SUPREME COURT OF QUEENSLAND

CITATION:	*Johnston v Brisbane City Council & Ors* [2014] QSC 268
PARTIES:	**NICOLE JOHNSTON** (applicant) v **BRISBANE CITY COUNCIL** (first respondent) and **SIMONE BAIN** (second respondent) and **MICHAEL HALLIDAY** (third respondent) and **RAY OVENS** (fourth respondent)
FILE NO/S:	BS4250/14
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	30 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2014
JUDGE:	Alan Wilson J
ORDERS:	

1. That Orders/Recommendations made by the Panel in its Report dated 31 March 2014:

(a) That Councillor Johnston make an oral apology in person in the Council Chambers in the terms of the Schedule to the Report during the course of the next Ordinary Council meeting attended by her; and

(b) That the Panel requests that the Chief Executive Officer provide a copy of the Executive Summary of the Report and consider providing a copy of the Report of the Panel to the Chief

Executive Local Government with a view if thought appropriate to amend relevant legislation to empower the Minister to remove or suspend a Brisbane City Councillor for misconduct as may be found by the Panel

be declared void and set aside;

2. **That the respondents pay two-thirds of the applicant's assessed costs.**

CATCHWORDS: LOCAL GOVERNMENT – REGULATION AND ADMINISTRATION – MEETINGS – PRESERVING ORDER AND EXCLUSION OF COUNCILLOR OR ALDERMAN – where the applicant is a Brisbane City Councillor – where the first respondent Brisbane City Council Councillor Conduct Review Panel is a body established under and governed by the *City of Brisbane Act* 2010 (Qld) – where a decision was made by the Panel in respect of the applicant, ordering her to pay a fine and apologise in specified terms, following a complaint by another Councillor – where that same Councillor made a second complaint after the applicant failed to deliver the apology – where the Panel made a second decision again ordering an apology in the same terms – where the applicant seeks judicial review of the Panel's second decision on three alleged grounds of jurisdictional error, either under the *Judicial Review Act* 1991 (Qld) or the court's inherent jurisdiction – whether the court has jurisdiction to review decisions made by the Panel under the *City of Brisbane Act* 2010 (Qld), and whether the second decision is open to review for jurisdictional error

Brisbane City Council Meetings Subordinate Local Law 2005, s 25, s 47
City of Brisbane Act 2010 (Qld), s 178, s 179, s 180, s 183, s 183A, s 186A, s 187, s 226, Ch 6 Pt 2 Div 6, Ch 6 Pt 2 Div 7
Civil Proceedings Act 2011 (Qld), s 10
Judicial Review Act 1999 (Qld), s 20, s 30, s 41, s 47, s 49, Pt 3, Pt 4, Pt 5
Local Government and Other Legislation Amendment Act 2012 (Qld), s 33
Supreme Court of Queensland Act 1991, s 119
Uniform Civil Procedure Rules 1999 (Qld), s 681

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2013] QCA 394, cited
Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390, cited

Craig v South Australia (1995) 184 CLR 163, cited
De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd [2010] QSC 279, cited
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421, cited
Green v Daniels & Ors (1977) 13 ALR 1, cited
Hughes v Western Australian Cricket Association Inc (1986) ATPR 40-748, cited
Johns v Australian Securities Commission (1993) 178 CLR 408, cited
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531, cited
Nguyen v Minister for Health and Ageing [2002] FCA 1241, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525, cited
Pinner v Everett [1969] 1 WLR 1266, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, cited
Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-Stock Corporation & Ors (No 2) (1980) 44 FLR 455, cited
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, cited
Smith v The Queen (1994) 181 CLR 338, cited
Thompson v His Honour Judge Byrne (1999) 196 CLR 141, cited
X & Y (by her tutor X) v Pal & Ors (1991) 23 NSWLR 26, cited

COUNSEL: N M Cooke for the applicant
M S Trim for the respondents

SOLICITORS: Thynne & Macartney for the applicant
Brisbane City Legal Practice for the respondents

[1] **Alan Wilson J:** Complaints about the conduct of Brisbane City Councillors can be heard and decided by a body set up under the *City of Brisbane Act* 2010 (Qld). The body is called the *Brisbane City Council Councillor Conduct Review Panel.* If the Panel upholds the complaint it can impose various sanctions and penalties – e.g., requiring an apology from the Councillor, or ordering suspension, or imposing a fine.

[2] Ms Johnston has served as Councillor for Tennyson Ward since 2008. She is dissatisfied with the outcome of Panel proceedings which followed a Council meeting on 30 July 2013, but also have a connection with events at an earlier meeting on 26 February 2013.

[3] A Councillor made a complaint against Councillor Johnston alleging that, at the February meeting, she refused to comply with a direction to leave the Chamber.

The Panel upheld the complaint and in a Report published on 17 July 2013 ordered that Councillor Johnston pay a fine of $5,500, and make an apology at the next Council meeting she attended. I will refer to that Panel finding as 'the first decision'.

