Lawrie v Lawler [2016] NTCA 03

PARTIES:	LAWRIE, Delia Phoebe v LAWLER, John
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 5, 6 and 8 of 2015 (21434660)
DELIVERED:	2 June 2016
HEARING DATES:	1 and 2 March 2016 and 8, 9 and 10 March 2016
JUDGMENT OF:	DOYLE, DUGGAN & HEENAN AJJ
APPEAL FROM:	SOUTHWOOD J

CATCHWORDS:

APPEAL – Judicial review – requirements of procedural fairness – inquiry pursuant to s 4A of the *Inquiries Act 1945*(NT) - extent of obligation of the Commissioner to notify parties likely to be affected by the inquiry of the issues under investigation and/or of likely adverse findings – sufficiency of notice - identification of issues – degree of precision required – alleged waiver of right to procedural fairness – refusal by Judge to recuse – application by non-party for leave to intervene or be joined as co-appellant – interests affected – personal reputation – officer of the court – costs – indemnity costs – indemnity principle – retainer of solicitors - remedies and relief

Crown Lands Act 1992 (NT) s 12(3)
Inquiries Act 1945 (NT) s 4A, s 4A(1), s 4A(3), s 7

Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act 2008 (NT) s 4, s 5, s 5(1), s 5(2), s 12(3)
Supreme Court Act 1979 (NT) s 9(1), s 51
Supreme Court Rules 1987 (NT) r 85.11, r 85.11(2)

Adams v London Improved Motor Coach Builders Ltd [1921] 1 KB 495; *Ah Toy v Registrar of Companies (NT)* (1985) 10 FCR 280; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Annetts v McCann* (1990) 170 CLR 596; *Ashby v Slipper* (2014) 219 FCR 322; *Brinsmead v Commissioner, Tweed Shire Council Public Inquiry* (2007) 69 NSWLR 438; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45; *Dyktynski v BHP Titanium Minerals Pty Ltd* (2004) 60 NSWLR 203; *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438; *Kioa v West* (1985) 159 CLR 550; *Levy v The State of Victoria* (1997) 189 CLR 579; *Mahon v Air New Zealand Ltd* [1984] AC 808; *Marsh v Baxter (No 2)* [2016] WASCA 51; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507; *Minister for Immigration and Multicultural and Indigenous Affairs, Re; Ex parte Lam* (2003) 214 CLR 1; *National Companies & Securities Commission v News Corporation Ltd* (1984) 156 CLR 296; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; *Queensland Police Credit Union Ltd v Criminal Justice Commission* [2000] 1 Qd R 626; *Ramsay v Pigram* (1968) 118 CLR 271; *Roadshow Films Pty Ltd v iinet Ltd* (2011) 248 CLR 37; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634; *Smits v Roach* (2006) 227 CLR 423; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Telstra Corporation Ltd v Smith* (2008) 105 ALD 521; *Vakauta v Kelly* (1989) 167 CLR 568, applied.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524; *Chiropractors Association of Australia (South Australia) Ltd v Workcover Corporation of South Australia* [1999] SASC 120; *Commonwealth of Australia v Construction, Forestry, Mining and Energy Union* (2000) 98 FCR 31; *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391; *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305; *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Escobar v Spindaleri* (1986) 7 NSWLR 51; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641; *Hall v University of New South Wales* [2003]

NSWSC 669; *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648; *Harmer v Oracle Corporation Australia Pty Ltd* (2013) 299 ALR 236; *Henderson v Queensland* (2014) 255 CLR 1; *Inglis v Moore (No 2)* (1979) 46 FLR 470; *J v Lieschke* (1987) 162 CLR 447; *Lenthall v Hillson* [1933] SASR 31; *MH6 v Mental Health Review Board* (2009) 25 VR 382; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377; *Noye v Robbins (No 6)* [2008] WASC 266; *Noye v Robbins* [2010] WASCA 83; *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446; *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13; *R v GJ* (2005) 16 NTLR 230; *R v Ludeke & Ors; Ex parte Customs Officers' Association of Australia, Fourth Division* (1985) 155 CLR 513; *Rushby v Roberts* [1983] 1 NSWLR 350; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396; *Trevorrow v State of South Australia (No 7)* (2008) 251 LSJS 91; *Victims Compensation Fund Corporation v Nguyen* (2001) 52 NSWLR 213; *Wells v Carmody* [2014] QSC 59; *Wilson v British American Tobacco Australia Services Ltd* (CA (Vic) - 26 July 2002); *Witness v Marsden* (2000) 49 NSWLR 429, referred to.

Bond v Australian Broadcasting Tribunal (No 2) (1988) 19 FCR 494, distinguished in the Reasons of Heenan AJ.

REPRESENTATION:

Counsel:

Appellant: on 1 and 2 March 2016	A Scott
on 8 – 10 March 2016:	PJ Davis QC and A Scott
Respondent: on 1 and 2 March 2016	D McLure SC and G O'Mahoney
on 8 – 10 March 2016	D McLure SC and G O'Mahoney
Applicant to Intervene – on 1 and 2 March 2016 -	W Sofronoff QC and D Skennar

Solicitors:

Appellant:	Ward Keller Lawyers
Respondent:	Paul Maher Solicitors
Applicant to Intervene -	Carter Newell

Judgment category classification:	A
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lawrie v Lawler [2016] NTCA 03
No. AP 5, 6 and 8 of 2015 (21434660)

BETWEEN:

DELIA PHOEBE LAWRIE
Appellant

AND:

JOHN LAWLER
Respondent

CORAM: DOYLE, DUGGAN & HEENAN AJJ

REASONS FOR JUDGMENT

(Delivered 2 June 2016)

DOYLE & DUGGAN AJJ:

Background

[1] On 10 July 2012 the Cabinet of the Northern Territory Government approved the offer of a Crown Lease for a "term of 10 + 10 years" to "Unions NT". "Unions NT" is the operating name of the Northern Territory Trades and Labour Council Incorporated. For convenience we will refer to that body as "Unions NT".

[2] The proposed lease was to be a lease of land in the city of Darwin, known as the "Stella Maris site". We will refer to it in the same way.

[3] When the Cabinet made its decision a general election for the Northern Territory Parliament was to take place on 25 August 2012. We understand that the caretaker period was to begin on 6 August 2012.

[4] After the Cabinet decision the lease conditions and a letter of offer were prepared by the Department of Lands and Planning. The documents were stamped with the relevant Minister's signature on 3 August 2012, the last working day before the caretaker period began. The documents were emailed to the secretary of Unions NT that same day. The secretary signed them that day but did not pay the required lodgement fee, nor fix the seal of Unions NT to the document, until 9 August 2012.

[5] The election on 25 August 2012 resulted in a change of government. The new government was not favourably disposed to the proposed lease. In fact, the lease was never registered. The Stella Maris site remains unalienated Crown Land. The details of the dealings with the Stella Maris site after the election are not now relevant.

[6] On 18 December 2013 the Administrator of the Northern Territory, exercising power conferred by s 4A(1) of the *Inquiries Act 1945* (NT) *(Inquiries Act)*, appointed Mr John Lawler as Commissioner. Mr Lawler was required to enquire into and report on the following matters:

> 1. The circumstances of the purported decision of the then Minister for Lands and Planning to grant a lease over Lot 5260 Town of Darwin known as Stella Maris (the site) to Unions NT on or about 3 August 2012.

2. The public policy and public accountability considerations involved in making the purported decision to grant a lease of the site to Unions NT without putting the matter out to expressions of interest or public tender.

3. The performance of relevant persons, including the then Minister for Lands and Planning, in carrying out their obligations under the relevant regulatory regime and ensuring the proper accountability processes were applied in the tenure management of the site.

4. The adequacy and effectiveness of the regulatory regime in ensuring transparency, good governance and community input into the process of leasing or granting Crown land.

5. The provision and accessibility of relevant information to affected stakeholders and the public in relation to the proposal and purported decision to grant the lease of the site to Unions NT.

6. Any measures that might help ensure transparency, good governance and community input into the process of leasing or granting Crown land with particular reference to the purported decision to grant the lease of the site to Unions NT.

7. Any other suggestions or recommendations the Commissioner considers relevant to the above matters.

[7] Mr Lawler embarked on the Inquiry. He presented his Report ("the Report") to the Administrator on 26 May 2015.

