (Commission) to undertake a process of modernising awards. Section 140C empowers the Minister to give the Commission an award modernisation request (Request) to carry out an award modernisation process.
> >
> > [2] On 26 September 2014 following a Request from the then Attorney-General and Minister for Justice given in January 2014, a differently constituted Full Bench

[1] [2017] QIRC 009.

of this Commission made the *Queensland Local Government Industry Award - State* 2014 (the 2014 Award).

[3] The Act was amended in 2015 by the *Industrial Relations (Restoring Fairness) and Other Legislation Act 2015* which amongst other things, amended s 140D of the Act 'Modern award objectives', by deleting the requirement that the Commission have regard to 'financial considerations' as defined in that section. It also amended the principal object of the Act by deleting s 3(p) which required that when wages and employment conditions are determined by arbitration and the matter involved the public sector, the financial position of the State and the relevant public sector entity and the State's fiscal strategy were to be taken into account.

[4] The *Industrial Relations (Restoring Fairness) and Other Legislation Act* 2015 also inserted Part 20, *Transitional Provisions for Industrial Relations (Restoring Fairness) and other Legislation Amendment Act* 2015 in to the Act. Section 841 of the Act requires the Commission to review a relevant modern award and vary it if the Minister gives the Commission a variation notice under s 140CA. Section 140CA(1) [sic s 842(1)] requires the Commission to remove certain provisions which had been required to be inserted prior to their repeal by the *Industrial Relations (Restoring Fairness) and Other Legislation Act* 2015, as well as to include certain provisions that had been contained in relevant pre-modernisation awards.

[5] On 17 July 2015 the Treasurer and Minister for Employment and Industrial Relations (Minister), pursuant to s 140CA(1) issued a variation notice and made a Consolidated Request.

[6] A differently constituted Full Bench dealt with the Consolidated Request and the requirement of s 844 that the Commission consider an increase to the number of awards covering the Queensland local government industry (Excluding Brisbane City Council) ("Queensland local government industry'). That Full Bench declined to increase the number of awards governing the Queensland local government industry deciding that one award is appropriate.

[7] Following that decision, pursuant to the Consolidated Request, the Commission's award modernisation team (AMOD Team) conducted conferences with

> interested parties in an attempt to come to an agreed position in relation to amending the 2014 Award in conformity with the Consolidated Request. No agreement was reached and, on 10 September 2015, Deputy President Bloomfield referred the variation of the award to the Vice President who constituted this Full Bench to deal with the matter and to vary the 2014 Award in conformity with the Consolidated Request. The Referral included an Exposure Draft of a proposed new modern award for this Full Bench to consider.'

[3] On 10 November 2015, an appeal against the Full Bench's decision was lodged in the Industrial Registry.

[4] The appeal concerned questions with respect to, among other things, the effect of the *Industrial Relations (Restoring Fairness) and Other Legislation Act* 2015 and the Minister's request made under the award modernisation provisions. The grounds of appeal were:

> 'The appellants contend that the Full Bench erred in two ways:
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> (a) with respect to the capacity of the Minister to direct the Commission; and
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> (b) by misinterpreting the terms of the Consolidated Request and making a modern award in which there was a loss or reduction of entitlements compared to relevant pre-modernisation awards.'

[5] In short, Martin J found that the previous Full Bench erred in its determination of the requirements of the Consolidated Request and, as a result, fell into error in the manner in which it proceeded to make the new award. The decision of the Full Bench was set aside and the matter was remitted to the Commission to be heard and determined according to law.

[6] On 20 July 2016, Deputy President O'Connor directed that the *Local Government Industry Award - State* 2016 ('the Proposed Award') be referred back to the AMOD Team in order that further conciliation conferences be conducted with interested parties. It was further ordered that that the AMOD Team produce a further Draft Award for consideration by the parties and for a differently constituted Full Bench to hear and determine any outstanding issues about which the parties could not reach a consent position.

[7] The Commission recommenced the award modernisation process following the passing of amendments to the Act and the issuing of a variation to the existing Ministerial Request (Consolidated Request) on 17 July 2015. A new Consolidated Request was issued by the Honourable Grace Grace, Minister for Employment and Industrial Relations (the Minister) on 6 June 2016.

