QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Local Government Association of Queensland v Queensland Services, Industrial Union of Employees* [2020] QIRC 068
PARTIES:	**Local Government Association of Queensland** (Applicant) v **Queensland Services, Industrial Union of Employees** (Respondent)
CASE NO:	MA/2019/4
PROCEEDING:	Application
DELIVERED ON:	7 May 2020
HEARING DATE:	27 February 2020
MEMBERS:	O'Connor VP Hartigan IC McLennan IC
HEARD AT:	Brisbane
ORDERS:	**Full Orders per last page of decision**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – AWARDS – PARTITION OR VARIATION – Partitioning of Local Government Award under s 996 of *Industrial Relations Act* 2016 - Where partitioning of Award included an extension of locality allowance and annual leave - finding by Industrial Court of jurisdictional error after partitioning – effect of Court decision on partitioning process by Industrial Registrar – whether inclusion of

award provisions in partitioned award had validity.

INDUSTRIAL LAW – PROCEDURE – DECLARATION- Application to dismiss substantive proceedings - Application for declarations - Power of the Commission under s 463 to hear and determine application - Standing to make application under s 464 - Whether directly affected by the declaration – circumstances where discretion exercised to decline declaratory relief - Application dismissed

LEGISLATION:

Acts Interpretation Act 1954 (Qld)
Building and Construction Industry Payments Act 2004 (Qld)
Industrial Relations Act 1999 (Qld) s 140CE, s 995
Industrial Relations Act 2016 (Qld) s 463, s 464
Migration Act 1958 (Cth)
Social Security Administration Act 1992 (Cth)
Queensland Local Government Industry Award - State 2017
Queensland Local Government Industry Award - State 2014

CASES:

Adelaide Development Co Pty Ltd v The Corporation of the City of Adelaide and Anor (1991) 56 SASR 497
Ainsworth v CJC (1992) 175 CLR 564; [1992] HCA 10
Baxter v New South Wales Clickers' Association (1909) 10 CLR 114
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (2013) 1 Qd R 228
City of Port Adelaide Enfield v Bingham [2014] SASC 36; 119 SASR 1
Dillon v Douglas Shire Council [2004] QPEC 50

Forbes v New South Wales Trotting Club Ltd (1979) 143 CLR 242
Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123; [2018] HCA 34 1
Ipswich City Council v The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland (B/2013/50)
Jackson v Purton [2011] TASSC 28
Jadwan Pty Ltd v Secretary, Department of Health and Aged Care (2003) 145 FCR 1; [2003] FCAFC 288
Local Government Association of Queensland Limited v Queensland Services Industrial Union of Employees and Others [2017] ICQ 002
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; (2018) HCA 4
Queensland Nurses and Midwives' Union v State of Queensland (Department of Health) [2019] ICQ 12
R v Rent Officer Service and Anor, Ex Parte Muldoon (1996) 3 All ER 498; [1996] 1 WLR 1103
Re Salmon; Priest v Uppleby (1889) 42 ChD 351
The Queensland Public Sector Union of Employees v Queensland Fire and Rescue - Senior Officers Union of Employees (2009) 192 QGIG 39
Truenergy Austraia Pty Ltd v Minister for Industrial Relations (2005) 93 SASR 393; [2005] SASC 490

APPEARANCES:

Mr A J Herbert of Counsel instructed directly by the Applicant.

Mr N Henderson of the Respondent

Reasons for Decision

[1] On 28 February 2017 a Full Bench of the Commission made, pursuant to s 140CE(1)(a) of the *Industrial Relations Act* 1999, the *Queensland Local Government Industry Award - State* 2017. At the same time, it repealed the *Queensland Local Government Industry Award - State* 2014.

[2] The Full Bench dealt with a number of issues but, for the purposes of this application only two are of relevance: locality allowances and annual leave extension.

[3] 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.

[4] The Local Government Association of Queensland lodged an appeal against that part of the decision of the Full Bench. The appeal was heard on 18 May 2017.