[8] Mr A Wyvill SC (Mr Wyvill) and Ms C Spurr (Ms Spurr) acted as counsel and solicitor respectively for Ms Delia Lawrie (Ms Lawrie) in connection with the Inquiry.

[9] The Report contains a number of findings and criticisms adverse to Ms Lawrie. When the Cabinet decision was made Ms Lawrie was Deputy Chief

Minister and Treasurer. She had been the Minister for Lands and Planning until 4 December 2009. The Department of Lands and Planning was, in the ordinary course of things, the Department responsible for the grant of the proposed lease over the Stella Maris site, if the proposed lease were to be granted. At this stage it suffices to say Ms Lawrie was firmly in favour of the proposed lease to Unions NT; was convinced that in the event of a change of government at the forthcoming August election the lease of the Stella Maris site to Unions NT might not be granted; had been closely involved, over a period of time, in the taking of steps that led to the Cabinet decision, and took an active part in ensuring that the matter came before Cabinet on 10 July 2012, in circumstances suggestive of some urgency.

[10] Mr Lawler found that Ms Lawrie was, over a period of years, determined to ensure that the Stella Maris site was granted to Unions NT, believing that to be in the public interest. She took steps to exclude from the process other bodies that might have had an interest in obtaining a grant of a lease over the Stella Maris site. She failed to follow certain established practices regulating the application for a grant in such a case, and the making of a grant in such a case.

[11] There is no suggestion of corruption. Mr Lawler accepted that Ms Lawrie believed that her objective was in the public interest, and that it was appropriate to act as she had. However, he criticised her conduct in a number of respects.

[12] On 30 July 2014 Ms Lawrie instituted proceedings in the Supreme Court of the Northern Territory against Mr Lawler. She claimed the following relief:

> 1. A declaration that, in reporting adversely to the plaintiff in his report entitled "Inquiry into Stella Maris – 2014" ("the Report") purportedly pursuant to s 4A (3) of the *Inquiries Act*, the defendant failed to observe the requirements of procedural fairness.
>
> 2. An order in the nature of certiorari to quash the Report.

[13] In brief Ms Lawrie complained that she was denied any or an adequate opportunity to respond to the criticisms before Mr Lawler published his Report.

[14] On 1 April 2015 a Judge of the Supreme Court dismissed the action. The Judge found that Ms Lawrie was accorded procedural fairness.

[15] Ms Lawrie appeared before the Commissioner. He took her through relevant documents, disclosing the history of the dealings with the Stella Maris site, that led up to the Cabinet decision. This was done informally. Ms Lawrie then gave evidence before Mr Lawler, and was given an opportunity to comment on all of these documents, and to comment on pertinent issues put to her by the Commissioner.

[16] But Ms Lawrie claimed that, in addition to this, she was entitled to be informed by Mr Lawler, before publication of his Report, of any adverse findings that Mr Lawler proposed to make about her and her conduct, and

that she was entitled to an opportunity to respond to these foreshadowed adverse findings.

[17] The Judge had an alternative basis for the order dismissing the action.

[18] The Judge found at [141] that:

> Ms Lawrie and her lawyers had, by their conduct, abandoned the entitlement to any such notice and further opportunity to be heard.

[19] The Judge said at [142] that the conduct of Ms Lawrie and her lawyers:

> had waived the right to claim procedural fairness beyond what Ms Lawrie was in fact accorded by Mr Lawler.

[20] In the course of explaining his conclusions on this aspect of the matter, the Judge made serious adverse findings relating to conduct on the part of Ms Lawrie, Mr Wyvill and Ms Spurr.

[21] On 1 May 2015 Mr Lawler made an application for costs. Mr Lawler applied for an order that Ms Lawrie pay Mr Lawler's costs "in the gross amount specified by the Court", and in the alternative that Ms Lawrie pay Mr Lawler's costs on an indemnity basis; *Lawrie & Anor v Lawler* [2015] NTSC 40 at [1]. Mr Lawler further applied for an order that Mr Wyvill and Ms Spurr be made jointly and severally liable for the costs payable by Ms Lawrie to Mr Lawler.

[22] Ms Lawrie and Mr Wyvill submitted to the Judge that he should withdraw from hearing the application for costs.

[23] The application to the Judge to recuse himself arose from the following circumstances. The Judge's wife was employed by the Northern Territory Government in the Attorney-General's Department. Her role, as described by the Judge at [23], was to:

> act as a point of communication between the Agency requesting legal services, the lawyer who was in private practice and the director of the relevant division within the Solicitor for the Northern Territory.

[24] In other words, she had a part to play when a government agency requested that arrangements be made for the provision of legal advice or representation by a lawyer in private practice. In that capacity in August 2014 she had played a part in arranging legal representation for Mr Lawler in connection with the proceedings brought by Ms Lawrie against Mr Lawler. In January 2015 Mr Maher, the solicitor representing Mr Lawler, sent an email to an officer in the Department of the Chief Minister: at [98]. The report provided "an updated estimate of costs" and explained, in some detail, various twists and turns in the proceedings between Ms Lawrie and Mr Lawler, by way of an explanation for the anticipated costs having increased substantially. The email included some references to prospects of success. On 20 January 2015 the Judge's wife asked Mr Maher for "an updated estimate of your fees." Mr Maher explained that he had overlooked forwarding to the Judge's wife a copy of the detailed email to the officer in the Department of the Chief Minister and forwarded a copy of that earlier email.

[25] On the recusal application, Ms Lawrie and Mr Wyvill argued that the involvement of the Judge's wife in the provision of legal services for Mr Lawler put her "in the camp" of Mr Lawler and that, for those reasons, an observer might reasonably have apprehended that the Judge might not decide the costs issue impartially.

[26] There was another point taken. It was that the basis on which the Judge's wife arranged for legal services was such that Mr Lawler did not incur any liability to pay Mr Maher's costs or Ms Lawrie's costs, because he was wholly indemnified in respect of costs by the Northern Territory Government, and accordingly costs should not be awarded in his favour. Mr Lawler had paid no costs, had incurred no liability to pay costs, and so the argument ran, was unable to obtain a costs order against Ms Lawrie: at [18].

[27] On 22 July 2015 the Judge dismissed the recusal application.

[28] On 1 August 2015 the Judge heard the costs application against Ms Lawrie. He awarded costs against her, in part, on an indemnity basis.

[29] Ms Lawrie now appeals (in some instances by leave or with an extension of time to appeal) against each of these decisions.

[30] As to the first judgment under appeal, the grounds are as follows:

1. The judgment was attended by an apprehension of bias.

2. The learned Judge at first instance erred:

a. by considering the wrong question, namely whether the findings made in the respondent's report as to the Inquiry were true;

b. by further considering whether the appellant had notice of "issues";

c. by not considering whether the appellant had notice of particular possible adverse findings;

d. otherwise found that procedural fairness had been afforded to the appellant when it had not; and

e. by finding against the weight of the evidence that the appellant waived any breach of the rules of natural justice.

[31] The first ground raises the matters relied upon in the application made to the Judge that he recuse himself. The second ground, raised some time after the first ground, challenges the Judge's findings relating to procedural fairness.

[32] In the second appeal the grounds are:

1. The Honourable Judge erred in law in his interlocutory judgment by not finding that there was apprehension of bias and by not disqualifying himself from hearing the application for costs.

2. The interlocutory judgment was attended by an apprehension of bias.

[33] The issue of bias that is raised here is the same issue as is raised in relation to the first judgment.

[34] The third appeal is an appeal against the decision on costs. The grounds are as follows:

(i) the judgment is affected by apprehended bias;

(ii) there was no liability by the respondent for costs and therefore no liability which he could or should have been indemnified against by a costs order;

(iii) there was no basis or no reasonable basis, to award costs to the respondent on an indemnity basis.

[35] These grounds raise the same issue of bias as is raised in the other appeals, the question of whether Mr Lawler was unable to recover costs because he had no liability to pay costs, and finally the merits of the decision to award costs on an indemnity basis.

[36] The three appeals were heard concurrently. Before the Court embarked upon the hearing of these appeals, it dealt with some procedural matters.

[37] We heard an application by Mr Wyvill, who, as we have said, acted as counsel for Ms Lawrie during the Inquiry or during most of it. Mr Wyvill applied for leave to intervene, or to be joined as appellant, or to be heard as *amicus curiae*, in each appeal.

