

# SUPREME COURT OF QUEENSLAND

CITATION: *Cornack v Fingleton* [2002] QSC 391

PARTIES: **SHERYL LOUISE CORNACK**  
**(applicant)**  
v  
**DIANE McGRATH FINGLETON**  
**(respondent)**

FILE NO: 8261 of 2002

DIVISION: Trial Division

DELIVERED ON: 27 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 12-14 November 2002

JUDGE: Mackenzie J

ORDER: **1. I refuse the application for declarations insofar as it relates to “decisions” referred to in paras 1(a) and (b) of the amended application.**  
**2. Having regard to the undertaking offered on behalf of the Chief Magistrate on 15 November 2002, I refuse the application for declarations insofar as it relates to the decisions referred to in paras 1(c) and (d) of the amended application.**  
**3. I order the respondent to pay the applicant’s costs of and incidental to the application to be assessed.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW  
LEGISLATION – COMMONWEALTH, QUEENSLAND  
AND AUSTRALIAN CAPITAL TERRITORY –  
JURISDICTION AND GENERALLY – improper exercise of  
power – exercise for purpose other than purpose for which  
conferred

MAGISTRATES – JURISDICTION AND PROCEDURE  
GENERALLY – JURISDICTION, POWERS AND DUTIES  
– where a direction given by the Chief Magistrate – where  
power to reprimand – whether power to reprimand relates to  
“behaviour” or “demeanour” in courtroom - whether power to  
reprimand for failure to comply with direction

PROCEDURE – COURTS AND JUDGES GENERALLY –  
JUDGES – judicial independence – internal independence of  
judicial officers – sufficiency of general power to administer  
court to affect

*Judicial Review Act 1991 (Qld)*  
*Magistrates Act 1991 (Qld), Pt 4, s 10, s 10(2), s 10(8), s 15*

COUNSEL: P McMurdo QC, with P Callaghan, for the applicant  
 W Sofronoff QC, with G Newton, for the respondent

SOLICITORS: Boe & Callaghan for the applicant  
 McCullough Robertson for the respondent

- [1] **MACKENZIE J:** This is an application for review under the *Judicial Review Act 1991*. Leave was given to amend and in its amended form the application seeks the following declarations:

“Declarations that:

1. The Respondent had no power to make decisions:
  - (a) that the Applicant not exercise her judicial power as a Magistrate in the criminal jurisdiction of the Magistrates Court until the Applicant was deemed fit to do so by the Respondent;
  - (b) that the Respondent not exercise her judicial power as a Magistrate at all until the Applicant was deemed fit to do so by the Respondent;
  - (c) directing the Applicant to report to the Respondent as purportedly directed by the Applicant in a meeting on 4 June 2002 and by the Respondent’s email to the Applicant dated 5 June 2002 which is Exhibit ‘SC-9’ to the affidavit of the Applicant filed on 6 September 2002;
  - (d) directing the Applicant to attend a meeting with the Respondent on 6 June 2002, as the Respondent purported to do in the meeting of 4 June 2002 and in the said email dated 5 June 2002.
2. Alternatively, that each of the decisions referred to in (1) involved an improper use of the Respondent’s powers, in that it involved an exercise of a power for a purpose other than a purpose for which the power was conferred and that it was an exercise of a power that was so unreasonable that no reasonable person could so exercise the power.”

- [2] It is necessary to touch in some detail on the history of the relationship between the respondent the Chief Magistrate of Queensland and the applicant so that the context in which immediately relevant events occurred may be understood. The Chief Magistrate deposed that occasionally she receives complaints from litigants and legal representatives about both outcomes of cases and the manner in which cases have been conducted by Magistrates. She regards it as her duty and right to deal with complaints about conduct of Magistrates in court, unlike complaints about the outcome where she generally sends a standard letter appropriate to the case advising the person complaining of the right to appeal or the absence of one.

- [3] She operates on the premise that, as litigants are entitled to have their case presented and received fairly, complaints which question whether or not this has occurred are obliged to be properly considered by her as Chief Magistrate. Where the complaint concerns courtroom “demeanour” or “behaviour” of a Magistrate, apart from writing to the aggrieved person informing them that the matter is being considered by her, she asks the Magistrate to report to her on the matter the subject of criticism.
- [4] Some of the complaints she received concerned the applicant. Five instances from July 2000 to July 2001 are summarised in her affidavit. Two of those complaining were advised of a right of appeal. The other complaints were brought to the applicant’s attention. She defended herself in respect of each of them but it may be inferred from her evidence that she was left with the impression that the Chief Magistrate had not accepted her attempted refutations. In respect of the third occasion she gives an account, which is not disputed in any material or evidence by the Chief Magistrate, of being berated in strong and personal terms for not granting an adjournment.
- [5] The Chief Magistrate deposed that by August 2001 she had thought it appropriate to ask the applicant to come to her chambers to discuss her “approach” to the conduct of cases before her. The applicant responded that it would be difficult to come “into Brisbane” after work because she had regular commitments during the week. She suggested meeting during a conference both were to attend in about 3 weeks time. At the time she resided on the south side of Brisbane. Her personal commitments were attending a yoga class on Monday, attending tuition 2 nights a week with a view to obtaining a dancing diploma and teaching dance 1 night per week. The yoga and the 2 nights tuition began in the range of 5.30 to 6pm. The evidence is silent as to the teaching commitment.
- [6] The Chief Magistrate sent an email to her, undated, but, from the internal evidence, after the conference had been held which includes:
- “I am disappointed that you are unable to find any time after work to meet with me because of your busy social life, on issues in and surrounding your performance as a Magistrate, as mooted by me to you recently in my office. I did wish to discuss with you the tone of some of the complaints in relation to your work as a Magistrate.
- However, if you are unable to find the time, I do not wish to take the extra step of directing you to attend but please bear in mind that your performance in court is purely your own responsibility. If I am unable to offer any guidance in relation to your performance, because you do not wish to cooperate in discussing the issue, so be it.”
- The Chief Magistrate deposed that this reflected her frustration at what she thought was the applicant’s reluctance to engage with her on a matter she regarded as critical to the proper operation of the court.