[5] As at 1 July 2017, the Industrial Registrar was 'as soon as practicable after the commencement' required to partition the *Queensland Local Government Industry Award - State* 2017 by terminating the award and making three replacement modern awards.[1]

[6] Between the hearing of the appeal in the Industrial Court and prior to the rendering of a final decision by Martin J, the Registrar pursuant to s995 of the Act partitioned the 2017 Modern Award. Consistent with the legislative scheme, the Registrar terminated the 2017 Modern Award and made three replacement awards. Relevant for these proceedings is the *Queensland Local Government Industry Award (Stream A) Award – State* 2017. Section 995(6) of the Act provides that the awards are taken to be revoked by the Commission under Chapter 3 of the Act and the newly partitioned awards are taken to be modern awards under Chapter 3. For the purposes of the Act, they are deemed to be made by the Commission.[2] A party to the relevant award is not entitled to be heard in relation to the partitioning of the Award.[3]

[7] Martin J handed down his decision on 7 July 2017.[4] As far as is relevant to these proceedings he found that:

> 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

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[1] *Industrial Relations Act* 2016 s 995(2).
[2] Ibid s 995(6)(b).
[3] Ibid s 995(5).
[4] *Local Government Association of Queensland Limited v Queensland Services Industrial Union of Employees and Others* [2017] ICQ 002.

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.

The failure to take into account relevant considerations is an abuse of the discretion available to the Commission to vary a modern award. Jurisdictional error was described in this way by McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf*:

> 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.
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> '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.

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. 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.[5]

[8] The matter was remitted by Martin J back to the Commission to proceed according to law.

[9] On 18 August 2017 the matter was mentioned by the Full Bench for the purposes of considering the implications of the Court's decision and how the matter should be further progressed. The matter was adjourned by the Full Bench to permit discussions between the parties.

[10] Subsequent to the mention, the parties took no formal steps to progress the matter until an application was filed in the Commission by the LGAQ on 1 August 2019 seeking to vary the Stream A Award.

[11] On 24 September 2019 the Applicant filed the amended application seeking the following declarations and orders:

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[5] Ibid, [45]-47] (citations omitted) (emphasis added).

1. The Commission declares that upon, and as a consequence of, the Orders made by Martin J in matter C/2017/8 on 7 July 2017, the Locality Allowance provision of Stream A Award ceased to have any force and/or effect as terms of the Award insofar as those provisions relate to Cherbourg Aboriginal Shire Council, Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council, Napranum Aboriginal Shire Council and Torres Strait Island Regional Council (collectively known as the "Councils").

2. The Commission declares that upon, and as a consequence of, the Orders made by Martin J in Matter C/2017/8 on 7 July 2017, the additional week of annual leave provisions of Stream A Award ceased to have any force and/or effect as terms of the Award insofar as those provisions relate to Mapoon Aboriginal Shire Council, Norther Peninsula Area Regional Council and Torres Strait Island Regional Council.

3. Further to 1-2 above, or in the alternative, the Commission orders that the Award provisions, insofar as they relate to the Councils, are set aside with effect from 7 July 2017.

4. In the alternative to 1-3 above, the Commission orders that the Award provisions, insofar as they relate to the Councils, are set aside with immediate effect.

Further, or in the alternative to 1-4 above, the Commission orders that the Award be varied so as to include a fair and equitable transition process for the application of the Award provisions as they relate the Councils, with such variation to operate as and from 7 July 2017.

[12] A further mention was held on 19 November 2019 at which time leave was granted for the applicant to file an amended application.

[13] The application for declarations is opposed by the respondent. The respondent filed in the registry on 12 February 2020 an application in existing proceedings seeking to have the amended application dismissed.

The effect of the decision of Martin J.

[14] It is contended by the applicant that consequent upon the decision of Martin J, the award issues were stripped of any legal effect. The inclusion of the award issues in the Stream A Award as part of the partitioning exercise under s996 of the Act had no validity.

[15] The applicant submitted that the Award issues were not, at any time, lawfully part of the *Queensland Local Government Industry Award - State* 2017 and as a consequence there was no mechanism by which the Industrial Registrar could have included them in the Stream A Award.