[38] In his first judgment, the subject of the first appeal, the Judge had said at [142]:

> I have found that Ms Lawrie was accorded procedural fairness by Mr Lawler. However, if am wrong about that, I find that Ms Lawrie and her lawyers, on her behalf, waived the right to any greater procedural fairness for Ms Lawrie than Mr Lawler accorded her.

[39] In the course of his reasons of so finding the Judge made serious findings against Ms Lawrie, Mr Wyvill and Ms Spurr. The Judge said at [144]:

> Mr McLure submitted that from on or about 31 March 2014 Ms Lawrie and her lawyers made a conscious decision to change their strategy and withdraw from further participation in the Inquiry. He submitted that Ms Lawrie and her lawyers engaged in a deceptive strategy to ignore, disengage and discredit the Inquiry. The words "ignore, disengage and discredit" are words that were used by Mr Wyvill when developing the strategy. I accept the respondent's submission. I find that by engaging in that strategy Ms Lawrie and her lawyers waived her right to any greater procedural fairness. They intentionally and knowingly abandoned any further participation in the Inquiry by engaging in conduct inconsistent with a right to be further heard by Mr Lawler. Instead of further participating in the Inquiry, Ms Lawrie chose a political course of action.

[40] It suffices to say that the Judge found that they set out to deceive Mr Lawler, and acted in a deceptive manner, so as to preserve for Ms Lawrie an ability, when his Report was complete, to attack any adverse findings on the basis that Ms Lawrie had not been accorded procedural fairness.

[41] As can be seen, these were serious criticisms. The Judge's reasons in support of this conclusion occupy a substantial part of his judgment.

[42] Mr Wyvill was neither a party to the proceedings before the Judge nor a witness (although at one stage it was foreshadowed that he would give evidence) nor was he counsel in the first proceedings. Mr Wyvill argues that the situation is unfair. He has been the subject of findings which are likely to harm substantially his personal and professional reputation. He argued that in one way or another he should be heard to enable him to defend his reputation.

[43] On this application we heard Mr Sofronoff QC for Mr Wyvill and Mr McLure SC for Mr Lawler. Counsel for Ms Lawrie supported Mr Wyvill's submissions.

[44] Having heard these submissions, we concluded that the application should be refused. The hearing of the appeals accordingly proceeded without Mr Wyvill participating. The reasons for our decision on Mr Wyvill's application follow.

Application by Mr Wyvill

[45] On 1 April 2015 the Judge gave judgment for Mr Lawler on the application by Ms Lawrie, and published his Reasons. In those Reasons he made findings and observations severely critical of the conduct of Mr Wyvill in connection with his role as counsel for Ms Lawrie. The Judge was equally severe in his criticisms of Ms Spurr and Ms Lawrie.

[46] On 18 August 2015 Mr Wyvill filed a summons in the appeal by Ms Lawrie against that Judgment. He sought "…leave to intervene in the appeal…". On 9 September he filed an Amended Summons seeking leave "… to intervene in and/or be joined as a party to the appeal." On the hearing of these applications his counsel Mr Sofronoff, applied for leave, in the alternative, to be heard on the appeal as *amicus curiae*.

[47] Earlier in our Reasons we referred to the criticisms of Mr Wyvill made by the Judge. It is not necessary to repeat them. Further detail can be found in

the reasons of Heenan AJ. It suffices to say that they are likely to injure his personal and professional character and reputation. The criticisms were made in the course of proceedings in which Mr Wyvill was not a party. Nor was he called as a witness. He was available to be called, and the Judge had been told that he was likely to be called or would be called. Mr Wyvill, Ms Spurr and Ms Lawrie each swore affidavits on the morning of 27 January 2015 (the first day of the trial). Counsel for Ms Lawrie had these affidavits in his possession. But on the morning of the second day of the trial (28 January 2015), and after some discussion with the Judge, counsel for Ms Lawrie told the Judge that the affidavits would not be read; Reasons *Lawrie v Lawler* [2015] NTSC 19 at [224].

[48] By s 51 of the *Supreme Court Act* (NT) a party to a proceeding can appeal to the Full Court "… from a Judgment given in that proceeding …". "Judgment" is defined in s 9(1) as follows:

> Judgment includes a decree, order, declaration, determination, finding (including a finding of guilt) conviction or sentence and a refusal to make a decree, order, declaration, determination or finding, whether final or otherwise.

[49] Mr Sofronoff did not submit that s 51 permits an appeal other than against a judgment or order. He accepted that s 51 does not permit an appeal against reasons for decision, as distinct from an appeal that challenges the correctness of an order or judgment, albeit by attacking the reasons given for that order or judgment.

[50] Rule 85.11 of the *Supreme Court Rules 1987* (NT) provides:

> (1) Each party to a proceeding who is affected by the relief sought by a notice of appeal or is interested in maintaining the judgment appealed from shall be joined as a party appellant or respondent to the appeal.
>
> (2) The Court of Appeal or a Judge may order the addition or removal of a person as a party appellant or respondent to an appeal.
>
> (3) A person shall not be made an appellant without his consent.

Mr Sofronoff based his application on Rule 85.11(2), and in the alternative he relied on the Court's inherent jurisdiction. His submissions did not explore the inherent jurisdiction in any detail, in particular its relationship to Rule 85.11(2). Suffice it to say that whatever may be the source of our power, in our opinion Mr Wyvill could be joined as a party to the appeal only for the purpose of challenging an order or judgment by which he was bound. He could not be joined for the purpose of an attack only upon the Judge's Reasons.

[51] Mr Sofronoff identified no relevant order or judgment other than the order by the Judge of 1 April 2015, by which he dismissed Ms Lawrie's action. Mr Sofronoff identified no ancillary or interlocutory order or decision, binding Mr Wyvill, and by which he was aggrieved, which might in its own right be susceptible to appeal by Mr Wyvill: *cf Witness v Marsden* (2000) 49 NSWLR 429 ('*Witness v Marsden*'); *Commonwealth of Australia v*

Construction, Forestry, Mining and Energy Union (2000) 98 FCR 31 (‘*CFMEU*’).

[52] As to the Judge’s order dismissing the application by Ms Lawrie, Mr Wyvill has no standing in relation to or interest in that order as such. It does not bind him. Nor, of itself, does it or can it affect any right or interest of his. If the entitlement to be joined, upon which Mr Sofronoff relies, does exist, it can only have arisen, we consider, once it became apparent that the Judge might make findings adverse to Mr Wyvill’s reputation. Once again, Mr Sofronoff did not identify the stage at which the right to be joined as a party to the trial arose.

[53] The practical difficulties in identifying the stage at which the right to be joined arose are evident. Also evident are the practical difficulties of permitting joinder of a new party part way through a trial. We leave that aside for the moment. We are concerned with an appeal against a decision or judgments already made. If the right to be joined exists, then in one way or another it must have arisen by this stage.

[54] We accept that reputation is an interest that the law will, in a variety of circumstances, protect; see *Annetts v McCann* (1990) 170 CLR 596 at 608 (*‘Annetts v McCann’)*; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578 (*‘Ainsworth’*). But that general proposition does not dispose of the difficulty that Mr Wyvill faces. The fact that the reasons given for a judgment or order, which has no direct effect on an interest or right of

Mr Wyvill's, affect Mr Wyvill's interest in his reputation, is not of itself sufficient to entitle him to be joined as a party. The difficulty is that the judgment or order does not bind him.

[55] We have been assisted by the reasons of the Full Court of the Federal Court of Australia in *Ashby v Slipper* (2014) 219 FCR 322 (*'Ashby v Slipper')*. In that case a Judge of the Federal Court dismissed civil proceedings brought by Mr Ashby, as an abuse of process. The Judge made serious criticisms of the professional conduct of Mr Harmer, the solicitor for Mr Ashby. Mr Harmer gave evidence in the case. Mr Ashby sought leave to appeal against the decision, the decision being an interlocutory decision. He succeeded on appeal, the order striking out the action being set aside. Before Mr Ashby's appeal was heard Mr Harmer applied for leave to appeal. That leave was refused.

[56] Mansfield J and Gilmour J agreed with the Reasons of Siopis J for refusing leave to appeal.