[4] The Panel Report contained a schedule headed 'Public Apology' with a form of wording which Councillor Johnston was required to deliver '*... orally in person and in full ...*' before '*Members of the Council Chamber*'. It spoke in terms of apology to the Lord Mayor, all Councillors, Council staff, the police officers who were in attendance at her removal on 26 February, and her constituents. A copy is attached to these Reasons, marked 'Schedule A'.

[5] The next Council meeting after the Panel's order was on 30 July 2013. Councillor Johnston attended. She did not deliver the apology. (She denied, before the Panel, that this was her fault and argued that she was wrongly denied the opportunity to proffer the apology. For reasons which follow, that argument was rightly rejected by the Panel.)

[6] The same Councillor made a second complaint following Councillor Johnston's failure to comply with the first decision – i.e., in not making the apology. That complaint was made to the Chief Executive Officer of the BCC, who referred it to the Panel for consideration under s 180 of the *COB Act*. The Panel, constituted by the second, third and fourth respondents, made the decision that is the subject of this application on 31 March 2014 ('the second decision').

[7] The Panel held that Councillor Johnston had engaged in misconduct within the meaning of the *COB Act* by failing to deliver the apology ordered under the first decision at the meeting on 30 July. The Panel ordered that she pay a fine of $1,540 and, again, make an oral apology in specified terms at the next BCC meeting she attended. (The apology in this second decision is in the same form as the one attached to the first decision, contained in Schedule A.)

[8] An air of exasperation pervades the Panel Reports for both decisions. The first speaks of eight earlier instances when police were present on occasions when Councillor Johnston was ordered to leave the Council chamber, and thirteen alleged occasions of inappropriate conduct.

[9] Although it is not material to this proceeding those events, and that history, may explain why the Panel also ordered in the second decision that the CEO provide a copy of the Executive Summary and, if minded, the decision itself, to the Chief Executive Local Government '*...with a view if thought appropriate to amend relevant legislation to empower the Minister to remove or suspend a Brisbane City Councillor for misconduct as may be found by the Brisbane City Council Councillor Conduct Review Panel*'.

[10] Councillor Johnston seeks judicial review of the second decision. Her originating application sought broad review under the *Judicial Review Act* 1991 (Qld), or the Court's inherent jurisdiction.

[11] In written submissions Councillor Johnston's lawyers relied upon three grounds of alleged jurisdictional error: first, that the Panel did not have jurisdiction to

make the second decision because of the effect of ss 178(2) or 179(6) of the *COB Act*; secondly, that the Panel did not have jurisdiction to specify how and when, and in what terms, the applicant should apologise; and, thirdly, that the Panel did not have the power to request that certain material be made available to the Chief Executive, Local Government.

Does the Court have jurisdiction to review the Panel's decision?

[12] There is a preliminary question whether this Court has jurisdiction to review decisions of the Panel.

[13] The Panel is a body created under the *COB Act* to hear and determine complaints of misconduct or inappropriate conduct by Councillors.[1] Section 178(8)(a) of the *COB Act* provides that a decision of the Panel '*is not subject to appeal*'. That section contains a note stating that it should be read in conjunction with s 226, which provides:

> **226 Decisions not subject to appeal**
>
> (1) If a provision of this Act declares a decision to be not subject to appeal, that means the decision—
>
> (a) can not be quashed, set aside, or called into question in any way (including under the Judicial Review Act, for example); and
>
> (b) is not subject to any writ or order of a court on any ground.
>
> *Examples—*
>
> 1. A person may not bring any proceedings for an injunction to stop conduct that is authorised by the decision.
>
> 2. A person may not bring any proceedings for a declaration about the validity of conduct that is authorised by the decision.
>
> (2) A ***decision*** includes—
>
> (a) conduct related to making the decision; and
>
> (b) a failure to make a decision.
>
> (3) A ***court*** includes a tribunal or another similar entity.

[14] On its face the *COB Act*, then, prevents review by this Court of the Panel's second decision. The respondents properly concede, however, that these provisions will not prevent the Court reviewing the Panel's decision if it was affected by jurisdictional error, as the High Court explained in *Kirk v Industrial Court of New South Wales*:

> '*Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of*

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1 *COB Act*, s 178(6).

> *relief for non-jurisdictional error of law appearing on the face of the record is not beyond power*'.[2]

[15] The applicant appeared in her submissions to be hedging her position, as it were: she seeks review of the decision for jurisdictional error pursuant to the Court's inherent jurisdiction, but only in the event that an application for a statutory order of review under Part 3 of the *JR Act*, or an application for review under Part 5, is not available.

[16] The ground of jurisdictional error is codified in the *JR Act*: Part 4, in s 20(2)(c), says it applies in the eventuality '*that the person who purported to make the decision did not have jurisdiction to make the decision*'; but the *COB Act*, in s 226(1)(a), speaks in clear terms to exclude appeals of any kind against decisions including, specifically, review under the *JR Act*.[3]

[17] In light of that exclusion, as the parties agreed, the only source of review for jurisdictional error can be under the Court's inherent supervisory jurisdiction or statutory provisions like s 10 of the *Civil Proceedings Act* 2011 (Qld).[4] As the applicant has limited her claim to grounds alleging jurisdictional error I am satisfied that the Court has power, through that course, to review the Panel's decision in relation to those claims – but only, of course, if error is shown.