[16] In support of its contention, the applicant relies upon the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* ('*Bhardwaj*').[6] In that case, the Immigration Review Tribunal cancelled Mr Bhardwaj's student visa. At the time of

[6] (2002) 209 CLR 597.

making the decision, because of an administrative oversight by the Tribunal, it was not aware that Mr Bhardwaj had requested an adjournment of the hearing because of illness.

[17] The High Court found that the initial failure to provide a hearing breached the procedural fairness requirements of the *Migration Act* 1958 (Cth), constituting a failure to properly exercise the decision-making power. In a joint judgment, Gaudron and Gummow JJ wrote:

> It is sometimes convenient to ask whether administrative decisions which involve reviewable error are either void or voidable, the former signifying that the decision is "ineffective for all purposes" and the latter that it is "valid and operative unless and until duly challenged but ... deemed to have been void ab initio." The tendency to conceptualise erroneous administrative decisions as voidable rather than void may be the result of the need to treat a decision as having at least sufficient effect to ground an "appeal" or other legal proceedings. Thus, it was said by Lord Wilberforce in *Calvin v Carr* that:
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> > Their Lordships' opinion would be, if it became necessary to fix upon one or other of [the] expressions ['void' or 'voidable'], that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated. In the present context, where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent.
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> In our view, it is neither necessary nor helpful to describe erroneous administrative decisions as "void", "voidable", "invalid", "vitiated" or, even, as "nullities". To categorise decisions in that way tends to ignore the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision. And, perhaps more importantly, it overlooks the fact that an administrative decision has only such force and effect as is given to it by the law pursuant to which it was made.

[18] Their honours went on to observe:

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.
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> As already pointed out, a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all. Once that is accepted, it follows that, if the duty of the decision-maker is to make a decision with respect to a person's rights but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed. Thus, not only is there no legal impediment under the general law to a decision-maker making such a decision but, as a matter of strict legal principle, he or she is required to do so.[7]

[19] Hayne J in adopting a like approach said:

> In general, judicial orders of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction. By contrast, administrative acts and decisions are

[7] *Bhardwaj* (n 6) 612-615 [45], [46], [51], [53] (citations omitted).

> subject to challenge in proceedings where the validity of that act or decision is merely an incident in deciding other issues. If there is no challenge to the validity of an administrative act or decision, whether directly by proceedings for judicial review or collaterally in some other proceeding in which its validity is raised incidentally, the act or decision may be presumed to be valid. But again, that is a presumption which operates, chiefly, in circumstances where there is no challenge to the legal effect of what has been done. Where there is a challenge, the presumption may serve only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached. It is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside. For that reason, there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and orders of the Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction.
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> This is not to adopt what has sometimes been called a 'theory of absolute nullity' or to argue from an a priori classification of what has been done as being 'void', 'voidable' or a 'nullity'. It is to recognise that, if a court would have set the decision aside, what was done by the Tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision would be set aside for jurisdictional error, the statutory power given to the Tribunal has not been exercised
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> …
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> Nothing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the September decision. In particular, the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect. Once it is recognised that a court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences.[8]

[20] *Bhardwaj* is authority for the proposition that until a decision in accordance with the statute had been made there was no decision. To pick-up from the reasoning of Gaudron and Gummow JJ "*[T]he duty to make a decision remains unperformed*".[9]

[21] In the High Court case of *Plaintiff S157/2002 v The Commonwealth of Australia*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, referring to passages from the reasons of *Bhardwaj* wrote:

> *This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all"*.[10]

[22] More recently, in *Hossain v Minister for Immigration and Border Protection,* Kiefel CJ, Gageler and Keane JJ said:

> Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction. A decision

[8] *Bhardwaj* (n 6) 645-647 [151]-[153] (citations omitted).
[9] Ibid 616 [53].
[10] (2003) 211 CLR 476, 506 [76] citing *Bhardwaj* (n 6) 614-615 [51] (Gaudron and Gummow JJ), 618 [63] (McHugh J), 646-647 [152] (Hayne J).