[8] In accordance with Chapter 5, Part 8, Division 2 of the Act (i.e. the award modernisation process provisions of the Act) and the Consolidated Request under s 140C(1) of the Act from the Minister, the AMOD Team of the Commission prepared an Exposure Draft of the Proposed Award."

[4] The Full Bench dealt with a number of issues but only two are of consequence for this appeal: locality allowances and annual leave extension.

The consolidated request of June 2016

[5] In June 2016, the Minister gave the Commission a Consolidated Request pursuant to s 140C of the *Industrial Relations Act* 1999 ("IR Act"). That section provides:

> **"140C Minister may make award modernisation request**
>
> (1) The Minister may give the commission a written notice (an award modernisation request) requesting that an award modernisation process be carried out.
>
> (2) An award modernisation request must state—
>
> (a) details of the award modernisation process that is to be carried out; and
>
> (b) the day by which the process must be completed.
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> (3) The day stated in the notice under subsection (2)(b) must not be later than 2 years after the day on which the award modernisation request is given to the commission.
>
> (4) An award modernisation request may state any other matter about the award modernisation process the Minister considers appropriate.
>
> (5) Without limiting subsection (4), the award modernisation request may—
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> (a) require the commission to—
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> (i) prepare progress reports on stated matters about the award modernisation process; and
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> (ii) make the progress reports available as stated in the request; or
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> (b) state permitted matters about which provisions must be included in a modern award; or
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> (c) direct the commission to include in a modern award terms about particular permitted matters; or
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> (d) give other directions about how, or whether, the commission must deal with particular permitted matters.
>
> (6) In this section—

permitted matter means a matter about which provisions may be included in a modern award under chapter 2A, part 3, division 1 or 2."

[6] The Consolidated Request contains the following, relevant material:

"**Objects**

1. The aim of the award modernisation process is to create a comprehensive set of modern awards. As set out in section 140BA of the Act, the principal object of the modernisation process is the modernisation of awards so they:

   a) are simple to understand and easy to apply; and

   b) together with the Queensland Employment Standards (QES), provide for a fair minimum safety net of enforceable conditions of employment for employees; and

   c) are economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and

   d) are in a form that is appropriate for a fair and productive industrial relations system; and

   e) result in a certain, stable and sustainable modern award system for Queensland.

Statement of Intent

2. A modern award shall provide for fair and just employment conditions.

   The purpose of award modernisation is to ensure awards remain relevant and provide for the rights and responsibilities that ensure economic advancement and social justice for all employees and employers.

   Award modernisation is not intended to reduce or remove employee entitlements and conditions from what is available in pre-modernisation awards. Having regard to this, the Commission shall ensure wages and employment conditions continue to provide fair conditions in relation to the living standards prevailing in the community and what is afforded to employees and employers in the relevant pre-modernisation award/s. Furthermore, the Commission must give special regard to the needs of low paid employees and the desirability of safeguarding the employment entitlements and protections for such employees.

   When modernising awards, the Commission is to take into account the amended legislative framework under which the award modernisation process will recommence, particularly the amendment of the modern award objectives at section 140D of the IR Act and the removal of proscriptions and qualifications for certain content which may now be

included in modern industrial instruments. The Commission must also have due regard to any agreement reached by the parties on a particular matter for inclusion in a modern award throughout the modernisation process.

The outcome of award modernisation is to provide for a fair and just industrial relations system underpinned by clear, certain and stable modern awards.

3. The Commission is to establish an award modernisation program for completing the award modernisation process in accordance with paragraphs 4 to 11 of this request. The award modernisation program is to be published in an electronic format.

...

12. When undertaking the award modernisation process, the Commission must have regard to:

    a) Chapter 5 Part 8 of the IR Act;
    b) for the review and varying of existing modern awards – the provisions of Chapter 20 Part 20 Division 2 of the IR Act;
    c) for those awards yet to be modernised – section 851 of the IR Act; and
    d) Part 13 Division 6 of the *Hospital and Health Boards Act* 2011 (in relation to the *Resident Medical Officers (Queensland Health) Award – State* 2014).

...

Schedule 1 - Local Government (excluding Brisbane City Council) award modernisation priorities

...

Allowances and other provisions

The Commission is to review the allowances and other provisions in the *Queensland Local Government Industry Award State* – 2014.

To this end, the Commission is to restore the provision of locality allowance and additional annual leave provisions where such provisions were available in the pre-modernisation award/s.