[57] Siopis J approached the question of leave to appeal on the following basis at [310]:

> The *Federal Court Act* does not make any express provision for the circumstances in which a non-party can appeal from a final judgment or seek leave to appeal from an interlocutory judgment. However, the authorities demonstrate that a non-party with the necessary standing may obtain leave to appeal from a final or an interlocutory judgment. The question is whether Mr Harmer has the necessary standing.

[58] Siopis J referred to *Witness v Marsden* and to *CFMEU*. In those cases orders were made in the course of proceedings, affecting a person who was not a party to the proceedings. But the court held that the ancillary or interlocutory order in question, being an order binding the person in question, could be the subject of an appeal, and so of a grant of leave to appeal. Siopis J then said at [320]:

> In this case, it is apparent that Mr Harmer could never have been a party to the main proceeding which embraced the controversy between Mr Ashby and Mr Slipper and the Commonwealth. Mr Harmer's involvement in that controversy arises from his retainer as a legal practitioner and agent of Mr Ashby for the purposes of Mr Ashby prosecuting his claim against Mr Slipper and the Commonwealth, and also, from the fact that he was a witness in the interlocutory proceeding. Therefore, Mr Harmer, having no personal interest in the controversy between the parties to the proceeding, is not adversely affected by the interlocutory order dismissing the proceeding to which he was not a party.

[59] The analogy with this case is apparent. He then said at [321]:

> Rather, as is apparent from his affidavit of 14 January 2013, Mr Harmer's complaint is in relation to the findings which were made by the primary judge in the reasons for judgment published by the primary judge. It is those findings and criticisms which, said Mr Harmer, have affected, or have the potential to affect, his professional reputation and, consequently, his financial interests and that of his firm. It is those findings which Mr Harmer challenges. However, as is evident from the authorities referred to above, this is not a sufficient basis for a non-party to obtain leave to appeal. Rather the non-party must show that he or she is in the words of Heydon JA "substantially affected" by the operation of the interlocutory order.

[60] Again, the analogy is evident. He added at [325]:

> As previously mentioned, Mr Harmer cannot demonstrate that he is adversely affected by the order of the primary judge dismissing Mr Ashby's application. There may, however, be cases where a court

> order may have an adverse effect upon the reputation of a non-party, in which case the non-party may have sufficient standing to appeal (*Harmer v Oracle Corporation Australia Pty Ltd* (2013) 299 ALR 236). However, this is not such a case.

[61] Siopis J then considered a variety of circumstances in which a court might have occasion to comment adversely on the manner in which a legal practitioner had acted in the conduct of a proceeding before the court. The point he made was that it is not uncommon for a court to find reason or justification for a consideration of the conduct of a practitioner and to comment on that conduct. It is not necessary for our purposes to summarise those occasions. Siopis J concluded his discussion of the situations in which a court may be entitled or even required to comment adversely on a practitioner's conduct, by saying at [339]:

> In all of these circumstances, a court's findings or observations may have the propensity adversely to affect the professional reputation of the legal practitioner concerned. However, the authorities do not support a contention that, in relation to standing to appeal, a non-party legal practitioner whose complaint is no more than that he or she has been the subject of adverse judicial comment, is to be treated differently from any other non-party who has been the subject of adverse judicial comment with a propensity to affect his or her professional reputation. Rather, the authorities show that an aggrieved non-party will have the standing to obtain leave to appeal only if that non-party is adversely affected by an order made by the court.

For those reasons in his opinion the application for leave to appeal should be refused, as it was.

[62] To the like effect is the decision of the Full Court of the Federal Court in *Harmer v Oracle Corporation Australia Pty Ltd* (2013) 299 ALR 236

(‘*Harmer*’). In that case Mr Harmer acted as solicitor for a plaintiff in an action in the Federal Court. In the course of dealing with an application for costs, after the trial of the action the Judge criticised Mr Harmer’s behaviour in connection with the case. Mr Harmer applied to the Court for leave to appeal from the costs order, on the basis that he had been treated unfairly. But he was not appealing against the costs order itself. It was the Judge’s criticisms, part of his reasons for the order, that Mr Harmer wished to challenge. The Court made the point that it was necessary, for Mr Harmer to obtain the order that he sought, that he appeal against some “dispositive order”, and not against the Judge’s reasons; at [22]. The Court said at [23]:

> In his draft notice of appeal Mr Harmer, no doubt recognising this requirement, seeks orders setting aside the indemnity costs order made against Ms Richardson. At first blush, it is difficult to see why Mr Harmer has any personal interest in that question for he does not have to pay them and is not financially affected by them. Senior counsel for Mr Harmer submitted that he did have an interest in having the indemnity costs order set aside because while they remained in force there was a possibility that Oracle might seek a personal costs order against him or that he might be faced with professional misconduct proceedings.

[63] The Court then said at [34] and [35]:

> We turn then to the question of whether leave to appeal should be granted. Mr Harmer, of course, is a non-party. It was not in dispute that a person who is not a party to a proceeding but who is either bound by an order or aggrieved or prejudicially affected by it or is otherwise sufficiently interested in it may appeal but only with leave: *Fortress Credit Corp (Australia) II Pty Ltd v Fletcher* (2011) 281 ALR 38; 85 ACSR 38; [2011] FCAFC 89 AT [32].
>
> We would accept that reputational damage arising from a judgment or orders could, in some circumstances, provide sufficient standing

> to seek leave to appeal. That is not this case; and it is not the claim made by Mr Harmer: see [24] – [25] above.

[64] Mr Sofronoff urged us to prefer the approach of the Court of Appeal of the Supreme Court of Victoria in *Wilson v British American Tobacco Australia Services Ltd* (CA (Vic) - 26 July 2002) (‘*Wilson*’), action number 8121 of 2001. This was an interlocutory ruling by the Court on an application made on summons. A trial had been conducted before the Supreme Court of Victoria. The trial Judge, in his reasons, made findings which seriously damaged the reputation and professional standing of Mr Wilson, a solicitor. Mr Wilson was not a party to the action, nor did he give evidence. On the appeal by the unsuccessful defendant, Mr Wilson applied for an order that he have leave to appear and make submissions on the appeal. The application was opposed by the respondent to the appeal.

[65] The court granted that leave, and Mr Wilson, through counsel, subsequently participated in the hearing of the appeal, which appeal was ultimately successful.

[66] In brief reasons for making the order, the two members of the court concerned said that *prima facie* natural justice should require that a person against whom serious findings have been made should have leave to address the appellate court to challenge the trial Judge’s findings; at [5]. The respondent argued that there could be no right to intervene because the judgment in question did not directly affect Mr Wilsons’s legal interest in any way. As to that, the court said at [6]:

> This may be so, but the Court has a broad discretion to hear counsel on a person's behalf as amicus curiae.

Accordingly the court held that leave should be given. Clearly enough, this decision rests on the power of the court to hear a person as *amicus curiae*. That power involves the exercise of a broad discretion.

[67] To the extent that there is a conflict between the decisions in *Ashby v Slipper* and *Wilson* (and we do not think there is), we followed the decision and reasoning in *Ashby v Slipper*. That decision is consistent with such authority as there is on this topic and refers to relevant cases not apparently considered by the Court of Appeal of the Supreme Court of Victoria.

[68] In coming to our decision we paid careful attention to the observations by Brennan CJ in *Levy v Victoria* (1997) 189 CLR 579 ('*Levy v Victoria*'). At 601 Brennan CJ said:

> It is of the nature of that jurisdiction that it should be exercised in accordance with the rules of natural justice. Accordingly, its exercise should not affect the legal interests of persons who have not had an opportunity to be heard. Therefore, a non-party whose interests would be affected directly by a decision in the proceedings – that is, one who would be bound by the decision albeit not a party – must be entitled to intervene to protect the interest liable to be affected. This, indeed, is the explanation of many of the cases in which intervention has been allowed in probate and admiralty cases and in other cases where an intervener and a party are privies in estate or interest. (Footnotes omitted)

[69] He went on to say that a legal interest may be affected in more indirect ways than as a result of the holder of that interest being bound by a decision. But none of the illustrations that he gave are pertinent to the present case, nor do

they provide any assistance to Mr Sofronoff. He went on to make the following observations at 603 which are pertinent to the exercise of the court's discretion:

> The exercise of this Court's jurisdiction to determine controversies between parties is not, and could not be, conditioned on allowing intervention by all those whose interests are susceptible to affection by the Court's judgments. Such a condition would virtually paralyse the exercise of that jurisdiction. The principles of natural justice which control the exercise of curial power must take account of the nature of the jurisdiction to be exercised.
>
> However, where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceeding may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene.