> made outside jurisdiction is not necessarily to be regarded as a "nullity", in that it remains a decision in fact which may yet have some status in law. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all". To that extent, in traditional parlance, the decision is "invalid" or "void".[11]

[23] In *Jadwan Pty Ltd v Secretary, Department of Health & Aged Care,* Gray, Kenny and Downes JJ wrote:

> In our view, *Bhardwaj* cannot be taken to be authority for a universal proposition that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever. All that it shows is that the legal and factual consequences of the decision, if any, will depend upon the particular statute. As McHugh, Gummow, Kirby and Hayne JJ said in *Project Blue Sky Inc v Australian Broadcasting Authority*:
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> > 'An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.'[12]

[24] In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors,* the court considered a submission that the provisions of the *Building and Construction Industry Payments Act* 2004 did not support a conclusion that an adjudicator's decision affected by jurisdictional error is necessarily of no legal effect.[13] Muir J, (Holmes JA and A Lyons J agreeing) wrote:

> *That proposition, with respect, may be accepted but, absent statutory provisions necessitating a contrary conclusion, the general principle identified in [Bhardwaj applies.*[14]

[25] With respect, we accept what was said by Muir JA that absent statutory provisions necessitating a contrary conclusion, the general principle identified in *Bhardwaj* apply.

[26] It must follow from the above analysis that a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all".

The effect of the decision of Martin J on the Industrial Registrar's partitioning of the Award

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[11] (2018) 264 CLR 123, [23] (citations omitted).
[12] (2003) 145 FCR 1, 16 [42] (citations omitted).
[13] (2013) 1 Qd R 228, [61] citing *Truenergy Austraia Pty Ltd v Minister for Industrial Relations* (2005) 93 SASR 393, 413 [107]; *Jackson v Purton* [2011] TASSC 28, [60]–[61]; *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1, 16 [42].
[14] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (*2013) 1 Qd R 228, [66].

[27] The Registrar undertook her statutory responsibilities in accordance with s 996 of the Act to partition the *Queensland Local Government Industry Award - State* 2017 as it stood at the time of partitioning.

[28] In exercising that authority to partition, the Registrar could make any necessary provision to ensure wages and employment conditions for employees were not affected by the partitioning.[15] As the Explanatory Notes to the *Industrial Relations Bill* 2016 reveal, the function of the Registrar is an administrative one and is undertaken to assist employers and workers by making the awards "more user-friendly for each occupational division". However, the power granted to the Registrar to partition did not extend to determining questions of law or to make a decision otherwise than in accordance with the law.

[29] It is clear from the reasoning of Martin J that in respect of the two award issues, the Full Bench did not have authority to make the decision that it did. Nor did it have the jurisdiction to do so. Moreover, the decision of the Full Bench with respect to the award issue involved a jurisdictional error. The jurisdictional error identified by Martin J had the effect of invalidating any order or decision which reflects it.

[30] The partitioning of the award by the Registrar is deemed to be a decision of the Commission. Accepting, as we do, that a decision made outside jurisdiction is a decision in fact which is properly to be regarded as "no decision at all" it must follow that the Stream A Award should not include the two award issues.

Power to make a declaration

[31] The Commission's power to make a declaration is contained in s463 of the Act. Section 463 relevantly provides:

463 Power to make declarations about industrial matters

(1) The commission may, on application by an entity mentioned in section 464, make a declaration about an industrial matter.

(2) The commission may make the declaration whether or not consequential relief is or could be claimed.

(3) Subject to chapter 11, part 6, a declaration made by the commission under this section is binding in a proceeding under this Act."

464 Who may apply for declaration

The following may make an application mentioned in section 463 –

(a) a person who may be directly affected by the declaration;

[15] *Industrial Relations Act* 2016 (Qld) s 995(4).

(b) an inspector;

(c) an organisation of employees or employers of which a person mentioned in paragraph (a) is a member, if it is acting with the person's written consent;

(d) an organisation of employees or employers who may be directly affected by the declaration.

[32] The Commission's power to grant declaratory relief under s463 of the Act is discretionary. The circumstances in which the discretion to decline to issue a declaration are not closed.[16] The wide power conferred on the Commission by s 463 to make a declaration, is limited only by the requirement that it relates to an industrial matter.[17] An industrial matter is defined in s 9 of the Act and is a term that is far reaching.