The principles governing review for jurisdictional error

[18] At the crux of the applicant's three grounds of review for jurisdictional error is the question whether the Panel acted beyond the jurisdiction conferred upon it by the *COB Act* in making the second decision at all; and, also, in relation to the form of the order imposed as a consequence of the decision.

[19] The High Court in *Kirk* summarised three examples, previously mentioned in *Craig v South Australia*, of occasions where inferior courts fall into jurisdictional error '*by entertaining a matter outside the limits of the inferior court's functions or powers*':

> '*(a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case*'.[5]

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2 (2010) 239 CLR 531,at 581 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

3 *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525, at [6] per McMurdo P, at [27] per Chesterman JA, at [67]-[74] per White JA.

4 Ibid, at [9].

5 (2010) 239 CLR 531, 575, quoting *Craig v South Australia* (1995) 184 CLR 163, 177-78. This summary has also been recently cited and relied upon by the Queensland Court of Appeal in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394, at [33]-[34]. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, at 141 per Hayne J.

[20] Administrative tribunals will also commit jurisdictional error where they identify a wrong issue, ask themselves a wrong question, ignore or rely upon an irrelevant fact, or in some other way reach an erroneous or mistaken conclusion.[6] Those additional considerations, identified in *Craig*, apply to the Panel – it is a statutory body which exercises solely administrative powers, prescribed by the Act, rather than a mixture of judicial and administrative functions like inferior courts.[7]

[21] Of most relevance here is the last of the three examples given in *Craig*. The applicant contends that the Panel misconstrued and acted beyond its powers by determining the complaint, and issuing the apology order in the terms that it did, and, by making the further order with a view to encouraging law reform.

Did the Panel exceed jurisdiction by making a decision about conduct at a Council meeting?

[22] In the second decision the Panel concluded that Councillor Johnston was guilty of misconduct in that she failed, at the meeting on 30 July 2013, to deliver the apology which the Panel had ordered, in the first decision, that she make then.

[23] The transcript of what occurred at the July meeting is in evidence, as it was before the Panel. Councillor Johnston argued, before the Panel, that she had attempted to deliver the apology at the meeting but had been wrongly refused, by the chair, the opportunity to do so. The Panel's Report concluded that her claims about this were '*unfounded and vacuous*' and found that she had failed to deliver the apology in circumstances which could properly be categorised as a refusal, by her, to do so. I did not understand her submissions before me to challenge that conclusion. In any event, I am not persuaded that the Panel's conclusions were not reasonably open. The transcript does Councillor Johnston no credit and belies the possibility of any serious contention that she made a genuine attempt to tender the apology.

[24] It is said that the Panel fell into jurisdictional error in making its second decision because it related to conduct *at a meeting*, which the *COB Act* appears to remove from the ambit of the Panel's powers. Councillor Johnston points to s 178 of the *COB Act*, which outlines the Panel's jurisdiction and relevantly provides:

> **178 What this division is about**
>
> (1) This division is about dealing with complaints about the conduct and performance of councillors, to ensure—
>
> (a) appropriate standards of conduct and performance are maintained; and
>
> (b) a councillor who engages in inappropriate conduct or misconduct is appropriately disciplined.

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6 *Craig v South Australia* (1995) 184 CLR 163, 179.

7 See ibid, 176.

(2) **However, this division does not apply to the conduct of councillors at a meeting of the council or its committees, other than a failure of a councillor to comply with a direction to leave a meeting of the council or its committees made by the chairperson of the meeting.**

Note—

The rules of procedure deal with the conduct of participants at meetings of the council or its committees.

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

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

(b) that is or involves—

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

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

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

(iv) **a refusal by the councillor to comply with a direction or order of the BCC councillor conduct review panel about the councillor**; or

(v) a failure of the councillor to comply with a direction to leave a meeting of the council or its committees made by the chairperson of the meeting; or

(c) that contravenes section 173(3) or 175(4).

…

(5) It is irrelevant whether the conduct that constitutes misconduct or inappropriate conduct was engaged in—

(a) within Queensland or elsewhere; or

(b) when the councillor was not exercising the responsibilities of a councillor.

…

(*emphasis added*)

[25] Councillor Johnston argues that the Panel's decision contravened s 178(2) because the conduct it was considering – namely, her failure to deliver the apology – occurred at a Council meeting; and, the second decision did not itself relate to failure to *leave* a meeting when ordered (which was, of course, the subject of the first decision).

[26] The respondents contend otherwise, arguing that s 178(2) must be read in the context of s 178 as a whole and, in particular, s 178(3)(b)(iv) which, they submit, is a more specific provision that will override the general application of s 178(2).

[27] The respondents firstly rely upon the established rule of statutory construction to that effect that: '*... where there is a conflict between general and specific provisions, the specific provision prevails*',[8] and '*to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions*'.[9]

[28] Second, the respondents refer to the structure of the disciplinary proceeding provisions in Chapter 6, Part 2 of the *COB Act*. That part contains two divisions dealing with the discipline of Councillors, Divisions 6 and 7. The respondents' submissions address them, for the purposes of construction and understanding, in reverse order.