[70] There has been no suggestion in this case that Ms Lawrie is not able to and would not provide submissions on the findings made by the Judge adverse to Mr Wyvill. In any event, the observations by Brennan CJ relate to a person whose legal interests are affected, and in the present case Mr Wyvill cannot establish that.

[71] These statements were approved and followed by the High Court in *Roadshow Films Pty Ltd v iinet Ltd* (2011) 248 CLR 37 ('*Roadshow Films*'). There the High Court said at [2] and [3]:

> In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria* (2), are relevant. A non-party whose interest would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected. A non-party whose legal

> interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court will satisfy a precondition for leave to intervene. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interest following from the extra-curial operation of the principles enunciated in the decision of the Court or their affect upon future litigation.
>
> Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.

Again, there is nothing inconsistent in these observations with the approach we have taken.

[72] Accordingly, we concluded that Mr Wyvill was not bound by the orders made by the Judge at first instance. We doubt whether Mr Wyvill could have been joined as a party at first instance. It is not necessary to decide this point. Focussing on the issue of the power of the Court to join Mr Wyvill in the appeal, we consider that that power does not arise because Mr Wyvill is not bound by the orders made at first instance.

[73] If the power does arise, one must then consider the exercise of the discretion that the power confers. Likewise, if it is a question of Mr Wyvill being heard as *amicus curiae*, the Court is concerned with the exercise of a wide discretion. We considered that this discretion should not be exercised in Mr Wyvill's favour. First, to do so would erode the underlying principle relating to joinder of additional parties. It would not be uncommon for

persons, not parties to an action, to wish to complain about findings in the judgment on the action. At the end of the day, that is all that arises here. Moreover, to allow Mr Wyvill to be joined as a party or to be heard as *amicus curiae* will enable him to do no more than attack the reasons of the Judge, or some of the reasons, and not the ultimate order in which Mr Wyvill has no interest. Nor is there any reason to think that an order joining Mr Wyvill, or permitting him to be heard as *amicus curiae*, is necessary to enable the appeal to be properly argued, including in relation to the matters of which Mr Wyvill complains.

[74] Those are our reasons for the order that was made before the hearing of the appeals began.

The application to the Judge to disqualify himself

[75] As we said earlier, the application to the Judge to disqualify himself was based on the involvement of his wife, in her capacity as an employee of the Northern Territory Government, in the arrangements made for the legal representation of Mr Lawler in the proceedings brought against him by Ms Lawrie. The application was made by Ms Lawrie and by Mr Wyvill. Mr Wyvill was the subject of an application that he be jointly and severally liable for costs payable by Ms Lawrie, and so was entitled to be heard on this point.

[76] The statements of principle in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 are authoritative. It suffices to refer to some brief passages

from the reasons of Gleeson CJ, McHugh, and Hayne JJ. Their Honours said at [6]:

> Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a Judge … the governing principle is that … a Judge is disqualified if a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle. [Footnotes omitted]

[77] A little later, with reference to the apprehension of bias principle, they said at [8]:

> First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

[78] What is it in this case that might have led the Judge to decide the case other than fairly and on its merits? It is not enough to say that the Judge's wife played some part in arranging legal services or legal representation for Mr Lawler in the proceedings brought by Ms Lawrie. Some greater detail is required before one can make sense of the submission on bias. And, one must ask, what is the logical connection between that matter, the wife's role

in arranging legal representation, and the "feared deviation from the course of deciding the case on its merits"? Again more detail is required before this question can be answered.

[79] Our first task is to identify the matter which it is said might cause the Judge to decide the case other than fairly and on its merits. That requires a careful consideration of just what the Judge's wife did, and in what circumstances. One can then articulate or consider the logical connection between the role of the Judge's wife and the "feared deviation" from a decision on the merits. Accordingly, we turn to the Judge's findings, findings which have not been challenged on appeal.

[80] The Judge's wife was employed in the Attorney-General's Department. She worked in a small "administrative unit" called Legal Services Coordination; *Lawrie & Anor v Lawler* [2015] NTSC 40 at [8]. The Judge referred to an affidavit sworn by Mr Smyth, one of the Judge's wife's superiors. It is convenient to record here what the Judge said at [23]:

> In paragraph 8 of his affidavit made on 4 June 2014, Mr Smyth stated that [the Judge's wife] has no significant or substantive decision making authority, delegated or otherwise, for procuring ad hoc legal services that are outsourced to lawyers in private practice. Nor does she have any financial authority for such matters. Any decisions, apart from very routine administrative decisions, are made by the relevant Directors of the various Divisions within the Solicitor for the Northern Territory in conjunction with the Government Agency that requested legal services and the lawyer who is in private practice. [the Judge's wife's] role is to act as a point of communication between the Agency requesting legal services, the lawyer who is in private practice and the Director of the relevant Division within the Solicitor for the Northern Territory.

[81] On 1 August 2014 an officer of the Department of the Chief Minister sent an email headed "URGENT Request for Legal Services." This request came to the Judge's wife in the usual way and for her to deal with in the usual way. The email described the subject of the request as the Stella Maris Inquiry and the "Issue" was information that Ms Spurr (the solicitor for Ms Lawrie) had informed someone in the Department of the Chief Minister on 31 July 2014 that she had filed an Originating Motion in the Supreme Court. Ms Spurr was enquiring whether Mr Lawler could be served with the Originating Motion and supporting Summons. At that stage the claim being made was not known, but clearly enough it was likely to be some kind of attack on Mr Lawler's procedures or findings. The email stated that Mr Maher had previously been engaged to advise Mr Lawler, and the author of the email requested that Mr Maher be engaged in view of his familiarity with the matter; Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [36]. The Judge's wife forwarded the request to her superior, Mr Smyth, the Acting Director of the Litigation Division. One of his functions was to recommend the outsourcing of legal services to lawyers who were in private practice, a function which he performed in consultation with the Government agency that made the request for legal services; Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [7].

[82] On 1 August Mr Smyth approved the request, and the retaining of Mr Maher. Mr Smyth emailed the Judge's wife to that effect. On 5 August 2014 the Judge's wife asked Mr Smyth if she was to ask Mr Maher to act on behalf of

the Department of the Chief Minister. Mr Smyth replied that Mr Maher was to be engaged by the Department of the Chief Minister to act for Commissioner Lawler; Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [40] and [41]. The Judge's wife spoke to Mr Maher by telephone. Later that day she sent to Mr Maher what appears to be a routine and standard form of email engaging, or offering to engage, Mr Maher. The email is as follows: Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [43]:

> New Instructions: Ad hoc Legal Referral: Stella Maris Inquiry – Our ref: 20142426
>
> Further to my phone call of today, I attach the request we received from the Department of the Chief Minister to engage you to act on behalf of Commissioner Lawler in this matter.
>
> As advised on the phone we have not received the Originating Motion and Summons filed by Halfpennys but I will contact Cathy Spurr to let her know that you will accept service on behalf of Commissioner Lawler.
>
> Once you have received the documents and have had the opportunity to consider the matter, it would be appreciated if you could provide me with an estimate of your fees.
>
> Please note your invoice should be sent to the Legal Services Coordination Unit via email (legalservices.sfnt@nt.gov.au) but addressed to the Department of the Chief Minister as follows:
>
> Attention: Terri Hart
> Department of Chief Minister
> GPO Box 4396
> DARWIN NT 0801

[83] There were some further communications relating to accepting service of the proceedings issued by Ms Spurr.

[84] On 14 August 2014 Mr Maher sent an email to the Judge's wife with an estimate of his fees and the fees of counsel, and attaching certain documents required to be provided upon the engagement of a solicitor. The Judge's wife then emailed Mrs Hart, informing her that Mr Maher had been engaged and requesting approval of the fees as estimated by Mr Maher. On 14 August 2014 that approval was given and the Judge's wife was informed of that by email. On 18 August 2014 the Judge's wife informed Mr Maher that his estimate of fees had been approved. On 20 August 2014 the Judge's wife prepared two "Approvals to engage Ad Hoc legal and other expert services". One of these related to Mr Maher, the other to counsel who had been engaged. These documents were submitted to Mr Smyth for his approval, which he duly gave. On 16 October 2014 a revised estimate of fees was approved by the Deputy Chief Executive Officer of the Department of the Chief Minister. This approval was sent to Mrs Hart with a copy to the Judge's wife.