- [7] Three observations may be made. One is that it would not be unusual, as part of the collegiate function of a court, for a head of jurisdiction to raise, diplomatically, the fact that a complaint or complaints had been made with the judicial officer concerned. Secondly, it would not be surprising that there might be a sense of irritation if the head of jurisdiction felt that the person involved was avoiding the issue. Thirdly, it is apparent that the Chief Magistrate believed that if all else failed she had power to give a direction which would compel the Magistrate to attend upon her to discuss the complaints.
- [8] On 10 December 2001, following a written complaint that the applicant had bullied someone at a hearing, the Chief Magistrate and Magistrate Wilkie (the coordinating Magistrate at Southport) and the applicant met at Southport about the complaint. The applicant had been refused a copy of the complaint prior to the meeting but says she was formally directed to particularly read certain paragraphs. While there is some dispute about details of what happened at the meeting, it is common ground that the issue of curtness and abruptness in court, which the applicant acknowledged might occasionally happen notwithstanding attempts to correct the tendency, was discussed. It is also common ground that the applicant subsequently spoke to another female Magistrate about strategies for “keeping cool and keeping decorum in court” although there are different perceptions expressed as to whether she felt compelled to do so or accepted a suggestion from the Chief Magistrate to do so. It is not necessary to resolve that issue.
- [9] On 21 December 2001 an application for judicial review of one of her decisions was successful before Muir J on the ground of denial of natural justice by not allowing cross-examination in a small claims matter. Muir J said that the Small Claims Tribunal had control over its procedure and there was no absolute rule that cross-examination must be permitted in that kind of Tribunal. He held that, because of the conflicting factual issues, it was a case where cross-examination should have been allowed so that the Tribunal might make appropriate findings of fact. For present purposes the significance of the finding that natural justice had been denied is less than it would have been if the personal behaviour of the Magistrate had been impugned. In particular there was nothing in the judgment suggesting other than an error of exercise of discretion on this aspect of the appeal.
- [10] Then on 8 April 2002, Hall DCJ allowed an appeal from a decision of the applicant in a domestic violence matter. At the hearing the applicant had modified the procedure of taking evidence in a way that was held to have the consequence that she “failed to act judicially and acted in breach of natural justice”. However, Hall DCJ observed that she had “adopted what seems to have been intended as a practical solution to the heavy workload” of the court. He also said that it was apparent that the Magistrate’s motives for such significant variations to the normal procedure of her court were well intentioned. There were clear practical benefits in the saving of court time to be gained thereby, but in so acting the Magistrate misconceived the law. On that basis, in conducting the hearing in the manner described the Magistrate failed to act judicially and acted in breach of natural justice. It can be seen that this case, too, is not one where the applicant’s personal behaviour was criticised.