[33] In *Queensland Nurses and Midwives' Union v State of Queensland (Department of Health)*, Martin J spoke of the circumstances in which the Commission should exercise its discretion to make a declaration. His Honour wrote:

> The power to make a declaration should not be exercised lightly. A declaration, once made, binds not just the parties but all the employees. The discretion to make a declaration should, as a general proposition, be confined to the resolution of genuine disputes. Where an employer makes a formal concession of that kind (which, in this case, was affirmed on appeal) it will be bound by it in any other proceedings. A declaration is unnecessary. The Full Bench was correct when it recognised that the concession narrowed the issues before it. While it could have gone on to specifically deal with, and dismiss, that particular part of the application it is implicit in its expression at [4] and [5] of the reasons that it had done so.[18]

Can the Applicant bring an application for a declaration?

[34] The respondent argues that the applicant does not have the capacity to bring the application under s 464 of the Act as the applicant is not, in their submission, 'a person who may be directly affected by the declaration'.

[35] It is accepted that each of the five named Councils would be a 'person' for the purposes of s s464(a) of the Act, being a body corporate established pursuant to s 11(a) of the *Local Government Act* 2009.[19]

[36] Section 464(b) has no application to these proceedings.

[37] The applicant seeks to rely on s464(c) of the Act. The applicant is a registered industrial organisation under Chapter 12 of the Act being an organisation of employers. As noted above, each of the five Councils would be a 'person' mentioned in paragraph (a) of s464 of the Act and each is a member of the applicant. In order to enliven s 464(c), it must be established that the applicant in these proceedings is acting with the Councils written

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[16] *Ainsworth v CJC* (1992) 175 CLR 564, 581.
[17] *The Queensland Public Sector Union of Employees v Queensland Fire and Rescue - Senior Officers Union of Employees* (2009) 192 QGIG 39.
[18] [2019] ICQ 12, [47].
[19] *Acts Interpretation Act* 1954, s 32D(1).

consent. Relevantly for the purposes of s464(c) Mr Goode[20] deposes in his affidavit of 24 February 2020 the following:

> I have continued to keep Councils informed of the progress of this Application, including the Amended Application for Declarations. Upon the receipt of the Respondent's submissions, I have obtained the express written consent of the current Chief Executive Officer of NPARC Mr Graeme Gillam. Exhibit A to this Affidavit is a letter dated 20 February 2020 from Mr Graeme Gilliam, confirming in writing his express support of the LGAQ's Amended Application in the proceedings.
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> Further, the Chief Executive Officer of Mapoon Aboriginal Shire Council, Ms Naseem Chetty has also extended her written consent for the LGAQ to make the Amended Application in MA/2019/4. Exhibit B to this Affidavit is a letter from Ms Chetty also confirming in writing her express support of the LGAQ's Amended Application in the proceedings.

[38] There is nothing before the Commission to suggest that the Cherbourg Aboriginal Shire Council; Torres Strait Island Regional Council; or Napranum Aboriginal Shire Council have provided the written consent necessary to satisfy s464(c) of the Act. The written consent that is relied upon is dated 20 February 2020 and only produced in response to the submissions of the respondent. The Amended Application was filed in the Industrial Registry on 24 September 2019.

[39] For the purposes of this matter, s 464(d) appears to us to be the only provision under which the applicant can bring this application for declaratory relief. It is, as has been already established, an organisation of employers. The question that then arises is whether or not the applicant "may be directly affected by the declaration". That qualification applies irrespective of whether paragraph (a), (c) or (d) of s464 is relied upon.

Is the applicant directly affected by the declaration?

[40] The phrase "directly affected" has been considered in a number of statutory contexts both within this jurisdiction and outside.