In reviewing the consolidated and other allowance arrangements currently in the *Queensland Local Government Industry Award – State* 2014 the Commission is to ensure employee entitlements have not been reduced in comparison with the allowances arrangements prescribed in the pre-modernisation awards.

The Commission in reviewing the provisions currently in the *Queensland Local Government Industry Award – State* 2014 must make certain that the variation of the Award results in the reinstatement of allowances, other employee entitlements and conditions of employment of at least the same value as those which existed in the pre-modernisation award/s."

[7] Before considering the substantive appeal, I will deal with the application to adduce additional evidence.

Should the additional evidence be considered?

[8] The LGAQ seeks to lead evidence concerning the costs, financial sustainability, and employment implications which flow from the application of the locality allowance and increased leave entitlement to the affected councils.

[9] The capacity to hear "additional evidence" is governed by s 348 of the IR Act.[2] Section 348 provides:

> "(1) An appeal to an industrial tribunal is by way of re-hearing on the record.
>
> (2) However, the industrial tribunal may hear evidence afresh, or hear additional evidence, if the industrial tribunal considers it appropriate to effectively dispose of the appeal."

[10] This section, which appears to have been introduced in the *Industrial Relations Act* 1990, has been the subject of limited attention. There has been more consideration of a similar, but not identical provision, in s 561(3) of the *Workers' Compensation and Rehabilitation Act* 2003 ("WCR Act") where it is provided that an "appeal is by way of rehearing on the evidence and proceedings before the ... industrial commission, unless the court orders additional evidence be heard." It is immediately obvious that s 348 imposes a specific pre-requisite for the admission of additional evidence, viz, that it is "appropriate to effectively dispose of the appeal".

[11] This application is not to "hear the evidence afresh". That would involve calling the witnesses again and receiving the same exhibits. This application is for the court to hear "additional evidence". In *Carlton v Blackwood*,[3] I said, with respect to s 561 of the WCR Act:

> "[4] While this court is not bound by the decisions of other courts which have dealt with applications to call extra evidence, the principles which have been developed can assist in determining an application such as this. So much was recognised by Hall P in *MacDonald v Q-COMP*. In *Akins v National Australia Bank* the New South Wales Court of Appeal considered the relevant principles of an application to call fresh evidence. Although the rule that court considered only allowed fresh evidence on special grounds, the criteria which were applied assist in cases like this. The test that court administered had three conditions:
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> > (a) The evidence could not have been obtained with reasonable diligence for use at the trial;

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2 Pursuant to s 1024 of the *Industrial Relations Act* 2016 this appeal is a proceeding contemplated by s 1024(1)(a) and, thus, the provisions of the *Industrial Relations Act* 1999 apply.

3 [2015] ICQ 029 at [4]-[6].

> (b) The evidence must be such that there is a high probability that there would be a different result; and
>
> (c) The evidence must be credible.
>
> [5] The applicant does not satisfy either of the first two conditions. I note that the second condition was applied by Hall P in *Webb v Q-COMP*. I note further that the use of the word 'additional' in describing 'evidence' in s 561 strongly suggests that it must be evidence which was not before the Commission originally. It would not be consistent with the purpose of s 561(3) to allow witnesses to be called whose evidence would simply revisit an issue already considered by the Commission.
>
> [6] For that reason an applicant must be able to identify the evidence sought to be called. Otherwise the court has no prospect of assessing the application and determining whether any proposed evidence carries with it the high probability that there would be a different result if that evidence was allowed to be called." (citations omitted)

[12] The identification of the additional evidence is not an issue in this case. The evidence, both oral and written, has been provided.

[13] Notwithstanding the difference between s 348 of the IR Act and s 561 of the WCR Act, it is helpful to consider the approach taken in this jurisdiction to the exercise of the unfettered power in the WCR Act. For example, in *Regan v WorkCover Queensland*,[4] Hall P stated:

> "I accept that the statutory power to hear "additional evidence" is constrained only by the proper exercise of discretion and is not to be exercised only in those cases in which "fresh evidence" would be received in a civil matter at common law, compare *Chalk v. WorkCover Queensland* (2002) 171 QGIG 327 at 328. However, I can see no reason why the accumulated wisdom of the common law should be ignored. **Having regard to the desirability of finality in litigation, the upset and cost of litigation after a trial is completed and the need to encourage litigants to prepare for trial in a proper way, I can see no justification for exercising the statutory discretion to let in additional evidence which might, by the exercise of reasonable diligence, have been discovered by the appellant prior to the trial.** The "additional evidence" now relied upon is of that character." (emphasis added)