- [11] These two matters were not raised, as far as the evidence extends, by the Chief Magistrate with the applicant before the events with which the present application is concerned. The only reason why they have been analysed even to that extent is that the Chief Magistrate went armed with information about them to the meeting on 4 June 2002. They intruded into the discussion on that day in a way that strongly implied that they were further examples of unsatisfactory personal conduct in court on the part of the applicant, which is not an accurate analysis of the decisions.
- [12] On 9 May 2002 the Chief Magistrate received a letter which the applicant says, and the Chief Magistrate appears to agree, was from the teenage children of the person whose complaint had been discussed with the applicant on 12 December 2001 and concerned the same proceedings. The evidence is a little ambiguous whether the Chief Magistrate intended to raise the further complaint with the applicant. In any event, before anything was done, she received a telephone call from Magistrate Wilkie which set in motion the train of events from which the application arises. Magistrate Wilkie had held a “stakeholders meeting” with a small group of local practitioners, principally to discuss matters unconnected with issues in the present proceedings. However, it was reported to the Chief Magistrate that during that meeting some of the local practitioners had been critical of the courtroom demeanour of the applicant and had labelled her “rude” “belligerent” and “headstrong” generally, and “unnecessarily argumentative and combative” in the hearing of simply offences.
- [13] There were no minutes of the meeting, although there is a suggestion that notes were taken by Magistrate Wilkie. More particularly, there were no complaints in writing at that time from those at the meeting. Despite subsequent enquiries by the applicant’s solicitors (recited in Mr Boe’s affidavit) the only account in writing of the meeting apart from that is from the Senior Crown Prosecutor at Southport who, subsequent to relevant events, stated that in the course of the meeting Magistrate Wilkie had invited those present to discuss the strengths and weaknesses of the resident Magistrates. The Senior Crown Prosecutor says his impression was that the discussion concerning the Magistrates was being held in an effort for Magistrate Wilkie to assess the ability and standards of his Magistrates. Each Magistrate was discussed. Criticism, which the Senior Crown Prosecutor considered constructive criticism, was made of some Magistrates including the applicant.
- [14] With regard to her, his recollection was that there was a general consensus that she could on occasions be difficult to appear before, although there was a difficulty in properly expressing what it was that made her “difficult”. He recalled that he had referred to her as “headstrong”. He also recalled that there was a recognition that she appeared to be “more tempered in her approach in more recent times than when she first arrived at Southport”. He did not hear any person suggest that the applicant was unable to properly carry out her duties.
- [15] This account of the meeting was not in the possession of the Chief Magistrate at any relevant time. None of the other participants was prepared to commit himself to writing. She was reliant and relied on Magistrate Wilkie’s account of what had been raised at the meeting. The essence of what she was told is summarised in paragraph [12] above.

- [16] The difficulty inherent in dealing with generalised and unspecific complaints about judicial demeanour is the subject of pertinent observations in the following passage from a letter dated 6 June 2002 from the experienced solicitor for the applicant to the Chief Magistrate:

“Her demeanour in court may be different to some other magistrates. This is unsurprising. The individual approach of judicial officers varies widely, depending upon their personal manner, experience, confidence and competence. It would be surprising if it did not. Some judges are more demanding than others upon those who appear before them. Some practitioners who are required to meet the legitimate demands of these judges may perceive that they are unfairly treated or that the judge is rude. But perceptions have to be distinguished from reality. An ill-prepared practitioner may perceive perfectly proper questions that publicly expose weaknesses in a case to be unfair, rude or headstrong. The proper discharge of judicial duties sometimes requires a judicial officer to subject submissions to rigorous analysis even at the risk of unintentionally upsetting the person who is making the submissions.

...

We expect that some of the most senior judges in this country have on occasions been perceived by some litigants and lawyers appearing before them to be belligerent and headstrong, even to the point of being rude. No judicial officer wishes to encourage those perceptions. But they cannot be held responsible for perceptions that are unjustified by their actual conduct.”

- [17] At 3.37pm on Thursday 30 May 2002 the Chief Magistrate sent the following email to the applicant:

“Would you please take this e-mail as a direction for you to attend a meeting with George Wilkie, Brian Hine and myself on the issue of your demeanour in court. Further to the conversation of not too long ago when I took you through a list of complaints from persons in small claims matters and in relation to a d.v. matter, other issues have arisen as to your behaviour in criminal courts.

Would you let me know if the coming Monday at 4.30 p.m. in my office is suitable? George is aware of the meeting and will drive up for the meeting.

I would prefer to leave it until the meeting to go into the details of the issues with you - please let me know if that time is suitable, otherwise, we will make another time but it should be next week.”

- [18] The applicant was in Coolangatta that day, without email facilities. Not having received a reply by 2.40pm on Friday 31 May 2002 the Chief Magistrate emailed for a response by 5pm. The applicant replied at 4.37pm, explaining that she had been in court all morning and needed to check what she had listed on Monday 3 June 2002 before replying. She said that attending a meeting on Monday would be inconvenient because the matter was expected to go all day. She also made a series of requests designed to elicit full details of what was to be discussed and asking for

at least 2 days before the meeting so that she could check court records if necessary and be in a position to discuss them fully. She advised that she intended to bring an independent person and may wish to tape record the meeting “to avoid any misunderstanding about the conduct of the meeting”.

- [19] At 8.57am on Monday 3 June 2002 the Chief Magistrate advised the applicant that Magistrate Wilkie would tell the parties in the matter to which the applicant was assigned that she could sit only till 3pm because of “court business”. The relevant part of the email is as follows:

“Thank you for your e-mail of Friday. I must direct you to attend at 4.30 p.m. today. It will be by way of a preliminary discussion on issues to do with complaints about our demeanour in the arrest and criminal courts. There are no specific cases to be discussed but general comments from local stakeholders in the Southport Court. George will be here because he is your Co-ordinating Magistrate and the recipient of the complaints and I wish him to explain them to you.

...

I reiterate - please do not approach this meeting as a hearing. It is a preliminary meeting with a professional approach being adopted.

...