[29] Division 7 is headed '*Conduct in meetings of the council*', and covers situations where Councillors have engaged in '*disorderly conduct*' during meetings. '*Disorderly conduct*' occurs where a Councillor acts in contravention of the Council's rules of procedure, which are those rules determined by the Council to govern the conduct of its meetings.[10] Section 186A is the sole section comprising Division 7, and it confers on a meeting's chairperson powers to immediately deal with disorderly conduct, and does not affect the chairperson's disciplinary powers elsewhere under the rules of procedure.[11] The chairperson's powers under that section and the rules do not extend to dealing with a situation where a Councillor has failed to comply with an earlier order of the Panel.[12] Councillor Johnston's failure to apologise during the meeting could not, therefore, be classified as '*disorderly conduct*'.

[30] In contrast, Division 6, which incorporates ss 178 and 179 and is headed '*Conduct and performance of councillors*', sets out the process for dealing with complaints of '*misconduct*' or '*inappropriate conduct*'. Complaints of '*misconduct*' are heard by the Panel, and the word is defined to include a Councillor's failure to comply with a chairperson's direction to leave a meeting (s 178(3)(b)(v)), *and* a refusal to comply with an order of the Panel (178(3)(b)(iv)). The Panel's powers to respond to such complaints are broader than those that can be exercised by the chairperson under Division 7, and relevantly includes authority to order that a Councillor make an apology, and to order payment of a fine to the Council.[13]

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8 *Smith v The Queen* (1994) 181 CLR 338, 348 per Mason CJ, Dawson, Gaudron and McHugh JJ.

9 *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-Stock Corporation & Ors (No 2)* (1980) 44 FLR 455, 468 per Deane J.

10 *COB Act*, s 186A(3)-(4).

11 Ibid, s 186A(1)-(2).

12 With reference to the three potential orders the chairperson can make under s 186A(2), and to the *Brisbane City Council Meetings Subordinate Local Law* 2005, in force at the relevant time in July 2013.

13 *COB Act*, s 183(2)(b), (h).

[31] In light of this distinction between the powers given to the chairperson to deal with '*disorderly conduct*' and the Panel to deal with '*misconduct*', the statement in s 178(2) that Division 6 '*does not apply to the conduct of councillors at a meeting of the council*' must have a particular meaning. The subsection reiterates the general rule that powers arising under Division 6 are not to be exercised in response to breaches of procedural rules at meetings but, where a complaint of misconduct has been made, the Panel is empowered under Division 6 to make appropriate orders even if that misconduct occurred in the course of a meeting. Hence, although Councillor Johnston's failure to comply with the Panel's order occurred during a meeting, it is simply a specific example of misconduct under s 178(3)(b)(iv), and the Panel had jurisdiction to make a decision with respect to it, as misconduct.

[32] The applicant's contention that s 178(2) should be read and construed in conjunction with s 179(6) is, with respect, incorrect for a similar reason. That section provides: '*A complaint about the conduct of councillors at a meeting of the council or its committees is of no effect*'. The applicant submits that this provides further support for the view that responding to complaints of misconduct arising from conduct in Council meetings is prohibited under Division 6, and that the Panel, governed by that Part, therefore acted beyond power.

[33] Section 179 is not concerned with the Panel's jurisdiction but with the preliminary assessment of complaints by the CEO, and allows for the summary dismissal of frivolous, vexatious or hopeless complaints. The effect of subsection 179(6) is to exclude complaints that fall under Division 7 from this preliminary complaint mechanism in Division 6.

[34] In other words, in situations where a Councillor has engaged in '*disorderly conduct*' in a Council meeting for the purposes of Division 7, that preliminary assessment process under Division 6 does not apply. This is partly because of the separation of the types of conduct that give rise to the different powers and processes distinguished within Chapter 6 Part 2 – i.e., misconduct, or inappropriate conduct – in any setting for Division 6, as opposed to '*disorderly conduct*' for Division 7. Further, Division 7 confers powers to make orders immediately in response to violations of rules of procedure in meetings, which leaves the applicability of a preliminary assessment mechanism redundant.

[35] I am, for these reasons, satisfied that jurisdictional error did not mar the Panel's implied finding in the second decision that it had jurisdiction, and its actual finding that the applicant was guilty of misconduct. Although Councillor Johnston's failure to comply with the first decision by delivering the apology occurred within the course of a meeting, that failure constituted '*misconduct*' rather than '*disorderly conduct*', and the Panel was the correct body to respond under Division 6, and had jurisdiction. This part of her application fails.

Did the Panel enter into jurisdictional error in making the apology order?

[36] Councillor Johnston's second alleged ground of jurisdictional error is that the Panel acted beyond power in stipulating where, when, how, and in what terms the apology should be made.