[14] Similarly, in *Svenson v Q-COMP*:[5]

> "There is of course some capacity to go outside the evidence and proceedings before the Industrial Magistrates Court. Section 561(3) vests an express power to order that "additional evidence be heard". The Court has consistently adopted the view that the statutory power to hear "additional evidence" is constrained only by the

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4 (2003) 174 QGIG 1009 at 1010.
5 (2006) 181 QGIG 629 at 630.

proper exercise of discretion, and is not to be exercised only in cases in which "further evidence" would be admitted in a civil matter in the general courts, compare *Chalk v WorkCover Queensland* (2002) 171 QGIG 327 at 328, and *Regan v WorkCover Queensland* (2003) 174 QGIG 1009 at 1010. Such an approach, which does not preclude deriving assistance from the recorded wisdom of the civil courts, does not necessarily advance the position of the appellant seeking to adduce "additional evidence". This Court has no authority to order a retrial at the Industrial Magistrates Court, and does not itself have authority to conduct a new trial. **An appellant seeking to adduce additional evidence to address a forensic error at first instance, which is attributable to the appellant's conduct at proceedings at first instance, cannot reasonably expect the grant of indulgence where the consequence will be that this Court is put in the position of determining issues of primary fact and, in particular, issues of credibility where part of the evidence has been heard by the Industrial Magistrates Court and part of the evidence has been heard by this Court.**" (emphasis added)

[15] Section 348 was considered by a Full Bench of the Commission in *Smith v Mackay Business Brokers Pty Ltd*,[6] where the following was said:

> "Every litigant is entitled to procedural fairness. However, procedural fairness requires that a litigant be given "a reasonable opportunity to present his case" and not that the Tribunal ensure "that a party takes the best advantage of the opportunity to which he's entitled" *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343 per Deane J, approved *Re Association of Architects of Australia; Ex Party Municipal Officers' Association of Australia* (1989) 63 ALJR 298 at 305 per Gaudron J (with whom Dawson J agreed). **This was a case in which the applicant should have realised that the execution of the Employment Agreement was an issue**, compare *Re Building Workers Industrial Union of Australia; ex parte Gallagher* (1988) 62 ALJR 81 at 84 approved *Re Association of Architects of Australia; ex parte Municipal Officers' Association of Australia*, op. cit. at 305. **A litigant who loses the opportunity to have his case fully and fairly considered by his own folly or the neglect of his advisors has no remedy**, *Reg v Home Secretary, ex parte Al- Mehdawi* [1990] 1AC 877 at 898 per Lord Bridge of Harwich (with whom the other members of the House of Lords agreed) and *SBA Foods Pty Ltd v Victorian WorkCover Authority and Anor* [2001] VSC 276 (10 August 2001) at para 283 per Gillard J.
>
> In our view the application for leave to appeal should be dismissed both upon the ground that the proposed appeal has no prospect of success and upon the basis that it is not in the "public interest" (section 342(3)) to permit a litigant to found an appeal upon the inadequacy of the case presented at first instance. For completeness, we note that **it would be unconscionable to exercise the discretion at s. 348(2) to allow "additional evidence" which, by the exercise of a modicum of prudence and diligence, might have been made available and placed before the Commission at first instance.**" (emphasis added)

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[6] (2004) 176 QGIG 317 at 318.

[16] The background to the LGAQ's submission may be summarised as follows:

(a) The final exposure draft of the proposed award was provided to the parties on 15 November 2016, along with a Referral Advice.

(b) The Referral Advice noted that the Queensland Services Industrial Union of Employees sought the extension of the locality allowance and five weeks annual leave to the affected councils. This proposed extension did not form part of the exposure draft.

(c) On 16 November 2016 directions were issued by the Commission requiring the parties to file and serve the following by 28 November 2016:

(i) a list of the interested organisation's objections (itemising the clauses to which objections are taken) and the interested organisation's proposal for that clause (in detail); and

(ii) affidavits of evidence of all persons giving evidence in support of the interested organisation's proposal.

(d) On 28 November 2016, the Queensland Services Industrial Union of Employees ("QSU") filed a submission in which it objected to the omission in the exposure draft to extend the locality allowance and five weeks annual leave to the affected councils.