I look forward to seeing you at 4.30 p.m. today. One of the reasons I want the meeting to proceed is to let you know as soon as possible the substance of the complaints and so that the matter is not hanging over your head.”

The Chief Magistrate also advised the applicant that she could bring an independent person other than a Magistrate to the meeting if she wished but could not tape record it.

- [20] At 2.14pm on 3 June the applicant emailed the Chief Magistrate in the following terms:

“I am uncertain and concerned about your email and what seems to be a criticism of my conduct as a judicial officer. I am unsure what you mean when you say that you now ‘direct’ me to attend a meeting.

I repeat that I do not think it fair or reasonable to expect me to attend a meeting at short notice without written information about the issues to be discussed and full particulars of any complaint made about me. Nor do I think it fair for you to expect me to attend a meeting on my own where it appears that a panel of three other judicial officers including yourself intend to confront me about matter about which I have been given no proper information. This does not seem appropriate, respectful or collegiate.

Your email message did not address the matters I raised with you seeking proper particulars. Could you please provide me with the written information I have requested as soon as possible. I need a

proper opportunity to consider the material I have requested before I can respond to your request to attend a discussion with you.

Firstly, I need to know in writing prior to the meeting the purpose and nature of the meeting. Your email says that it will be a 'preliminary discussion'. I need to know what this phrase means and what you expect to follow the discussion that makes it preliminary.

If you are not prepared to provide me with a list of matters you wish to discuss with me, could you please at the very least clarify with me prior to the meeting what you mean by 'demeanour' and what you mean by 'performance' as I am not sure what you mean by those terms. I also do not fully understand what you mean by the term 'stakeholders' in respect of the matters you wish to raise.

Prior to attending the meeting I need you to give me details in writing as to what you have so far told George about the meeting. I think it only fair that I know as much about the meeting as George does before the meeting commences. Could you please also tell me why you have discussed matters concerning me with George.

Could you also please advise me in writing prior to the meeting of the following matters.

1. How many complaints have been received.
2. Who received them.
3. When did they receive them.
4. If George has received complaints about me, why he has chosen not to discuss them with me himself at Southport.
5. What were the circumstances leading up to the complaints.

I wish to advise that whilst I appreciate that George is the co-ordinating magistrate for the Southport Magistrates Court, I do not accept that he has any supervisory role in respect to me as an independent judicial officer. If George is to be at the meeting to outline what he has been told, then I advise you now that I object to him attending in any other capacity or remaining in the meeting after he has had the opportunity to pass on whatever it is that he has been unable to discuss with me locally prior to now.

I also advise you that I do not consider the conduct of the earlier meeting I had with you and George to have been conducted in a professional manner.

I also wish to place on record with you that it is my recollection that George indicated on the last occasion that he had not received any complaints about my demeanour from any practitioner appearing in Southport Magistrates Court any time in the past four years. I would therefore like to know how the complaints came to the attention of

George and what discussions he had had with those making the complaints prior to the complaints being made.

I would like you to clarify why it is necessary for Brian Hine to be present at the meeting. I also need to know what you mean by the term ‘meetings to do with magistrates, such as this.’

I would also like you to please clarify what you mean by ‘discussing your performance’.

Could I also pass on to you that I find it unacceptable and concerning that another magistrate has this morning spoken to the parties in a trial part heard before me about the conduct of the trial.

I am not able to attend a meeting until I have the particulars I need in writing and I have a proper opportunity to consider them.

I request that you send me the information I need as soon as possible. Once I have considered the material I will be able to contact you further about the meeting you propose.

I look forward to hearing from you.”

- [21] The applicant deposed that she was then away from her chambers until shortly after 3pm attending to other matters in the courthouse and obtaining lunch. When she returned to her chambers she found a recorded telephone message from the Chief Magistrate advising her that she was required to attend the meeting but that she had “nothing to fear” about the meeting because it was to be a “preliminary meeting” only. At about 3.30pm Magistrate Wilkie told her that he had been asked by the Chief Magistrate to direct her to ring her within the next 10 minutes. He repeated that that was a direction. She then received and opened an email from the respondent sent at 3.41pm which is as follows:

“I believe you should know what a direction from the Chief Magistrate means.

Unless I have your attendance at the meeting this afternoon and on the terms of the e-mail sent to you this morning, you will be reprimanded for refusing to comply with a reasonable direction of the Chief Magistrate (see *Magistrates Act 1991* - S. 10(8)(e).

I intend to instruct Magistrate Wilkie not to allocate any courtwork to you for the next few days, until this matter is sorted out. Until such time as you meet with me on the terms of my e-mail to you earlier today, you will not resume courtwork at Southport Magistrates Court.

You are now directed to attend a meeting with me at my office at 9.00 a.m. tomorrow. Brian Hine will be here - I am unsure at this point in time, as to whether George Wilkie will be able to attend. It is my hope that the matters I have raised with you can be discussed.

Please now confirm with me your attendance at my office at 9.00 a.m. tomorrow.”