[37] The Panel's powers upon making a finding of misconduct are established by s 183, which relevantly provides:

> **183 Taking disciplinary action—BCC councillor conduct review panel**
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> (1) This section applies if the BCC councillor conduct review panel decides, after hearing a complaint, that a councillor engaged in misconduct or inappropriate conduct.
>
> (2) The BCC councillor conduct review panel may make any 1 or more of the following orders or recommendations that it considers appropriate in view of the circumstances relating to the misconduct or inappropriate conduct—
>
> (a) an order that the councillor be counselled about the misconduct or inappropriate conduct, and how not to repeat the misconduct or inappropriate conduct;
>
> (b) **an order that the councillor make an admission of error or an apology;**
>
> (c) an order that the councillor participate in mediation with another person;
>
> (d) a recommendation to the department's chief executive to monitor the councillor or the council for compliance with the local government related laws;
>
> (e) an order that the councillor reimburse the council;
>
> (f) a recommendation to the Minister that the councillor be suspended for a stated period;
>
> (g) a recommendation to the CCC or the police commissioner that the councillor's conduct be further investigated;
>
> (h) an order that the councillor pay to the council an amount of not more than the monetary value of 50 penalty units.
>
> (3) A recommendation mentioned in subsection (2)(f) may include a recommendation about the details of the suspension.
>
> …
>
> (*emphasis added*)

[38] The Panel's power to order a Councillor to make an apology (s 183(2)(b)) is expressed in relatively sparse terms. The applicant and the respondents advance different interpretations of the scope of that subsection. The respondents contend that it leaves room for the Panel to specify the nature and terms of an apology, but say little to support that contention. The applicant says that both the plain text of the provision, and a proper consideration of its purpose within the context of the *COB Act*, support the conclusion that it only confers a bare power to order a Councillor to make an apology.

[39] The natural and ordinary meaning of the bare words in s 183(2)(b) does not confer upon the Panel anything more than a power to make an order, following

a finding that a Councillor has engaged in misconduct, for that Councillor to apologise. That is not the end of the matter, of course; the meaning of a provision in a statute must also be considered within the context of the Act in which it appears, read as a whole. The High Court has emphasised the importance of examining '*the context, the general purpose and policy of a provision and its consistency and fairness*',[14] as '*the process of construction must always begin by examining the context of the provision that is being construed*'.[15]

[40] The exercise will include, where necessary, ascertaining whether giving a provision any particular meaning '*would result in absurdity, conflict with some other provision of the statute or lead to a "result which cannot reasonably be supposed to have been the intention of the legislature"*'.[16]

[41] As to context within s 183(2) itself, the other orders in that subsection are phrased in similarly sparse terms. It lists what orders may be made but does not imply any power, in the Panel, to exercise any additional or expanded discretion – e.g., by making an order that does not appear on that list. It only allows the Panel to '*make any one or more of the following orders or recommendations that it considers appropriate*'. It contains a complete list of potential orders, and provides sufficient detail as to the form those orders might take.

[42] There is also no conflict within s 183 as a whole, or within Part 2 of Chapter 6, if s 183(2)(b) is given its plain, ordinary meaning of conferring a bare power which the Panel may choose to exercise, if appropriate, with respect to misconduct.

[43] Within the subsection, the lack of specificity in s 183(2)(b) can be contrasted with the greater detail given about the scope of the power under (2)(f) – namely, allowing the Panel to make '*a recommendation to the Minister that the councillor be suspended for a stated period*'. That power is further supplemented by s 183(3), which provides that an order under s 183(2)(f) '*may include a recommendation about the details of the suspension*'. Where that level of detail about the scope and the manner of the exercise of a power is given in respect of a particular power conferred by the Act, it would be inconsistent to interpret another part of the same subsection as conferring, or implying, the same level of detail (in terms of expanding the power) in the absence of words with plain, ordinary meaning to that effect.

[44] The applicant also submits that this bare power should be read in the broader context of the Panel's coercive powers. Section 178(3)(b)(iv) provides that a failure to comply with an order of the Panel constitutes misconduct. This means that, although the power under s 183(2)(b) contemplates that the Councillor subject to such an order will have some leeway in giving an

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14 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, at 397 per Dixon J, quoted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at 381 per McHugh, Gummow, Kirby and Hayne JJ.

15 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381.

16 *Thompson v His Honour Judge Byrne* (1999) 196 CLR 141, at 158 per Gaudron J, quoting *Pinner v Everett* [1969] 1 WLR 1266, at 1273 per Lord Reid.

apology, if it is not given to the Panel's reasonable satisfaction, then the Councillor will face a further sanction under s 183(2).

[45] A further consequence of failing to comply with the order is that findings of misconduct are matters of public record.[17] Serious disciplinary and personal consequences flow from failing to make an ordered apology. Specifying how that apology should be given, in explicit detail (which may be contrary to how the Councillor would otherwise give it, albeit still genuinely) is, in this light, excessive and unnecessary and, potentially, oppressive.

[46] The wording and context of s 183(2)(b), for these reasons, do not expressly give scope or power to the Panel to make detailed stipulations about form or content when framing orders made under that section.