[41] In *Ipswich City Council v The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland,* Commissioner Fisher had to determine whether or not the Council had standing to bring the application. Commissioner Fisher found:

> In the *SOU Case*, Hall P was considering a case stated to the Industrial Court about whether the commission had power under s. 274A to make certain orders and directions pursuant to s. 274A of the Act. More will be said about the application of that decision to the present matter later. For present purposes, it is important to note that the President held that "there is nothing remote or tenuous about the connection between the regulation of the relations between employer and employee and participation in and representation in the enterprise bargaining regime which is a means of regulation." The Commission accepts that these comments were made in the context of considering the meaning of the term "industrial matter" in s. 7 and Schedule 5 to the Act. However, in my view the above statement by the President is also apposite to the issue of whether the employer is directly affected by the representation by industrial organisations of certain employees or classes

[20] Mr Anthony Robert Goode is employed as the Workforce Strategy Executive by the Local Government Association Qld.

of employees. The Council has been the respondent to a dispute notification filed by the CFMEUQ and by a member of the CFMEUQ regardless of whether conferences before the Commission have proceeded. The CFMEUQ intends to become involved in negotiations about a new agreement to replace the present agreement covering Waste Services employees. It is not a party to the present agreement. In these circumstances there is nothing remote or tenuous about the effect of this application on the Council and it is directly affected.[21]

[42] *R v Rent Officer Service and Anor, Ex Parte Muldoon*[22], involved a judicial review by two applicants concerning the refusal or failure of the Rent Review Officer Service and the local authority to determine claims for housing benefits. The Secretary of State for Social Security was required by s 135 of the *Social Security Administration Act 1992* to reimburse up to 95% of the local authority's' housing benefit qualifying expenditure. The Secretary of State applied to the High Court to be joined as a respondent in both applications as a person 'directly affected'.

[43] In giving the unanimous decision of the House of Lords, Lord Keith of Kinkel concluded:

> That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency. In the present case if the applications for judicial review are successful the Secretary of State will not have to pay housing benefit to the applicants either directly or through the agency of the local authority. What will happen is that up to 95 per cent of the amount paid by the local authority to the applicants will be added to the subsidy paid by the Secretary of State to the local authority after the end of the financial year. The Secretary of State would certainly be affected by the decision, and it may be said that he would inevitably or necessarily be affected. But he would, in my opinion, be only indirectly affected, by reason of his collateral obligation to pay subsidy to the local authority. In the course of the argument there was cited as bearing on the point in issue In *re Salmon; Priest v Uppleby* (1889) 42 ChD 351. Rule 2 of the then Order 58 provided that notice of appeal was to be served on all parties 'directly affected'. The defendant to an action had brought in third parties alleging that the latter had agreed to indemnify him. The plaintiff, who had been unsuccessful against the defendant at first instance, appealed. The defendant objected that the plaintiff had not served notice of appeal on the third parties. The Court of Appeal, Cotton LJ dissenting, repelled the objection. Lord Esher MR said, at p.361: 'I do not think that a third party brought in on the ground that he has undertaken to indemnify the defendant can be said to be 'directly affected' by the appeal." Fry LJ said, at p.363:
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> > 'Two questions arise in this action: first, whether the defendant is liable to the plaintiff; secondly, if so, whether the third parties are liable to indemnify the defendant. The first question affects the third parties, only through the intervention of the right of indemnity. Therefore, I think, the third parties are only indirectly affected by the appeal by reason of the defendant's rights against them.'
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> The case presents a certain analogy with the present one, in respect that if the defendant was liable to the plaintiff the third parties might in substance have to meet the plaintiff's claim, yet they were held to be only indirectly affected. The reasoning is brief, but the point was a short one, not capable of any elaboration. I consider that a similar conclusion is correct in the present case.[23]

[44] Lord Keith held that whilst the Secretary of State would be affected by the decision, and would inevitably or necessarily be affected, he would only be indirectly affected by reason of his collateral obligation to pay subsidy to the local authority. Equally, in *In re Salmon; Priest v Uppleby*[24] a case referred to in *R v Rent Officer Service and Anor, Ex*

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[21] *Ipswich City Council v The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland* (B/2013/50), [11].
[22] *R v Rent Officer Service and Anor, Ex Parte Muldoon* (1996) 1 WLR 1103.
[23] *R v Rent Officer Service and Anor, Ex Parte Muldoon* (1996) 1 WLR 1103, 1105-1106.
[24] In R*e Salmon; Priest v Uppleby* (1889) 42 ChD 351.