- [22] At 4.46pm the Chief Magistrate asked for confirmation of receipt of the email of 3.41pm. At 4.52pm the applicant replied as follows:

“Now that I understand that you have given me a formal direction purportedly under Section 10 of the Magistrates Act and now that you have warned me that you intend to reprimand me if I do not attend this meeting with you, I advise that I will attend at your office at 9am tomorrow.

I wish to advise that I do not agree that you have the power to give me a direction to attend such a meeting. I do not wish to discuss any matter about the discharge of my judicial duties with a panel of peers or be subject to any form of peer review. I believe this to be at odds with the nature of judicial independence. I will attend at your office and will listen to whatever you wish to tell me. I will not be in a position to respond at that time as I will need time for reflection away from the meeting.

Could you please make sure that you have copies for me of any material you wish to discuss with me so that I can take it away with me.

George has told me that these matters arise out of a stakeholders meeting. I have no idea what a stakeholders meeting is. I would be grateful to obtain copies of the minutes of the meeting.”

- [23] The next morning the applicant attended the Chief Magistrate’s chambers, accompanied by a retired Magistrate, Mr Williams. The applicant came prepared to take notes, which are in evidence, and that night prepared a typed record of the meeting which is also in evidence. In her affidavit she said that she took “contemporary handwritten notes of the entire dialogue”. The handwritten notes are reasonably comprehensive but it is apparent that the typed document represents an expansion of the handwritten notes into a complete version of the conversation. However, nothing turns on that because the Chief Magistrate accepted the typed document as a reasonably accurate record of events and on being offered the opportunity to do so, did not wish to take distinct issue with any parts of it.
- [24] Notwithstanding the applicant’s understanding from what she had been advised in a previous email that she might have an independent person accompany her the Chief Magistrate refused to allow Mr Williams to remain. The only reason advanced was that she had agreed to allow the applicant to have someone present at the meeting scheduled for the previous day. She went on to say that the applicant had not complied with her direction to attend the previous day and Mr Williams could not stay because she had not agreed to anyone sitting in at the meeting that was about to be held. The Chief Magistrate ordered Mr Williams to leave. When the applicant said that if she was not allowed to have a support person with her she did not wish to stay and wished to leave immediately, the Chief Magistrate said words to the

effect “No I have directed you to attend this meeting. You may not leave this meeting. I am directing you to sit down and hear what I have to say. You may not leave.” Mr Williams then left and the applicant stayed.

[25] After this inauspicious start, there was a passage of conversation in which comments were made by the Chief Magistrate about how she perceived the applicant’s attitude in court, and towards her, in a manner which became quite personal in some respects. The applicant largely rejected the Chief Magistrate’s view also with some vigour. It is not necessary to say more than that about that part of the conversation since it is not directly relevant to the outcome. The decisions referred to in paras [9] to [11] were also raised. Relevantly, during the conversation the Chief Magistrate expressly said that the applicant was there pursuant to a direction under s 10 of the *Magistrates Act* and that the meeting was about complaints received about her “behaviour in court”.

[26] At the end of the meeting the applicant was given explicit directions to give a written response about how she proposed to improve her demeanour in court in light of the complaints. She was also given a direction to attend a further meeting at which the Chief Magistrate would decide whether the applicant’s response was sufficient. It is implicit in what was said that the Chief Magistrate’s decision whether or not she would restrict the kind of cases to which the applicant would be assigned would depend on her view as to the adequacy of what the applicant proposed. It may be also observed that nothing was suggested in the interview or in the hearing before me that the purpose of the meeting was intended to be to set in train either a process under s 10(8) or the more drastic process under s 15 of the *Magistrates Act*.

[27] An email sent at 9.21am on Wednesday 5 June confirmed that directions to report on issues discussed the previous day and to attend a further meeting at 9.30am on 5 June 2002 to further discussion of the issues had been given. From an email later that day to the applicant’s legal adviser the clear inference may be drawn that the Chief Magistrate had in mind the notion that failure to comply with a direction would constitute a breach for which the applicant could be reprimanded. It also confirms that the directions were concerned with her behaviour as a Magistrate in court. It continues:

“..., she was given from yesterday morning until 4.00pm today to respond to me about what I consider an internal matter to do with her behaviour as a Magistrate in court and which I take most seriously. I believe there has been sufficient time for her to do so and she will be in breach of my direction which was clearly given to her yesterday, if she neither responds to me by 4.00pm nor attends the meeting at 9.30am tomorrow.

Your last paragraph does not say as to whether I can expect my directions to be complied with but please inform your client that they remain in force.”

[28] Judicial independence is one of the cornerstones of a free society. Any legislative incursion upon it could only be achieved by the clearest of words. The long title of

the *Magistrates Act* 1991 is “An Act relating to the office of Magistrates, the judicial independence of the Magistracy, and for related purposes”. The fact that the Act was premised on recognition of the principle of judicial independence was reinforced by the then Attorney-General in introducing the Bill when he said in the second reading speech “... the independence of the judiciary is of paramount importance and must not be compromised. This legislation will ensure that such independence is statutorily recognised.”