[47] The same conclusion is supported by consideration of the Act's purpose. The *COB Act*'s '*legislative purpose*' is '*ascertained by reference to the language of the statute, its subject matter and objects*'.[18] The purpose of the Act is expressed in s 3: to provide for '*the way in which the Brisbane City Council is constituted and the unique nature and extent of its responsibilities and powers*', and to establish '*a system of local government in Brisbane that is accountable, effective, efficient and sustainable*'. Chapter 6 Part 2 Division 6 (in which s 183 falls) is consistent with that purpose in establishing a system for regulating the conduct of Councillors. The explanatory notes canvassing the addition of s 183 in its present form do not elaborate further on its specific limits.[19]

[48] Interpreting s 183(2)(b) as conferring a bare power to make an order is consistent with the Act's underlying purpose of regulating Councillors to ensure that the aims of accountability, effectiveness and efficiency are met. It is not necessary, to comply with that purpose, for that power to be construed in a way which requires or permits specific directions as to form and content, or the identity of the recipients, to be given in making the order.

[49] Both on its face and in context s 183(2)(b) did not, therefore, empower or authorise the Panel to specify, as they did, that Councillor Johnston was required to apologise to the particular recipients named in the draft and in the exact, drafted terms. That narrower interpretation of the power is consistent with, and not absurd in light of, the *COB Act*'s purpose. As such, the Panel acted beyond power and entered into jurisdictional error.

[50] The respondents also argued that an inference that the Panel can stipulate terms is reasonably necessary to make the power effective. The respondents draw upon authorities suggesting that statutory provisions should be interpreted as permitting '*everything which can fairly be regarded as incidental to or consequential upon the authority itself*',[20] and that express statutory powers

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17 *COB Act*, s 183A.

18 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 per McHugh, Gummow, Kirby and Hayne JJ.

19 The section in its present form was added by *Local Government and Other Legislation Amendment Act* 2012 (Qld), s 33: see explanatory notes at pp. 56-57. See also explanatory notes to *City of Brisbane Bill* 2010 (Qld), at pp. 57-58.

20 *Johns v Australian Securities Commission* (1993) 178 CLR 408, 428-29 per Brennan J.

implicitly confer '*powers to do any incidental thing which is reasonably necessary to make the express grant of power effective*'.[21]

[51] It is said that the exercise of the power under s 183(2)(b) incidentally and necessarily involves consideration of the proper recipient of the apology, what conduct it seeks to redress, and in what place it should be made, because failing to consider such essential matters would leave a bare order directing an apology '*meaningless*'.

[52] Undoubtedly, orders for a Councillor to apologise must be framed to some extent with reference to the particular event from which they arise; but the order made by this Panel goes far beyond this. The first two paragraphs of the apology, addressing the Chair of the meeting Councillor Johnston refused to leave and the members of the Council themselves, are appropriate in light of the apology's aim to address, and redress, Councillor Johnston's misconduct within the Council Chamber at the relevant meeting.

[53] But it is unnecessary, and superfluous, and oppressive for her to be made to apologise for the '*considerable anxiety*' allegedly caused to the staff at the Chamber; to the Queensland Police Service for allegedly causing '*an unjustified waste of their valuable time and of public funds*'; and to the constituents of Tennyson Ward for her alleged '*unbecoming conduct*'. Those stipulations make assumptions about what occurred which exceed what the evidence before the Panel revealed, and are unnecessary and unwarranted. There is no evidence of trauma to staff. The involvement of police officers is unusual but not novel and there is, again, no evidence of upset within the Queensland Police Service about the use of resources in that circumstance. The misconduct, relevantly, occurred in a political context and in a political arena; some of Councillor Johnston's constituents might approve of it.

[54] Although the respondents did not argue for it, it might have been reasonable for the Panel to give directions about how and when the apology should have been given so as to meet the circumstance (which arose here) where a Councillor fails to abide by procedural rules for Council meetings in making the apology, and therefore fails to comply with the order. Those rules provide that, apart from moving a motion, '*the time allocated for general business permits Councillors to speak on a defined topic, which must be defined prior to speaking*',[22] and, further, that '*[a]t the commencement of general business, the chairman will call for councillors to make any statements required of them as a result of a councillor conduct review panel order*'.[23] Councillor Johnston failed to follow that procedure: when asked by the Acting Chairperson when she rose at the start of general business whether she intended to speak on a Panel matter, she would not answer 'yes' or 'no' and the words she spoke suggested, rather, that she intended to launch into a speech about a number of topics.[24]

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21 *Nguyen v Minister for Health and Ageing* [2002] FCA 1241, at [64].

22 *Brisbane City Council Meetings Subordinate Local Law* 2005, s 25(6).

23 Ibid, s 47(1).

24 Affidavit of Rebecca Ann McAnalen, sworn on 22 July 2014, Exhibit RM-1, at p. 103.

[55] The apology the Panel drafted did not specify the procedure to be followed in bringing the apology at the start of general business; only, rather, that it must '*be made before Members of the Council Chamber [and] must be given orally in person and in full by Councillor Nicole Johnston*'.[25] These requirements did not make the apology effective, in a procedural sense, because they did not explicitly set things out in a way that complies with the procedural rules.

[56] The apology cannot be said, then, to have been specifically drafted in order to render it effective. Its terms were not intended to ensure that Councillor Johnston abided by procedural rules but, as is compelling, seemed to have the underlying object of causing embarrassment. The Panel must be seen as having acted in jurisdictional error in drafting the apology, which also goes beyond power in light of the plain meaning of the statutory provision upon which it was ordered. That part of the Panel's decision is for this reason open to review by this Court.