[85] This summary is drawn from the Judge's Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [51] – [55]. None of this material is challenged.

[86] We interpolate at this stage the observation that the function of the Judge's wife was an administrative one. She did not decide whether the request for legal services should be made, whether if made it should be granted, who

was to be engaged to provide the legal representation, nor did she have authority to approve or disapprove of fee estimates from legal practitioners engaged in this way.

[87] There is one other matter we should record at this stage. Its relevance will appear later. On 15 December 2014, in a discussion between Mr Maher and Mrs Hart, Mrs Hart advised Mr Maher that the Government indemnified Mr Lawler not only in respect of his own solicitor/client costs, but also in respect of any adverse costs order that might be made in the proceedings brought by Ms Lawrie; Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [72]. Mrs Hart confirmed this by email on 24 December 2014; Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [77].

[88] In the meantime the action by Ms Lawrie against Mr Lawler was proceeding. Between September and late January, when the trial was due to commence, the matter of discovery gave rise to a number of contested interlocutory applications and hearings.

[89] On 14 January 2015 Mr Maher sent an email to Mrs Hart. She was the officer in the Department of the Chief Minister who had originally made the request for legal services. The email began: “I am providing the report I promised and update estimate of costs” Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [98]. The email canvassed various aspects of the litigation. It referred to the prospects of Ms Lawrie succeeding in the litigation, indicating that originally counsel for Mr Lawler had thought that

Ms Lawrie might well obtain a declaration that she had not been accorded procedural fairness. But documents recently discovered and disclosed by Ms Lawrie caused counsel to think that there had been a significant improvement of the prospects of success, and it was now more likely than not that a declaration would be refused; Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [98]. The email contained a revised upwards estimate of fees. The thrust of the email was to explain, by reference to the events occurring in the course of the litigation, the substantial increase in the estimated legal costs. It may well be that the email was unnecessarily lengthy for its purpose, but in fairness to the author it is fair to say that it explained clearly what had transpired in the litigation.

[90] At [101] the Judge said that most of the matters raised in this email were known to the plaintiff, her legal advisors and to the Court, having been canvassed at some length during an interlocutory application on 9 January 2015 and 14 January 2015. The Judge said that most of these matters were not in any way confidential.

[91] On 20 January 2015 the Judge's wife emailed Mr Maher, asking for an updated estimate of fees. That same day Mr Maher sent to the Judge's wife the email that he had sent to Mrs Hart on 14 January 2015, saying

> My apologies – I should have copied you in of my email of 14 January to Terri Hart, which I now forward to you. I will also forward the invoices I subsequently sent to Terri.
> Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [114].

[92] As the Judge said at [115], it is clear that the reason for providing a copy of the email to the Judge's wife was to provide an update of an estimate of legal costs, and nothing more than that; Reasons *Lawrie & Anor v Lawler* [2015] NTSC 40 at [115].

[93] That completes our summary of the relevant facts. We turn to the question of bias.

[94] It was argued that the email sent by the Judge's wife to Mr Maher on 5 August 2014 was a potential source of embarrassment to the Judge's wife. The submission was that the email to Mr Maher, properly understood, gave rise to an agreement that Mr Lawler was not liable for Mr Maher's costs and disbursements under any circumstances, nor those of Ms Lawrie, and so Mr Lawler could not recover costs from Ms Lawrie. Accordingly, the Northern Territory Government would not be able to recover the money it had paid to Mr Maher and to counsel for Mr Lawler.

[95] The submission was that a fair-minded lay observer might reasonably apprehend that the Judge would not bring an impartial mind to the application for costs, because the Judge would not want to decide this point in a manner that might cause embarrassment to his wife. That is, by deciding that Mr Lawler could not recover costs, and so the Northern Territory Government could not recover costs. A fair-minded lay observer might fear that the Judge would decide the point other than on its legal and factual merits to avoid the embarrassment.

[96] In our opinion there is no substance in this submission. There is nothing in the email to Mr Maher to support it. That email appears to us to be quite routine. We referred above to a conversation between Mr Maher and Mrs Hart on 15 December 2014 and a confirmatory email of 24 December 2014, in which Mrs Hart confirmed that the Government indemnified Mr Lawler in respect of his own costs and in respect of any adverse costs order. We cannot see any conflict with anything that the Judge's wife did, or said to Mr Maher. In our opinion the suggestion that the Judge's wife faced any embarrassment arising out of her involvement in the arrangements for legal representation is completely unsubstantiated. There is nothing in it at all.

[97] A further submission before the Judge was that the Judge's wife should have been called to explain the email of 5 August 2014. If she had been called, her involvement in the grant of legal representation could have been explored by way of cross examination and in that event the Judge would have been embarrassed by having to decide whether or not to accept her evidence. Moreover, it was said her employment might be at risk if she had made a mistake. The short answer to this is that she was not called. The Judge did not have to consider her evidence. The failure to call her was something for the Judge to take into account in deciding the issue before him. But we mention that by way of precaution. In our opinion there was no need for the Judge's wife to be called and there is nothing to be made of the fact that she was not called. We fail to see how one can argue that if she had

been called there would have been a problem, bearing in mind that she was not called.

[98] The submission on bias was supported by reference to the email of 14 January, a copy of which was sent to the Judge's wife on 20 January 2015. This was one week before the trial of the action was to begin. We referred to this email above at [91]. Ms Lawrie submitted that the receipt of the email gave rise to an apprehension that the Judge's wife was "in the defendant's camp to some degree, at least"; *Lawrie & Anor v Lawler* [2015] NTSC 40 at [162]. The submission was that the email disclosed to the Judge's wife the strategy that had been adopted by Mr Lawler and his advisers in the lead up to the trial, a strategy unknown to Ms Lawrie; that the email contained comment about prospects of success and how they had improved, and outlined how the discovery process had generated material from Ms Lawrie's advisers that led to a challenge to their credibility; and to the claim that Ms Lawrie had waived any entitlement to be given notice of potential adverse findings.

[99] That is a fair summary of the email, but the context of the email is significant. It was sent to the Judge's wife because she was responsible for keeping track of the likely legal costs arising out of the grant of representation to Mr Lawler. The email is an explanation for a substantial increase in the costs already incurred, and the costs likely to be incurred. As the Judge also observed, much of the material contained in the email was

known to Ms Lawrie and to her advisors, and had been known for some time; *Lawrie & Anor v Lawler* [2015] NTSC 40 at [166] and following.

[100] These are the circumstances of the involvement of the Judge's wife that, it is said, might cause a fair-minded lay observer reasonably to apprehend that the Judge might not bring an impartial mind to the resolution of the questions he had to decide.

[101] The involvement of the Judge's wife having been identified, and put in context, one must then articulate the logical connection between that involvement and the "feared deviation" from deciding the questions on their merits.

[102] How or why would the involvement of the Judge's wife, outlined above, cause a fair-minded lay observer to fear that the Judge might not bring an impartial mind to the resolution of issues before him? As we have already remarked, there was no reason at all to think that the Judge's wife faced any criticism or embarrassment at all because of the manner in which she couched the documents recording the decision, made by others, to provide legal representation. Nor did she face any threat from her employer or to her employment. Any such suggestion is fanciful. There was no reason why she should have been called as a witness before the Judge, but in any event she was not called. The email of 20 January 2015 did not, in any way at all, put her in Mr Lawler's camp. The Judge's wife was an administrative officer, performing administrative functions. The email, or the information in it, was

relevant to that function. Faced with a substantial increase in the estimated costs, it was appropriate for the Judge's wife to be informed of the reasons for that. There is no way in which the receipt of the email by the Judge's wife leads to a conclusion that she had identified herself in some way with Mr Lawler's camp. However one looks at it, the suggestion that the Judge might not decide the case fairly lacks any support at all.

[103] The articulation of the logical connection between that matter and the feared deviation, leads to the firm conclusion that the suggested apprehension of bias is completely unfounded. We reject the criticism of the Judge's reasoning.