- [29] In an article “The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act* 1986”, (1987) 10 UNSW Law Journal 3, Professor Shimon Shetreet identified as a “major problem” the granting of disciplinary powers to administrative heads of the judiciary. At page 11 he said the following:

“A major problem in the *Judicial Officers Act* concerns the granting of disciplinary powers to the administrative heads of the judiciary collectively and individually. The result is the introduction of hierarchical patterns into the judiciary, which in turn have the result of chilling judicial independence. These hierarchical patterns may even bring about attempts by judges to influence other judges’ decisions, or give rise to latent pressures on the judges which may result in subservience to judicial superiors. Hierarchical patterns are usual in the civil service, a typically hierarchical organisation, but are objectionable in the context of the judiciary whose members must enjoy internal independence vis-à-vis their colleagues and judicial superiors.

Both the International Bar Association Standards and the Universal Declaration on the Independence of Justice recognise this issue and emphasize the importance of internal judicial independence.”  
(*footnotes omitted*)

The extent of the powers referred to is more limited than those in s 10(8) – see last paragraph of quotation in para [31].

- [30] Earlier, at pp 6 and 7 he recognised that the judiciary must be accountable as judicial independence cannot be maintained without judicial accountability for failures, errors or misconduct. He continued:

“Judicial accountability is, therefore, an important value to be maintained. However, its procedures and standards should not be formulated so as to exceed the boundaries of judicial independence. The task of balancing between judicial accountability and judicial independence is a difficult one. As shall be seen below, I am inclined to the view that the proposed reforms have not maintained that delicate balance.

Judicial independence has a number of aspects which should be expressly mentioned. The independence of the individual judge refers to his personal independence (that is his personal security of tenure and terms of service), as well as to his substantive independence (that is, in the discharge of his official function). In

addition to the independence of the individual judge there is also the collective independence of the judiciary as a whole. This aspect is sometimes referred to as the corporate or institutional independence of the judiciary.

Another significant aspect of judicial independence is the internal independence of the judge, which refers to his independence vis-à-vis his judicial superiors and colleagues. This aspect of judicial independence has not attracted sufficient attention. Nevertheless, the modern concept of judicial independence, as expressed in recent legal literature, judicial decisions and international standards, does recognise collective judicial independence and internal judicial independence.” *(footnotes omitted)*

- [31] In a paper entitled “Public Confidence in the Judiciary” delivered at the 6<sup>th</sup> Colloquium of the Judicial Conference of Australia at Launceston on 26 April 2002, and reproduced on the High Court of Australia website, Gleeson CJ said the following:

“It is a source of frustration to some people that judges are difficult to remove, ... . Of course, judges, like anyone else, are punishable for breaches of the law. But the sanction of removal is better seen as aimed at protecting the public than at punishing an individual. There may be, within a court, internal administrative measures that can properly be used to address some problems of judicial conduct. But, unless a judge does something so serious as to warrant removal following parliamentary resolution, there is generally no capacity in any person or authority to suspend, or fine, or otherwise penalise for misconduct. It is often wrongly assumed that, beyond their capacity to advise, warn, and take appropriate administrative steps, Chief Justices, and other heads of jurisdiction, have authority to penalise other judges. Judicial independence means, amongst other things, that judges are independent of each other.

...

As to procedures for dealing with complaints, I would make one comment based on my experience of almost 10 years as President of the Judicial Commission of New South Wales. As a rule, the more serious the complaint, the easier it is to devise means to deal with it. And the converse is true. If a judge is alleged to have committed a crime, then the matter is investigated and tried in the same manner as any other allegation of crime against a citizen. If a judge is alleged to be suffering such incapacity as warrants removal, the procedures to be followed are clear. The difficult cases tend to be those in which the complaint, even if made out, would not justify removal. The complainant is likely to assume that there must be some other sanction available. It can be difficult to satisfy an aggrieved person whose complaint is justified, but who sees no form of sanction visited upon the judicial officer involved. False expectations can be created. I do not put this as an argument against having any form of complaints procedure; but it is a problem that needs to be kept in mind.

*There is a fundamental problem about any course that would leave a judge in office, with both the capacity and the duty to exercise the judicial power of the Commonwealth, or of another unit of the Federation and yet publicly discredited by censure or some other form of disciplinary action. (Italics added)*

...

To some people, both inside and outside government, this is difficult to reconcile with current ideas of accountability. ... It is all the more important, then, that we should be in a position to explain the constitutional principles that are at work.

The Judicial Officers Act of New South Wales contains a limited power to suspend judicial officers while there is a pending complaint that is sufficiently serious to raise the possibility of removal, and following a charge or conviction of an offence punishable by imprisonment for 12 months or more. The power is vested in the head of jurisdiction. Subject to those qualifications, the Act provides no form of sanction short of removal. That is consistent with established principle.”