Did the Panel's further order that materials relating to the decision be provided by the CEO to the Chief Executive Local Government exceed jurisdiction?

[57] The applicant also seeks review of the Panel's further order that the CEO:

> '*provide a copy of the Executive Summary and consider providing a copy of the Decision of the Panel to the Chief Executive Local Government with a view if thought appropriate to amend relevant legislation to empower the Minister to remove or suspend a Brisbane City Councillor for misconduct as may be found by the [Panel]*'.

[58] The respondents submit that this order should not be construed as part of the Panel's decision but, rather, as a '*recommendation*' which is severable from the other parts of the order. Although the second part of the order is framed as a request and it is separated, in the list in the Panel Report, from the other orders that directly apply to Councillor Johnston, it is entitled a '*further order/direction*'.

[59] The terms of that order do not conform with the orders the Panel is authorised to make under s 183(2) and it therefore acted, again, beyond power and entered into jurisdictional error.

[60] The respondents argue that such an order is consistent with the purpose of Chapter 6 Part 2 Division 6, as expressed in s 178(1)(a) – namely, to deal '*with complaints about the conduct and performance of councillors, to ensure ... appropriate standards of conduct and performance are maintained*'.

[61] Section 183 must, as noted earlier, be interpreted on its own terms and in the context of its surrounding provisions as a provision which comprehensively and conclusively lists the orders the Panel is empowered to make. This 'recommendation' does not apparently fall within the ambit of those powers.

[62] Although a recommendation on these lines might be said to assist in meeting the purposes of the Act – regulating Councillors' behaviour – it exceeds (and is

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[25] Affidavit of Nicole Johnston, sworn on 6 May 2014, Exhibit NC-1, at p. 16.

not necessary for) the specific purpose of s 183, which is to set out the nature of disciplinary action the Panel can order in respect of an individual Councillor's misconduct. It also exceeds, and is superfluous to, the Panel's particular purpose: '*hearing and deciding a complaint of misconduct or inappropriate conduct by a councillor*'.

[63] The respondents alternatively submit that the Act does not evince an intention to void any Panel decision which contains a recommendation to this effect, even if it is beyond power. They refer, again, to the purpose of this Part of the Act, which seeks to maintain standards of conduct and behaviour. The Panel, they say, should have the ability to comment on whether the law governing its powers should be reviewed because that is necessarily incidental to their power to make orders with respect to Councillors' behaviour. Counsel for the respondents likened what the Panel had done here to *obiter dicta* from a judge or court, and submitted that a general recommendation of this nature was appropriate in light of Councillor Johnston's allegedly habitual offending.

[64] It does not necessarily flow from a statutory power to make disciplinary orders that a tribunal must also have the power to comment in a more general way on matters of law reform. The Panel is not comprised of members of the executive or the judiciary, but of persons appointed by the Council, by resolution, who have '*extensive knowledge of, and experience in*' one or more of the following: local government, community affairs, investigations, law, public administration, public sector ethics, public finance or another appropriate area.[26] Some Panel members may be personally qualified to make comments on law reform generally or make recommendations of this kind (and, here, the members are well-known and respected persons, and lawyers), but it remains the case that the order here went beyond the Panel's statutory purpose – to hear and decide particular complaints – and cannot be seen as a necessary incident of its disciplinary powers.

[65] The Panel's further order therefore conforms neither with the express list of orders the Panel is empowered to make, nor with its statutory purpose of responding to individual instances of misconduct.

Orders

[66] The Panel had jurisdiction to hear and determine the complaint and to order the payment of a fine (and Councillor Johnston has paid) but acted beyond its jurisdiction in both specifying the terms of the apology she was ordered to give, and in making a further order that the CEO consider providing material related to the decision to the Chief Executive Local Government for the purpose of investigating options for law reform. Both are examples of '*misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case*'.

[67] Councillor Johnston's originating application seeks an order that the decision be quashed or set aside because of that jurisdictional error, pursuant to either s

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[26] *COB Act*, s 187(1)-(2).

30(1)(a) or s 41(2) of the *JR Act*, or the Court's inherent jurisdiction; or, alternatively, an order remitting the matter to the Panel for further consideration pursuant to s 30(1)(b), s 47(3), or the Court's inherent jurisdiction. The originating application also seeks a declaration that the decision is void, pursuant to s 30(1)(c) or s 47(1) of the *JR Act*, s 10 of the *Civil Proceedings Act* 2011 (Qld), or the Court's inherent jurisdiction. Further or alternatively, the applicant seeks an order in the nature of prohibition, preventing the Panel from taking steps to enforce the decision.

[68] Section 30 falls under Part 3 of the *JR Act*, which sets out the statutory orders of review that the Court can make, whereas s 41 allows the Court to issue relief to the same effect as the prerogative writs where orders under Part 3 are not available.

[69] As noted earlier, this Court's power to review decisions made under the *COB Act* is limited to its supervisory jurisdiction to review for jurisdictional error. Orders pursuant to s 30, under Part 3 of the *JR Act*, are not available. Neither are orders under Part 5 of the Act, which includes the orders the applicant seeks pursuant to ss 41 and 47.