[104] There are some further points that should be made. We refer now to submissions on appeal and in particular to the written submissions provided by counsel for Ms Lawrie.

[105] The point was made that the case was "inherently political". The present Government and Opposition were said to have an interest in the outcome. That can be conceded. But then the submission was made that the Judge's wife was employed by the Government, and "directly involved" in Mr Lawler's defence of Ms Lawrie's claim. It was submitted that the Judge's wife, in this respect, was "on the respondent side". We reject that suggestion. The suggestion that, because she was employed by the Government and had some involvement in the grant of legal representation, she became partisan, should be rejected out of hand. The same point was

elaborated in the written submissions. Counsel argued that the contest in the case was "in substance" between the present Government and the present Opposition, the Judge's wife was employed by the present Government, she was "directly involved" in the defence of the proceedings and this would lead the Judge to favour the cause in which his wife was a participant and in which she had an interest (through her employer). We reject that submission out of hand. We think it regrettable that some of these submissions were put.

[106] The claim that the Judge should have disqualified himself was raised in the appeal against the first judgment: see above at [32]. It was not explained to us how this ground could succeed. The matters relied upon as a basis for the submission that the Judge should disqualify himself were matters of which the Judge was unaware, as we understand things, until after the completion of the trial and sometime not long before the issue of costs was argued.

As the submission to the Judge was based upon the belief or apprehension of a fair-minded observer, based on circumstances known to the Judge, the fact that the circumstances were not known to the Judge at the time of the trial seems to be an insuperable obstacle.

Procedural fairness

[107] The Stella Maris site is situated in a prominent position in Darwin.

A heritage-listed railway house was erected on the site in the early part of the 20th century and, since then, other buildings have been added to meet the purposes of various occupants of the site. The site was associated with

the North Australia Railway for a lengthy period of time. The Railway ceased operation in 1976. Shortly thereafter, the site was transferred to the Northern Territory Government. In 1979 it was leased to the Apostleship of the Sea, an organisation which conducted a seafarers' centre on the premises and gave the site its present name. The Apostleship of the Sea surrendered the lease on 29 September 2007.

[108] At the time of the surrender of the lease a Labor government was in power in the Northern Territory. The Chief Minister was Ms Clare Martin and the Minister for Lands and Planning was Ms Lawrie.

[109] When the previous occupant of the site advised its intention to surrender the lease, Ms Lawrie wrote to the Chief Minister on 3 September 2007 and stated that she would "brief Unions NT and the local member on the proposed surrender of the lease". Ms Lawrie then requested the Department to appoint a Working Party to report on the site. It appears that no such report was prepared.

[110] The next significant event was on 31 March 2009 when Unions NT first contacted Ms Lawrie about the site and she agreed to meet their representatives on 27 May 2009. At the meeting one of the representatives handed her a redevelopment proposal for the site which contemplated its use by Unions NT for its purposes.

[111] It is not in dispute that Ms Lawrie formed the view that Unions NT should be given a lease of the Stella Maris site at or about the time of this meeting.

[112] Some months before the meeting between Ms Lawrie and the representatives of Unions NT the Department commenced preparing a draft Cabinet Submission relating to the future of the site. Ms Jackie Stanger of the Lands Administration Services section of the Department co-ordinated the preparation of this document.

[113] The first draft recommended that the site be leased for low-scale commercial development through an expression of interest process. Subsequently, at the request of the Deputy Chief Executive of the Department, the draft was amended to include the option of community use of the site.

[114] The amended draft Cabinet Submission was provided to Ms Lawrie's office and then returned with a request to include an option to offer the site exclusively to Unions NT without an expression of interest process.

[115] It appears that little or no progress was made in relation to the matter for the next two years. In the meantime, on 4 December 2009, Mr Gerald McCarthy was appointed as the Minister for Lands and Planning and Ms Lawrie moved to another portfolio.

[116] The precise date is unclear, but sometime in 2011 Mr McCarthy received a copy of the application for a lease of the site by Unions NT. The application was dated 26 May 2009. There is no record of the application being provided to the Department.

[117] At this stage the draft Submission prepared by the Department recommended the option to re-lease the site by expression of interest for low-scale community use or commercial development. However, it also included the option of offering leasehold tenure of the site to the National Trust of Australia or Unions NT. It was stated in the draft that this was not the preferred option:

> ... as Government may attract criticism for dealing preferentially with select groups for such a high-profile site.

[118] The draft Submission was forwarded to Mr McCarthy on 17 August 2011 and circulated to relevant departments for comment on 7 February 2012. The comments which were received were largely supportive of the recommended option that included an expression of interest process being followed.

[119] At this time a Northern Territory election had been called and Mr McCarthy was travelling in a remote electorate from which he rarely returned. The caretaker period was due to commence on 6 August 2012 and a Cabinet meeting was scheduled for 10 July 2012.

[120] Prior to the Cabinet meeting a waiver of the time for the lodgement of Cabinet business was obtained in relation to the proposal for the lease of the site.

[121] Four of the eight Cabinet ministers attended the Cabinet meeting. Mr McCarthy was absent. It was decided at the meeting that Unions NT

would be offered a lease of the site without an expression of interest process.

[122] There was a change of government as a result of the election held on 25 August 2012 and the proposed lease of the site to Unions NT was never registered.

[123] It was argued on behalf of Ms Lawrie that she was denied procedural fairness by reason of the failure of Mr Lawler to identify to her potential adverse findings so as to provide her with the opportunity to make submissions or otherwise respond to them.

[124] In support of this argument Mr Davis SC relied upon cases such as *Mahon v Air New Zealand Ltd* [1984] AC 808 ('*Mahon*') at 821 where their Lordships held that any person represented at an inquiry who may be adversely affected by the decision:

> ….should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which *might* have deterred [the decision maker] from making the finding even though it cannot be predicted that it would inevitably have had that result.

[125] Mr Davis submitted that this requirement was particularly relevant in what he called inquisitorial inquiries. He said it was not enough that the issues in the Inquiry be identified; it was necessary for the potential adverse findings to be brought to the attention of the person affected.

[126] According to the argument the trial Judge erred in dealing with Ms Lawrie's complaint in this respect in that, instead of determining whether she was given sufficient notice of the proposed adverse findings and an opportunity to comment on them, the Judge restricted his analysis to the validity of the findings.

[127] Mr McLure, for Mr Lawler, pointed out that there were no immutable rules setting out the requirements of procedural fairness. He referred to the authorities which hold that whether or not a person was accorded procedural fairness was dependent upon the circumstances of the particular case. He also referred to the observation of Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs, Re; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*') at 821 that fairness in this context is not an abstract concept, but rather the concern of the law to avoid practical injustice.

[128] The arguments of both counsel necessitate a review of the steps leading to the appointment of Mr Lawler as Commissioner and the procedure adopted by Mr Lawler in conducting the Inquiry.

[129] According to the findings of Mr Lawler public disquiet was expressed in the media concerning the circumstances in which the proposed lease of the Stella Maris site to Unions NT evolved.

[130] The Terms of Reference of the Inquiry are set out above. Paragraph 2 directs enquiry into:

> ...the public policy and accountability considerations involved in making the purported decision to grant a lease of the site to Unions NT without putting the matter out to expressions of interest or public tender.

[131] Paragraph 3 directs enquiry into:

> ... the performance of relevant persons, including the then Minister for Lands and Planning, in carrying out their obligations under the relevant regulatory regime and ensuring the proper accountability processes were applied in the tenure management of the site.

[132] Paragraph 5 refers to:

> ... the provision and accessibility of relevant information to affected stakeholders and the public in relation to the proposal and purported decision to grant the lease of the site to Unions NT.

[133] Ms Lawrie was involved in recommending a grant of the lease to Unions NT from when the issue was raised with her in early 2007 to the time of the Cabinet decision in favour of Unions NT on 10 July 2012. It must have been apparent to her at the time the Commissioner was appointed and the Terms of Reference announced that her role in the process would come under scrutiny. She was aware that it was her decision to promote the grant of the lease to Unions NT without inviting expressions of interest. The fact that expressions of interest were not called for was a consideration referred to in the Terms of Reference.