- [32] The history of representations to remove the power to reprimand and the expressed willingness of the government to monitor the progress of the legislation and introduce changes where necessary are both recorded in the judgment in *Gribbin and Thacker v Fingleton*, delivered contemporaneously with this judgment. Perhaps the time is opportune to revisit the issues in light of the comments of the Chief Justice of Australia and the evidence in these cases.
- [33] Stripped to essentials, the relevant facts in the present case are:
1. The applicant was directed, under threat of reprimand under s 10(8) for failing to comply with a reasonable direction from the Chief Magistrate to attend the meeting on 4 June 2002;
  2. She attended the meeting because of the threat that she would be reprimanded if she did not;
  3. There was nothing to suggest that the meeting was preliminary to reprimanding her under s 10(8)(c) or (f) or taking steps for the purpose of acting under s 15;
  4. At the meeting the only substantive matters discussed were:
    - generalised and unspecific complaints made at the stakeholders meeting about the manner in which she conducted hearings in court;
    - judgments on appeal, interpreted as reflecting on her demeanour in court, but properly interpreted, not reflecting on her personal characteristics;
    - that she was obliged to respond and then attend a further meeting at which the adequacy of her response and any limitations on the kind of cases she would be allowed to hear would be considered.
  5. If she failed to comply with those directions she would be subject to reprimand for failing to comply with a reasonable direction given by the Chief Magistrate.

- [34] The principle that judges are independent of one another, or internal judicial independence, as described in paras [29] to [31] is incompatible with the existence of power to require a judicial officer to attend under compulsion to discuss issues concerning the way in which the judicial officer conducts hearings in court. It would require very plain words to abrogate the principle since it is a fundamental aspect of judicial independence. The notion that a head of jurisdiction could compel a judicial officer to modify how he or she conducted the actual hearing of cases by threat of sanctions is not reconcilable with the principle. Clear and unambiguous legislative provisions would be needed to achieve abrogation.
- [35] For the purpose of discussion, it is assumed, without needing to decide the question for the purpose of the case, that the powers in s 10(8) to discipline a Magistrate by way of reprimand for misconduct or conduct unbecoming a Magistrate extend to misconduct or conduct unbecoming a Magistrate while in court. Under the Act in its present form, if the Chief Magistrate set out to discipline a Magistrate by way of reprimand for either of those things, the matters of misconduct or conduct unbecoming a Magistrate would have to be particularised with respect to an identifiable occasion. There was no attempt to particularise particular incidents in this case. Indeed, the applicant requested but was denied any information prior to attending the meeting about what had been complained of. Those bases of the power to reprimand may therefore be put aside as having no application in the circumstances of the present case.
- [36] The method used in this case was to give a direction which, if not complied with, would be the subject of discipline by way of reprimand under s 10(8)(e). The direction was, in effect, that the applicant indicate how she intended to modify the way in which she conducted cases. If modification satisfactory to the Chief Magistrate was not proposed, the Chief Magistrate would decide whether limitations would be placed on the kind of cases in which the applicant was to sit. To make a requirement in this way is inconsistent with internal judicial independence and will not be a “reasonable” direction unless the principle has been clearly abrogated.
- [37] A power expressed in general terms to do all things necessary or convenient to be done for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Court in an Act intended to secure judicial independence to Magistrates is neither a clear indication of intention nor sufficient to do so.
- [38] Application of these principles leads to the conclusion that the giving of a direction to the applicant to report to the Chief Magistrate with regard to aspects of her demeanour in court and to attend under compulsion a further meeting at which the discussion would be renewed falls outside the power to give a direction for which the applicant could be reprimanded if she failed to comply with it.
- [39] On 6 June 2002 the applicant applied for sick leave. At 10.16am on that day the Chief Magistrate advised the applicant’s solicitor that she did not expect the applicant to be available to attend the meeting but that she should advise the Chief

Magistrate before resuming duties. In later correspondence this was characterised by the applicant's solicitor as a postponement *sine die* of the direction to report and to attend a further meeting.

[40] A letter of 14 June 2002 from the Chief Magistrate to the applicant requested her to attend a meeting on Tuesday 2 July 2002, if she could not do so earlier, to further discuss the reported "perceptions of (her) behaviour". The suggestion was made that arrangements be made for a mediator from the Alternative Dispute Resolution Centre attend, if she wished. In response, this was described as an "inappropriate course to take".

[41] On 20 June 2002, when preliminary correspondence concerning a possible judicial review proceeding was well advanced, the Chief Magistrate wrote to the applicant's solicitor that "any further discussion ... in relation to the recent complaints will be deferred for the present until she is in a frame of mind to discuss matters with me". This was repeated in a letter of the same date to the applicant.

[42] That letter also conveyed a "temporary determination" under s 10(2) of the *Magistrates Act* that "because of urgent circumstances" she was to sit at Brisbane Magistrates Central Courts for a period of not more than 3 months. This resulted in an application being made to the Judicial Committee set up under Pt 4 of the *Magistrates Act* which produced a response that all directions and the transfer determination were withdrawn.

