



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

BETWEEN:

BIANCA FULLER
First Appellant

and

CHIEF EXECUTIVE OF QUEENSLAND CORRECTIVE SERVICES
Second Appellant

and

MARK LAWRENCE
Respondent

APPELLANTS' REPLY

PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

10 **PART II: APPELLANTS' REPLY**

2. Central to the Respondent's defence of the Court of Appeal's decision is a conception that affection of the Respondent's rights derives from two sources, namely:
 - (a) the supervision order; and
 - (b) the force of the "status or effect" of the Direction "as a direction under s. 16C(1) of the DPSO Act".¹
3. By this logic, if the Direction were quashed or set aside on an application for statutory order of review, the affection of the Respondent's rights would be nullified, because – on the Respondent's case – that affection is reliant on both the existence of the order *and* the Direction to operate.
- 20 4. The veracity of this argument requires consideration of whether, on the proper construction of the DPSO Act, there is an affection of rights by the combined operation of the supervision order and the Direction's "status or effect as a 'direction' under s. 16C(1) of the DPSO Act".

¹ RS [37].

5. The text of s. 16(1) of the DPSO Act requires that a supervision order “must” contain certain “requirements”, including the requirement specified by s. 16(1)(db) that the prisoner “comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order”.
6. This statutory language makes compliance with a direction a “requirement” of the order. It indicates that a prisoner’s *legal* obligation to comply with a direction does not depend, in any sense, on a direction having “status or effect as a ‘direction’ under s. 16C(1) of the DPSO Act”.
- 10 7. This reasoning is consistent with the wider statutory context. Section 15 of the DPSO Act states that a supervision order, an exercise of judicial power, has effect “on the order being made or on the prisoner’s release day, whichever is the later”. The legal obligations (i.e. “requirements”) stated in the order are not contingent on subsequent exercises of administrative power. Whilst, in a practical sense, the obligations in the order are ambulatory in effect, being defined by reference to acts or events that happen after the order is made, those obligations derive, in no sense, their legal force from those facts or events. Immediately upon the order taking effect in accordance with s. 15, the requirements of the order constitute legal obligations by which the prisoner is bound, albeit with content that varies according to the happening of the facts or events upon which its terms are defined to operate.
- 20 8. The above reasoning is illustrated by the terms of the supervision order in this case. The text of the relevant requirement of the order states:²

A corrective services officers will supervise you until this order is finished. This means you must obey any reasonable direction that a corrective services officer gives you about:

- (a) where you are allowed to live;
 - (b) rehabilitation, care or treatment programs;
 - (c) using drugs and alcohol;
 - (d) who you may not have contact with; and
 - (e) anything else, except for instructions that mean you will break the rules in this supervision order.
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² AFM 17.

A “reasonable direction” is an instruction about what you must do or what you must not do, that is reasonable in that situation.

9. The above text does not state that the Respondent’s obligation to comply with a direction is contingent, in any way, on the direction having “status or effect” as a “direction” under s. 16(1) of the DPSO Act. It states instead that the requirement to comply with the direction depends on certain criteria, defined by the order, being met. Those criteria are consistent with the requirements of s. 16C of the DPSO Act. However, those criteria only affect the Respondent’s rights because they are incorporated into a final order of a Chapter III court, rather than because they are prescribed by an Act of Parliament.
10. In this context, it is as well to remember that the supervision order is not an outcome dictated by the legislature.³ It is a final judicial order that operates as a “new charter” of the rights and obligations as between the Respondent and the State.⁴ That charter is not altered, in any sense, by the occurrence, after the order is made, of the acts or events, such as a direction, on which the requirements of the order are defined to operate.
11. The above reasoning is consistent with the conception of “power” identified by Edelman J in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,⁵ as “the ability to effect a change in legal relations”. This is because the above reasoning focuses on the “source”⁶ of an affection of rights, rather than any contemporaneity between that affection and a decision, for the application of the second limb of the *Tang* test.
12. The above reasoning is also consistent with the nature of an order that quashes or sets aside a decision on judicial review,⁷ which is to “remove the legal consequences, or purported legal consequences, of an exercise of purported exercise of power which has, at the date of the order, a discernible or apparent legal effect upon rights”.⁸ In contrast,

³ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 502 [19] (Gleeson CJ), at 596 [34] and at 602 [44] (McHugh J), at 614 [90] to 621 [113] (Gummow J), at 647 [196] (Hayne JJ), at 656 [220]-[224] (Callinan and Heydon JJ); DPSO Act, ss. 8, 11, 13, 17, 25 and 31.

⁴ *R v Trade Practices Tribunal; ex parte Tasmania Breweries Pty Ltd* (1970) 123 CLR 361 at 374; *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; (2022) 276 CLR 519 at 542 [47] (Gageler and Gleeson JJ).

⁵ (2023) 179 ALD 1 at [120] (Edelman J), citing *Tang* at 128 [80] (Gummow, Callinan and Heydon JJ).

⁶ *Griffith University v Tang* (2005) 221 CLR 99 at 128 [81] (Gummow, Callinan and Heydon JJ) (*‘Tang’*).

⁷ i.e. at common law *certiorari* and an order made under s. 30(1)(a) of the *Judicial Review Act 1991* (Qld) in relation to applications for statutory orders of review.

⁸ *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; (2018) 264 CLR 1 at 13 [28] (Kiefel CJ, Keane, Nettle and Gordon JJ); see also at 24 [63] (Gageler J (as the Chief Justice then was));

such an order cannot change the historical fact that the act of a corrective services officer to give a direction has occurred,⁹ or the legal consequences that flow from that fact by the operation of the supervision order. Setting aside or quashing the Direction would leave intact the “charter of rights” created by the supervision order.

13. Thus, what defines judicial review and keeps it within “the administration of the law”,¹⁰ is that it only interferes with administrative power,¹¹ to the extent that it is the source of a change in legal relations.¹² Here, no relevant change in legal relations has been worked by the Direction because the Respondent’s obligation to comply with it comes from the charter of rights created by the supervision order, rather than the Direction “itself”.¹³

- 10 14. It is respectfully submitted that the Respondent’s submissions ought to be rejected and that the orders sought by the Appellants should be granted.

Dated: 18 July 2024

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Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 at 580 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ).

⁹ *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at 140 [46] (French CJ, Crennan and Kiefel JJ) and at 160 [113] (Heydon J).

¹⁰ *Re McBain; ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 388-9 [3]-[6] (Gleeson CJ).

¹¹ *Tang* at 128 [79] (Gummow, Callinan and Heydon JJ).

¹² AS [24]-[28].

¹³ *Tang* at 130 [89] (Gummow, Callinan and Heydon JJ).