(e) The LGAQ submission did not deal with those issues because it did not object to the way in which the exposure draft treated locality allowances etc.

[17] The LGAQ argues that, because there was no direction for the filing of submissions in reply, it did not have the opportunity to respond to the QSU submissions on this issue. It also submits that the QSU did not file any evidence as to the costs, associated financial sustainability or employment implications of their proposal to extend the locality allowance and so on.

[18] The argument for the LGAQ then proceeds to assert that at the hearing before the Full Bench on at 5 December 2016 there was no evidence as to the costs etc for the affected councils if the QSU proposal was adopted. Finally, and in an apparent attempt to reverse the onus, the LGAQ submits that the Full Bench did not enquire as to whether evidence existed with respect to the costs etc of adopting the QSU proposal.

[19] It could not have come as a surprise to the LGAQ that the issue of locality allowance and annual leave for the affected councils would be considered by the Full Bench given that it had a proposal for those very things from the QSU to consider. The LGAQ knew that no later than 28 November.

[20] When the Full Bench convened on 5 December, this was not the first time that an award modernisation hearing for this particular award was conducted. There had been two

earlier hearings (2014 and 2015) and the LGAQ, as a frequent and sophisticated participant in Commission hearings, must be taken to have known that it would have an opportunity at the hearing in December to respond to the QSU submission.

[21] At the hearing, the LGAQ made submissions with respect to locality allowance and annual leave. In those submissions specific reference was made to the QSU's arguments and to the "considerable amount of evidence" which had been considered on earlier occasions. The argument put forward by the LGAQ relied on its construction of the Consolidated Request and the following submission was made:

> "So our argument is fairly simply: where it applied previously, we've got no argument against the minister's request for its reinsertion but where it didn't apply, there's no merit – there was never any merit for it to go in in the first instance, and that's as far as it should extend."[7]

[22] The LGAQ knew that the QSU wanted the locality allowance and annual leave extension applied to the affected councils. It had an opportunity, at the Full Bench hearing, to either place evidence before the Full Bench or seek an adjournment to do so. It did not overlook the QSU submission. Rather, it sought to meet it on the basis that any extension was not open to be made because of the nature of the Consolidated Request.

[23] The evidence which the LGAQ seeks to have admitted on this appeal was evidence which it could have, with the "exercise of a modicum of prudence and diligence", placed before the Full Bench. Further, all the evidence sought to be admitted was evidence which was in existence, or could easily have been brought into existence, at that time.

[24] Where a party deliberately conducts an argument on the basis of a particular construction of a statute or an award, or, as in this case, the Consolidated Request, and does not seek to rely upon available evidence as part of an alternative argument, then it cannot expect to have a discretion exercised in its favour. What is being sought here is for the case, which the LGAQ could have conducted before the Full Bench, to be conducted in this Court. None of the arguments which were proposed for the LGAQ demonstrated that it would be appropriate to hear additional evidence to effectively dispose of the appeal. The application is refused.

The appeal against the inclusion of the locality allowance etc.

[25] The LGAQ contends that the Full Bench erred in law in the following ways:

(a) By providing that locality allowances would apply to the affected councils "where the restoration of such allowances for those Councils was not a requirement" of the Consolidated Request.

(b) By providing that locality allowances would apply to the affected councils contrary to the requirements of s 140BA(c) and s 140D of the IR Act.

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[7] Full Bench, 5 December 2016, T1-14.

(c) Alternatively, by providing that locality allowances would apply to the affected councils "in purported reliance on s 320(3) of the IR Act in circumstances where the application of locality allowance to those Councils will create inequity and unfairness as it only applies to some employees in each of those Councils, being only those falling within the Administrative, Clerical, Technical, Professional, Community Service, Supervisor and Managerial Group of the Modern Award".

(d) By providing for extended leave for the Mapoon Aboriginal Shire Council, Northern Peninsular Area Regional Council and Torres Strait Island Regional Council contrary to the requirements of s 140BA(c) and s 140D of the IR Act.

(e) Alternatively, by providing for extended leave for the Mapoon Aboriginal Shire Council, Northern Peninsular Area Regional Council and Torres Strait Island Regional Council "in purported reliance on s 320(3) of the IR Act in circumstances where the application of locality allowance [sic – extended leave] to those Councils will create inequity and unfairness as it only applies to some employees in each of those Councils, being only those falling within the Administrative, Clerical, Technical, Professional, Community Service, Supervisor and Managerial Group of the Modern Award".