Parte Muldoon, the third party was indirectly affected having only a contingent interest in the proceedings being liable to indemnify the defendant.

[45] In reliance on the reasoning in *R v Rent Officer Service and Anor, Ex Parte Muldoon,* it is arguable the applicant was not 'directly affected' by the declaration. Rather, the declaration sought by the applicant, if granted, can only impinge directly and immediately upon the five named Councils.

[46] That approach is supported by the reasoning of Debelle J in *Adelaide Development Co Pty Ltd v The Corporation of the City of Adelaide and Anor*, where his Honour wrote:

> The expression 'will directly affect' in this context is not a term of art. It means to have an immediate effect upon or to have an immediate influence upon: see the definitions of 'directly' and 'affect' and 'affected' in the Oxford English Dictionary and the Macquarie Dictionary. I am conscious that in attempting to define the expression, I am resorting to synonyms but the subsections are, I think, intended to apply when the proposal will produce an effect upon or have some consequence for an item of State heritage. The expression 'will directly affect' suggests a causal relationship between the proposed development and a heritage item. The effect could be detrimental or beneficial. The word 'directly' requires that the causal effect of the proposed development be direct or immediate: it is intended to exclude that which is indirect or remote. In legislation such as the *Heritage Act*, the expression 'will directly affect' should receive a more liberal interpretation that it might receive in other contexts. The effect may not, therefore, be limited to physical effects. It is, I think, wide enough to include an effect upon a heritage item such as overshadowing. It is wide enough also to include an effect occurring during the period of the works necessary for construction as well as an effect caused by the completed development. Thus, there may be a direct effect in the case of adjoining sites, where the development may involve an excavation which affects the rights of support of an adjoining heritage building. Whether a proposal will directly affect a heritage item will be a question of fact and degree in every case and each case will have to be considered in the light of its own facts and circumstances. Where it is not clear from the plans whether the proposal will directly affect the heritage item, it would be proper for the Council to make enquiries of the applicant to determine that question.[25]

[47] The words "directly affected" were further considered by Stanley J in *City of Port Adelaide Enfield v Bingham* where his Honour wrote:

> The context of that legislation differs from the *Ombudsman Act*. Legislation that is more closely comparable to the *Ombudsman Act* was considered by the Ontario Supreme Court in *Corporation of the Canadian Civil Liberties Association v Ontario Civilian Commission on Police Service*. That was a case of judicial review of a decision of the Ontario Civilian Commission on Police Services in which the Commission refused to deal with a complaint of police misconduct on the basis that the complainant was not a person directly affected by the conduct in issue. The relevant provision of the *Police Services Act*, RSO 1990 provided for complaints to the Commission about the conduct of a police officer. The complaint could only be made if the complainant was directly affected by the conduct. The Court cited with approval an earlier decision of the Alberta Court of Appeal which had construed the expression 'directly affected', relying on the interpretation of the same expression by Lord Hobhouse in *Re Endowed Schools Act*, that the term points to 'a personal and individual interest as distinct from a general interest which appertains to the whole community'. The Alberta Court of Appeal held that the words 'directly affected' must mean more than 'affected' and that the inclusion of the adverb signalled a legislative intent to further circumscribe a right of appeal. Nonetheless, that did not justify too restrictive an interpretation of the expression, given the broad public purpose of the legislation which was meant to protect the most vulnerable in society against the most powerful agents of the state. When considered in the context of the regulatory scheme,

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[25] *Adelaide Development Co Pty Ltd v The Corporation of the City of Adelaide and Anor* (1991) 56 SASR 497, [45]-[47].

the Court reasoned that the right of appeal was confined to persons having a personal rather than a community interest in the matter. There had to be some direct link between the complainant and the police conduct the subject of the complaint that distinguished the complainant's interest from that of any other member of the community.