[43] In a letter dated 28 June 2002 the Chief Magistrate confirmed that all directions and the temporary determination had been revoked. The letter continued:

"The revocation is not, and should not be taken as, an acceptance of any of the arguments you have advanced on behalf of Ms Cornack. Rather it is and should be seen as, a conciliatory gesture designed to defuse the present unfortunate situation.

It follows that Ms Cornack may return to work at Southport when she is well enough to resume work. No further action, including mentoring, will be taken in relation to the matters the subject of your application to the judicial committee and the subject of our correspondence. I sincerely hope that I do not have any further occasion in the future to speak to Ms Cornack in relation to complaints as to her judicial behaviour. I stand ready at any time to offer any assistance necessary to Ms Cornack should she require or wish it."

[44] The Judicial Committee proceedings were then abandoned but the applicant's position was maintained that some issues had not been satisfactorily resolved. The thrust of the correspondence was that the withdrawal was begrudging and belated and that the Chief Magistrate should take steps, detailed in the letter, to restore the applicant's reputation in the Magistracy and the profession.

[45] The Chief Magistrate replied to this suggestion by saying that she did not intend to respond to “comments as to matters of the past” as she regarded the “most unfortunate incident as concluded”. She added “From that you should not infer that any matter you have raised is accepted by me as having any merit”.

[46] After the Chief Magistrate was advised on 9 July 2002 that instructions had been given by the applicant to institute judicial review proceedings, her solicitor wrote a letter the thrust of which was that:

- revocation of the directions was done to defuse the situation and allow the applicant to return to work in the interests of both parties and the court system;
- mediation should be attempted rather than judicial review proceedings that would be “completely bereft of utility” and an “academic excursion to no useful purpose”.

The evidence is that mediation was attempted but failed before JB Thomas QC on 29 July and 1 August 2002.

[47] On 4 September 2002 the applicant’s solicitors offered to settle the issues without instituting judicial review proceedings if:

- if the Chief Magistrate determined that the applicant sit at Beenleigh Magistrates Court for a minimum period of 5 years on and from 1 October 2002;
- that she receive a written undertaking from the Chief Magistrate or the Department that she be paid \$25,000 plus GST towards costs incurred by her in respect of the matter.

As to the transfer to Beenleigh, the letter advised that the solicitor had been advised by Magistrate Ehrich that he was willing to transfer from Beenleigh pursuant to conditions he had discussed with the Chief Magistrate to accommodate the applicant’s movement to Beenleigh.

[48] This proposal led to an allegation at the hearing before me that the judicial review proceedings had been begun for an ulterior purpose, and therefore in bad faith, by the applicant. There was uncontradicted evidence that the applicant’s legal fees in connection with the Judicial Committee proceedings that became abortive because the underlying transfer determination was withdrawn were not being reimbursed by the Magistrates Association. There may have been some difficulty in successfully pursuing those proceedings in the Judicial Committee because of the duration of the transfer but if the whole matter were to be settled, provision for costs as part of the terms and conditions of settlement would not be unusual. Further, the fundamental proposition underlying the applicant’s belief that the process followed by the Chief Magistrate impinged on her internal judicial independence has been made out. I reject the allegation that the judicial review proceedings were commenced in bad faith.

[49] In the letter rejecting the offer of 4 September 2002, the Chief Magistrate offered, in effect, to delegate the handling of any further complaints against the applicant to the

Deputy Chief Magistrate and set out a proposed procedure for dealing with them. She expressed a desire to work cooperatively with the applicant “whatever be the history between the parties”. The letter did not specifically address the underlying complaint about compulsion. This was pointed out by the applicant’s solicitor in a fax dated 22 October 2002.

[50] After the decision was reserved at the conclusion of the hearing, counsel for the Chief Magistrate sought leave to revisit the matter. During addresses, the question whether there was some residual ambivalence remaining notwithstanding the steps taken to resolve the matter had been raised. He offered on the Chief Magistrate’s behalf an undertaking in the following form:

“Ms Fingleton undertakes that, subject to complying with any lawful demand made of her, she will not take any further action against Ms Cornack on or arising out of the matters of complaint about Ms Cornack discussed at the meeting held on 4 June 2002 the subject of Exhibit ‘SC 8’ to Ms Cornack’s affidavit.”

[51] The point of this rather protracted summary of events subsequent to the events directly relevant to the decisions complained of is that it was submitted that a declaration should not be made in the exercise of my discretion because the decisions were no longer operative.

[52] Having regard to the comprehensive nature of the undertaking a declaration is now unnecessary. The fact that the underlying proposition relied on by the applicant is established is apparent from the reasons. The fact that the fundamental proposition underlying the applicant’s submissions has been established is also determinative of the way in which the discretion as to costs should be exercised.

[53] The formal orders are the following:

1. I refuse the application for declarations insofar as it relates to “decisions” referred to in paras 1(a) and (b) of the amended application.
2. Having regard to the undertaking offered on behalf of the Chief Magistrate on 15 November 2002, I refuse the application for declarations insofar as it relates to the decisions referred to in paras 1(c) and (d) of the amended application.
3. I order the respondent to pay the applicant’s costs of and incidental to the application to be assessed.