[26] The submissions filed by the LGAQ dealt with these grounds in a different order and with a slightly different emphasis. I will deal with them in the order in which they appear in the written submissions.

The Consolidated Request

[27] The LGAQ refers to that part of the Consolidated Request which provides:

> "The Commission is to review the allowances and other provisions in the Queensland Local Government Industry Award State – 2014.
>
> To this end, the Commission is to restore the provision of locality allowance and additional annual leave provisions where such provisions were available in the pre-modernisation award/s."

Did the Full Bench err by inserting the allowances when it was not a requirement of the Consolidated Request?

[28] In its written submission, the LGAQ says:

> "The Minister's Variation Notice was specific on how the Commission was to deal with locality allowance and additional annual leave in its award modernisation function ie to restore that which existed previously. … this direction established the parameters for how locality allowance and additional leave was to be included in the 2017 award as part of the award modernisation process."

[29] It is common ground that the affected councils were not subject to the locality allowance or the additional annual leave and, thus, could not come within the Minister's direction "to restore the provision of locality allowance and additional annual leave provisions where such provisions were available in the pre-modernisation award/s".

[30] This was recognised by the Full Bench and dealt with in the following way:

> "[32] Whilst we also accept that in respect of the Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council, Napranum Aboriginal Shire Council and Torres Strait Island Regional Council, the Ministerial request imposes no obligation on the Commission to restore locality and additional annual leave provisions, it does raise something of a conundrum. The Commission, in its decisions, is governed by equity and good conscience. It would seem contrary to that provision to exclude workers employed by Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council, Napranum Aboriginal Shire Council and Torres Strait Island Regional Council from obtaining the benefits of additional annual leave and locality allowance. There appears to be no logical basis to do so. They are, by locality, entitled to the benefits. The mere fact that the Consolidated Request does not require it to be done is not a sufficient reason for them to be excluded.
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> ...
>
> [34] For the reasons advanced in paragraph [32] above, we see no logical reason why Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council and Torres Strait Island Regional Council should not be entitled to five weeks leave. As clause 19.1 provides, the entitlement to a period of leave is '...based upon the location of their employment'."

[31] The argument for the LGAQ is that, in the absence of a direction to include the allowances for all Councils, the Full Bench was confined only to inserting the allowances for Councils which were previously subject to them. This, it was argued, arises from the provisions of s 140CC:

> "**140CC Procedure for carrying out modernisation process**
>
> (1) The commission must carry out the award modernisation process in accordance with the award modernisation request.
>
> (2) Subject to subsection (1)—
>
> (a) the commission may decide the procedure for carrying out the award modernisation process; and
>
> (b) without limiting paragraph (a), the commission may inform itself in any way it thinks appropriate, including by consulting with any person, body or organisation in the way the commission considers appropriate.

(3) To remove any doubt, it is declared that subsection (2) does not limit the powers of the commission under any other provision of this Act."

[32] Reliance is placed on the consideration given by Applegarth J to the effect of s 140CC in *LGAQ v Grace*[8] where his Honour said:

> "[21] Section 140CC binds the commission to obey the terms of a ministerial request. The words of s 140C are not confined to matters of procedure. ..."

[33] His Honour also observed:

> "[32] It is not simply the text that I have to consider in arriving at the proper construction of the provisions. I have to consider the text in context. In that regard, the applicant points to other contextual matters.
>
> [33] The first is s 140CC which, as I have said, provides that the Commission must carry out the award modernisation process in accordance with the award modernisation request. It goes on to provide what the Commission may decide in terms of procedure.
>
> [34] The applicant submits the content of s 140CC is focused on the Commission's procedural powers and submits that this is an indication that the primary purpose of the award modernisation request provisions in s 140C is to permit the Minister to engage in agenda setting and in specifying procedure for the award modernisation process. I am unable to agree. It seems to me that s 140C is not confined to agenda setting. If a particular statement or direction sets an agenda, then procedures are adapted accordingly. If the direction states that certain terms are to be included in the award, then the procedure is adapted accordingly. The request may be a very basic one and not include any matters in addition to those things that must be included by virtue of subsections 140C(2) and (3)."