In my view, a similar approach to the construction of s 15(3a) should be adopted. Notwithstanding the broad powers conferred on the defendant by the *Ombudsman Act*, there can be no doubt that the legislative intention which underlies s 15(3a) is to restrict the power of the Ombudsman to undertake investigations on the basis of complaints by members of the public. The expression 'directly affected' posits a causal relationship between the administrative act and its effect on the complainant. Plainly the requirement for a causal relationship is established by the word 'affected'. The use of the adverb 'directly' indicates that a causal nexus is not necessarily sufficient to come within the restriction imposed by s 15(3a). In this context it is a word of limitation. In my view, 'directly' is used in contradistinction to 'indirectly'. A member of the general public may be indirectly affected by an administrative act. Should that person bring a complaint to the Ombudsman, that causal relationship would not satisfy the test in s 15(3a). The boundary between a direct or indirect causal relationship for the purpose of s 15(3a) does not lend itself to precise definition. Whether the nature of the causal relationship between the administrative act and its effect on the complainant is found to be direct or indirect, will be a matter of fact and degree."[26] (Citations omitted)

[48] In *Dillon v Douglas Shire Council* the words "directly affected" were considered in the context of the application of rule 8 of the *Planning and Environment Court Rules* 2010 (PECR), which required an originating application to name as a respondent the entity 'directly affected' by the relief sought. Skoien SDCJ wrote:

> The word 'directly' is a common word in the English language and, to my mind, it is well understood. Relevantly, it means 'immediately' or 'straight away'. If an originating application seeks an order that a person do something or refrain from doing something, that person is directly affected. Here, the council is directly affected because immediately the court declares the meaning of the provisions, the council will be bound to administer them in a way consistent with the interpretation and declarations.
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> However, the declarations which the court may make, if it makes any, will not require [the applicant] immediately to do or not to do anything.[27]

[49] The applicant asks the Commission to declare consequent upon the Orders made by Martin J that the Locality Allowance and Annual leave provisions of Stream A Award ceased to have any force and/or effect as terms of the Award insofar as those provisions relate to the various relevant Councils. It is the five Councils that are 'immediately' impacted by the declaration.

[50] Mr Goode in his affidavit recognises that the applicant represents the interests of five members (Councils) "whose rights have been directly affected by the challenged provisions."[28]

[51] It is the Councils which bear the responsibility and financial burden of implementing or otherwise the requirements of the Stream A Award. The applicant is not directly affected. They may be affected to the extent that they are a registered industrial organisation

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[26] *City of Port Adelaide Enfield v Bingham* [2014] SASC 36, [32]-[33].

[27] [2004] QPEC 50.

[28] Affidavit of Anthony Robert Goode affirmed on 24 February 2020

appearing before the Commission in a representative capacity and as a party to the Award. The Councils have an interest in the matter that is beyond that of the applicant. Drawing on the words in *Dillon v Douglas Shire Council* that if the declaration was granted the applicant would not be required to immediately do or not to do anything.

[52] For the reasons advanced above, we are of the view that the applicant does not have the necessary standing to bring its application.

Disposition

[53] Notwithstanding the view expressed by the Full Bench concerning the applicants ability to bring the application for the declaration and consistent with the view expressed as to the effect of the inclusion of the two award provisions when the Award was partitioned by the Industrial Registrar, the Full Bench is minded to make the following orders:

Orders

1. The application for a declaration is dismissed.

2. That to give effect to the decision of Martin J and acting on its own motion,[29] pursuant to s 147(1)(b) of the Act order that the *Queensland Local Government Industry Award (Stream A) Award – State* 2017 be varied by:

   (a) removing the Locality Allowance provision of Stream A Award insofar as those provisions relate to Cherbourg Aboriginal Shire Council, Mapoon Aboriginal Shire Council, Northern Peninsula Area Regional Council, Napranum Aboriginal Shire Council and Torres Strait Island Regional Council; and

   (b) removing the additional week of annual leave provisions of Stream A Award as that provision relates to Mapoon Aboriginal Shire Council, Norther Peninsula Area Regional Council and Torres Strait Island Regional Council.

3. That the question whether *Queensland Local Government Industry Award (Stream A) Award – State* 2017 should include provisions to 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 to provide within the Award 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 be the subject of a further hearing of the Full Bench.

[29] *Industrial Relations Act* 2016 (Qld) s 147(2)(a).

4. The matter be adjourned to a date to be fixed to allow the parties to be heard on appropriate directions orders for the proper conduct of the hearing.