[70] Where legislation purports to exclude all forms of review in that way, the supervisory jurisdiction of the Supreme Court to rectify jurisdictional error remains alive and, the High Court has said in *Kirk*, may be exercised through the grant of prerogative writs.[27] The proper relief to be granted in Queensland in that event is, however, a little uncertain – as the decision of the Court of Appeal in *Northbuild Construction*, also mentioned earlier, shows.

[71] As discussed by all three members of the Court of Appeal, s 41 provides that prerogative writs are no longer to be issued by the Court. Chesterman JA suggested in passing, however, that the effect of s 41 is not to abolish the Court's inherent power to grant prerogative relief in situations, as here, that fall within the ambit of *Kirk*.[28] In other words, where the *JR Act*'s application is excluded by the relevant Act, s 41 cannot apply, but the Court's inherent power to grant prerogative writs remains intact. McMurdo P favoured relief under s 10 of the *Civil Proceedings Act*. White JA appeared to favour a similar kind of relief, albeit under s 119 of the *Supreme Court of Queensland Act* 1991.

[72] Councillor Johnston has sought a declaration that the decision is void, either in the Court's inherent jurisdiction or pursuant to s 10 of the *Civil Proceedings Act* 2011 (Qld). That legislative provision for the making of declaratory orders applies where the applicant seeks declaratory relief only, rather than in addition to other relief, which is not the case here; but declaratory relief is not precluded as a remedy where prerogative relief is available,[29] and the Court's discretion to make a declaration is extremely wide and only limited by its discretion.[30]

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27 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, at 580-81.

28 *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525, at 543 per Chesterman JA. See also *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279, at [13] (Fryberg J).

29 *Green v Daniels & Ors* (1977) 13 ALR 1, at 14.

30 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, at 435 per Gibbs J.

[73] The nature of the proper form of relief is, it seems to me, of technical concern but not to a degree which should confound the Court and prevent the fashioning of appropriate orders. Declaratory relief, to the effect that the offending orders are void and will be set aside, meets the exigencies of the matter.

[74] The order will be that Orders/Recommendations made by the Panel in its Report dated 31 March 2014:

> (a) That Councillor Johnston make an oral apology in person in the Council Chambers in the terms of the Schedule to the Report during the course of the next Ordinary Council meeting attended by her; and
>
> (b) That the Panel requests that the Chief Executive Officer provide a copy of the Executive Summary of the Report and consider providing a copy of the Report of the Panel to the Chief Executive Local Government with a view if thought appropriate to amend relevant legislation to empower the Minister to remove or suspend a Brisbane City Councillor for misconduct as may be found by the Panel

be declared void and set aside.

Costs

[75] Councillor Johnston also seeks costs – initially, under s 49(1)(d) of the *JR Act* which would require the respondents to indemnify her for costs incurred in bringing this application. Alternatively, she seeks an order under s 49(1)(e) that the parties are to bear their own costs; or, alternatively, that the respondents pay her costs of the application on a party and party basis, in accordance with *UCPR* r 681.

[76] A costs order under s 49 of the *JR Act* is only available in respect of a statutory review application under Part 3 of that Act. As the basis upon which relief has been granted in this application is not under Part 3, a costs order under that Part is not available. As the respondents' submissions concede, the general rule that costs follow the event is appropriate.

[77] That said, it is material to the broad discretion attaching to costs orders that Councillor Johnston has not succeeded on all the points she brought into the Court. In particular, her primary attack upon the Panel's jurisdiction to deal with matters arising at a Council meeting failed. The question was an important one, and central to the proceeding. In that circumstance, it is appropriate to order that the respondents pay some, but not all, her costs.[31]

[78] It will be ordered that the respondents pay two-thirds of the applicant's assessed costs.

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[31] *UCPR*, r 684; *Hughes v Western Australian Cricket Association Inc* (1986) ATPR 40-748; *X & Y (by her tutor X) v Pal & Ors* (1991) 23 NSWLR 26.

Schedule A

Schedule: Public Apology

This apology to be made before Members of the Council Chamber must be given orally in person and in full by Councillor Nicole Johnston (Respondent) in accordance with the Determination of the Panel.

Terms of Apology

'I sincerely and unreservedly apologise for my refusal to leave the Chamber on the 26th of February 2013 on the Direction of the Chairman, Cr. Margaret de Wit.

My apology extends to the Lord Mayor, Cr. Graham Quirk and Members fo the LNP, and to the Leader of the Opposition, Cr. Milton Dick and Members of the ALP.

I realize [sic] that my actions caused considerable anxiety to the staff of the Chamber as well as to the officers of Council who were in attendance at the Chamber Meeting.

Further I apologise to the Queensland Police Service for requiring their attendance to escort me from the Chamber. I fully realise that such was an unjustified waste of their valuable time and of public funds which should not have occurred and was occasioned by my reluctance to abide by the Rules of the Chamber.

Finally I apologise to the constituents of my Ward of Tennyson for my unbecoming conduct as a Councillor duly elected by them to represent their interests and those of the City of Brisbane.

I resolve that in the future any procedural issues I may have with the Chairman will be determined in accordance with the relevant rules of procedure of the Chamber'.