[34] The LGAQ argues that the "terms of a ministerial request" should be construed to include the "intent" of the Minister's request and that the intent was to do no less than, and no more than, "restoring" allowances where they had existed under a pre-modernisation award. The argument proceeds that, by extending the allowances to the affected councils, the Full Bench exceeded its jurisdiction.

[35] One consequence of the LGAQ's argument would be that the Minister could, through the expression of an intent, deny the Full Bench the capacity to exercise all of its jurisdiction in making an award. What is contended is that it can be inferred from the Consolidated Request that the Minister was directing that the allowances could only be applied to those councils to which they previously applied and any power the Full Bench might otherwise have could not be used to extend the allowances to other councils. That contention must be rejected for two reasons:

(a) Section 140CC does not have that effect; and, in any case

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[8] [2016] QSC 194.

(b) The Consolidated Request could not remove the general powers available to the Full Bench elsewhere in the IR Act.

[36] Section 140CC does not confine the exercise of the Full Bench's jurisdiction to those matters contained within a request. It requires the Full Bench to "carry out the award modernisation process in accordance with the award modernisation request", but that does not mean that the Full Bench is necessarily confined to the terms of a request. Section 140CC must be read in context and part of that context includes the objects of modernising awards (in s 140BA) and the Commission's award modernisation function (in s 140BB).

[37] This is a different set of circumstances to those considered in *In the Matter of a Proposed Local Government Industry Award – State 2015*.[9] In that case, a Full Bench had declined to comply with the terms of a Minister's Request unless it could do so conformably with the balance of the Act. I held that the Full Bench had erred in proceeding on that basis. In this case, the Full Bench has complied with the Consolidated Request and, then, has gone further and used the powers generally available to it to extend the allowances. On that point alone, it has not erred. The other matters raised by the LGAQ are considered below, but, putting those to one side, the Full Bench has acted within its powers as envisaged by Applegarth J in *LGAQ v Grace* where he said:

> "[38] ... The sections which I have briefly noted contain some mandatory provisions effectively directing the Commission to remove or include some things in an award and some discretionary matters. Section 140C deals with different subject matters and, depending upon the terms of the request, the Commission may be required to include certain matters in the modern award. And it may, in addition, have ample discretion as to what it includes, or does not include, in the award. ..."

[38] The LGAQ contends that the Consolidated Request was composed in such a way that an intention could be inferred that the Full Bench was to restore allowances but no more. Even if such an inference could be drawn, the award modernisation provisions do not deny the exercise of other powers under the IR Act. They do, though, impose conditions on the exercise of such powers and they are considered below.

Did the Full Bench err in relying on s 320(3) as the basis for extending the locality allowance and leave provisions?

[39] Section 320 deals with the basis of decisions of the Commission. Subsection (3) provides:

> "Also, the commission or Industrial Magistrates Court is to be governed in its decisions by equity, good conscience and the substantial merits of the case having regard to the interests of—
>
> (a) the persons immediately concerned; and
>
> (b) the community as a whole."

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[9] [2016] ICQ 6.

[40] The only reasons the Full Bench gave for extending the locality allowance and leave provisions was that not to do so would be contrary to s 320(3) and illogical.

[41] In order that a Full Bench might vary a relevant modern award (and, given that there had been a "modern award" made in 2014, this is what the Full Bench was doing) it must consider those matters to which it is directed by the IR Act. Section 843 applies to variations which include a matter contained in a pre-modernisation award. It provides:

> "**843 Other variations**
>
> (1) The commission may vary a relevant modern award to provide for a matter contained in a relevant pre-modernisation award.
>
> (2) For deciding whether to vary the relevant modern award under subsection (1), the commission must have regard to—
>
> (a) the provisions permitted to be included in a relevant modern award under section 71ND; and
>
> (b) the desirability of a modern award not duplicating provisions of the Queensland Employment Standards; and
>
> (c) the modern awards objectives under section 140D; and
>
> (d) a submission made by a party covered by the relevant modern award about the proposed variation."

[42] The reasons given by the Full Bench find an echo in the provisions of s 71ND. It states:

> "**71ND General matters**
>
> (1) A modern award may include provisions to provide fair and just employment conditions.
>
> (2) Without limiting subsection (1), a modern award may include provisions about—
>
> (a) minimum wages, including—
>
> (i) wage rates for young employees, employees with a disability and employees engaged as apprentices or trainees; and
>
> (ii) piece rates; and
>
> (b) skill-based classifications and career structures."

[43] It may be that the Full Bench considered that the extension of the allowance and leave provisions would "provide fair and just employment conditions" but that was not said. The only reference was to s 320.

[44] Similarly, there was no reference to, or consideration of, the matters set out in s 140D. It provides:

> **"140D Modern awards objectives**
>
> (1) In exercising its chapter 5A powers, the commission must ensure modern awards, together with the Queensland Employment Standards, provide a minimum safety net of employment conditions that is fair and relevant.
>
> (2) For subsection (1), the commission must have regard to the following—
>
> (a) relative living standards and the needs of low-paid employees;
>
> (b) the need to promote social inclusion through increased workforce participation;
>
> (c) the need to promote flexible modern work practices and the efficient and productive performance of work;
>
> (d) the need to ensure equal remuneration for male and female employees for work of equal or comparable value;
>
> (e) the need to provide penalty rates for employees who—
>
> (i) work overtime; or
>
> (ii) work unsocial, irregular or unpredictable hours; or
>
> (iii) work on weekends or public holidays; or
>
> (iv) perform shift work;
>
> (f) the likely impact of the exercise of the chapter 5A powers on business, including on productivity, employment costs and the regulatory burden;
>
> (g) the need to ensure the modern award system—
>
> (i) is simple and easy to understand; and
>
> (ii) is certain, stable and sustainable; and

(iii) avoids unnecessary overlap of modern awards;

(i) the likely impact of the exercise of the chapter 5A powers on—

(i) employment growth and inflation; and

(ii) the sustainability, performance and competitiveness of the Queensland economy.

(3) Also, to the extent the commission's chapter 5A powers relate to setting, varying or revoking minimum wages in modern awards, the commission must establish and maintain a minimum safety net of fair minimum wages, having regard to—

(a) the matters mentioned in subsection (2)(a) to (d) and (i); and

(b) providing a comprehensive range of fair minimum wages to—

(i) young employees; and

(ii) employees engaged as apprentices or trainees; and

(iii) employees with a disability.

(4) The objectives of the commission under subsections (1) and (2) are the modern awards objectives.

(5) In this section—

chapter 5A powers means powers or functions of the commission under this chapter."

[45] When varying a modern award, the Commission is specifically required by s 843 to take into account certain identified matters. The Full Bench has identified those matters which moved it to extend the locality allowance and the leave provision to the affected councils. While logic should always play a part in any decision making process it, like the consideration of s 320(3), is not sufficient to satisfy the requirements of s 843. There is nothing in the reasons of the Full Bench to suggest that any of the matters in s 140D were taken into account in reaching the decision under appeal.

[46] The failure to take into account relevant considerations is an abuse of the discretion available to the Commission to vary a modern award.[10] Jurisdictional error was described

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[10] See *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39.

in this way by McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf*:[11]

> "[82] It is necessary, however, to understand what is meant by 'jurisdictional error' under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia,* if an administrative tribunal (like the 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."
>
> '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." (citations omitted, emphasis added)

[47] It is, of course, inappropriate to subject any decision of this type to over-zealous scrutiny or to be too eager to seek out error.[12] Nevertheless, jurisdictional error has been made out in this case – the Full Bench asked itself the wrong question and that affected the way in which it exercised its power.

[48] It follows that the appeal must be allowed and that the other grounds (which are of a similar nature) need not be considered.

[49] While both parties would prefer that this matter conclude in this Court, it is not possible to attempt to consider the issues which must, pursuant to s 843, be considered. Those issues are better dealt with in the Commission where they can be subject to appropriate directions concerning the evidence which might be necessary and the submissions which should be made.

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[11] (2001) 206 CLR 323 at 351.

[12] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 273; *Cunningham and Others (Flower and Hart) v William Hamilton Hart* (2009) 190 QGIG 126; *Cameron v Q-Comp* (C/2011/22).

Orders

[50] I make the following orders:

1. The appeal is allowed.

2. The part of the decision of the Full Bench extending the Locality Allowance to Cherbourg Aboriginal Shire Council, Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council, Napranum Aboriginal Shire Council and Torres Strait Island Regional Council be set aside.

3. The part of the decision of the Full Bench extending an additional one week of annual leave to Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council and Torres Strait Island Regional Council be set aside.

4. The matter is remitted to the Commission to proceed according to law.