[134] Mr Lawler commenced formal hearings on 12 February 2014. By that time he had been presented with documentation, including files from the Department of Lands and Planning, which revealed details of Ms Lawrie's

involvement in the future of the Stella Maris site. In the course of making a public statement at the commencement of public hearings Mr Lawler stated that the Inquiry had the opportunity to test the levels of government transparency and the application of due process in managing the Stella Maris site.

[135] Mr Lawler conducted a pre-hearing interview with Ms Lawrie on 10 March 2014 and took evidence from her on 13 and 14 March 2014. Mr Wyvill was present on each occasion. He took an active role in the proceedings responding to various questions asked of Ms Lawrie and, on occasions, proffering information on the issues being discussed.

[136] At the pre-hearing interview Mr Lawler explained that he intended to advise Ms Lawrie how he was going to conduct the Inquiry. He said he intended to put a large number of documents to her and ask her questions about them when the time came for her to give evidence. He stated that he would identify the documents at the pre-hearing interview so that Ms Lawrie had advance notice of the material prior to giving evidence. She was given copies of the documents during the interview.

[137] There was some discussion about the documents during the interview. Mr Lawler said that the purpose of drawing her attention to one series of documents was to establish that there were other community groups interested in the site at the time the leasing of it was under consideration. There was also discussion during the interview about documents which

referred to a meeting which took place between Ms Lawrie and representatives of Unions NT in July 2009 for the purpose of discussing the Stella Maris site. Other documents shown to her related to her involvement in the matter up to the time of the Cabinet decision to grant the lease to Unions NT. These documents were discussed in greater detail when Ms Lawrie came to give evidence.

[138] As stated above, Ms Lawrie complains that she was not given any or adequate opportunity to respond to certain adverse findings before the publication of Mr Lawler's Report. The adverse findings to which Mr Davis has drawn attention are set out in the Report (Report pp 12, 16, 37, 58, 59 and 60) and the summary in the judgment of the trial Judge delivered on 1 April 2015 at [91].

[139] Further reference will be made to the topics relied upon later in these reasons. However, it is appropriate to observe at this point that the major findings relate to Mr Lawler's conclusion that Ms Lawrie acted "with bias" in forming the view that Unions NT should be granted a lease over the Stella Maris site without calling for expressions of interest from other organisations or persons in the community who might be interested in leasing the site. It is principally in respect of these matters that it is claimed Mr Lawler failed to give appropriate notice of adverse findings which might be made.

[140] It must be said the dealings which Ms Lawrie had with Unions NT and her apparent determination to ensure Unions NT would be granted the lease without inviting expressions of interest was a theme which pervaded the questioning of her by Mr Lawler.

[141] Mr Lawler stated in his Report (Report p 28) that when the previous occupant of the site advised its intention to surrender the lease, Ms Lawrie wrote to the Chief Minister on 3 September 2007 and, inter alia, stated that she would "brief Unions NT and the local member on the proposed surrender of the lease". Mr Lawler pointed out that at this stage Unions NT had shown no formal interest in the site and that a similar briefing was not offered to 24HR Art, an organization which had made a formal approach.

[142] Ms Lawrie was asked about her memorandum to the Chief Minister in the following passage in her evidence (Appeal Book Vol 1 at p 63):

> Q But I understand your position to be that – well, let me ask you; you were going to brief the local member. I think that's perfectly appropriate and a reasonable thing to have done. But why were you going to brief Unions NT?
>
> A Because they'd been involved in the site for decades through the union movement.
>
> Q For all the reasons that you have given us?
>
> A All the reasons I've previously stated. I felt that they should be kept informed of the process that Government was following. As you can see, this is a memo from myself to the Chief Minister confirming that following the surrender of the lot, it would revert to Crown land. The Government will need to consider the future use of the site, and that you know, for

example, 24HR Art Board is aware and proposed an expression in the site. I'm asking the Chief Minister for her views, particularly on the future of the site. As you can see from the notation, Syd [Syd Stirling] was Acting Chief. He said wait until Clare [Clare Martin Chief Minister] sees this – Clare then noted to me 'note to Cabinet please on all issues to do with the future of Stella Maris'.

[143] And later (Appeal Book Vol 1 at p 64):

Q Well let me say, why you wouldn't have briefed 24HR Art?

A Because they just had no prior involvement in the site; they had no customer deal arrangements with the site. They weren't linked to the site. I was briefing people who were linked to the site, so the local member, of course, the site falls within her electorate. And the union movement had been taking care of the site, using the site for decades. So I was trying to brief the people who had been linked to the site.

Q So that was a very deliberate decision by you not to brief 24 HR Art?

A No. That's a sort of extreme twist on what I was doing. No, no deliberate decision not to brief them. A deliberate decision to brief the people who were linked to the site.

[144] Mr Lawler also questioned Ms Lawrie about the possibility of the National Trust becoming involved in the site (Appeal Book Vol 1 at p 66):

Q Now Ms Close has told the Inquiry that the National Trust would have been interested in the management of the Stella Maris site and felt that the National Trust was an important organization to have a say and be involved in conversations regarding the site. What would you say to that?

A Well that's her submission.

Q Would you agree with that?

A I've stated my position very clearly, Commissioner. My position has been that I was putting prime importance to the custodians of the site for decades, people who had invested in the site – you know, I've been very clear on that I thought.

[145] In his Report Mr Lawler found that Unions NT first contacted Ms Lawrie about the site on 31 March 2009 when she was the Minister for Lands and Planning. Ms Lawrie agreed to meet representatives of Unions NT on 27 May 2009. At the meeting a representative of Unions NT handed her a redevelopment proposal for the site which contemplated its use by Unions NT for its purposes. Mr Lawler asked Ms Lawrie about the meeting and she responded (Appeal Book Vol 1 at p 75):

> I have no doubt that I would have expressed my support for their submission and their intention, no doubt about that at all. My memory of it was then to say go away and work with the department on your proposal in terms of, you know, needing to follow a process which is the party [sic] between Unions NT and the Department.

[146] At another stage in her evidence when the topic of other entities being involved was being discussed Mr Lawler asked Ms Lawrie if she had formed a view that the site should go to Unions NT. She replied "Yes, absolutely." She added that she formed that view in 2009 (Appeal Book Vol 1 at p 59).

[147] Later in her evidence Ms Lawrie explained why she had made up her mind in 2009 that she wanted Unions NT to get the site (Appeal Book Vol 1 at p 75):

Q But it is fair to say that, based on your earlier testimony, you've made up your mind in 2009 that you wanted Unions NT to get the site?

A I thought it was a good thing, definitely. I thought it was the right thing to do to preserve the site, to ensure that the site was not just preserved but actually – there was a lot of work that needed to occur, a lot of investment that needed to occur – that it would be a community use. It could be used for training which I thought was a fantastic thing to do. It was an organization that reflected the previous decades of relationship with the site. So for me I was pleased that the unions were coming forward to, I guess, step up and invest in their own piece of Darwin's history in terms of its presentation. But also its use, it won't just lie idle. It would be used once again by the community and used for training. So I thought it was great.

[148] As previously stated, the fact that no expressions of interest were sought from other organizations which might be interested in the site was a central issue in the questioning of Ms Lawrie. This was a topic which was linked to Ms Lawrie's view that Unions NT, and not any other organisation, should be granted the lease despite the fact that the desirability of inviting expressions of interest was urged by officers in the Department of Lands and Planning from an early stage in the consideration of the future of the site.

[149] Mr Lawler stated in his Report that the Department commenced preparing a draft Cabinet Submission concerning the future of the site some months before Ms Lawrie met with Unions NT in May 2009. He said a draft was provided to the Department's Executive and possibly the Minister's office. The draft recommended the site be leased for low-scale commercial development through an expression of interest process. The Department's Deputy Chief Executive requested that the Cabinet Submission be amended to include an option for community use (Report p 33).

[150] Ms Stanger, the officer of the Department responsible for preparing the submission then amended it to include community use or low-scale commercial development through an expression of interest process as the recommended options.

[151] The amended Cabinet Submission was forwarded to Ms Lawrie's office and was returned with a request to include an option to offer the site exclusively to Unions NT without an expression of interest process. According to the Report Ms Stanger rang Ms Lawie's senior adviser, Mr Wolf Loenneker, on 30 July 2009 to clarify this request. Her file note of the conversation was as follows (Report p 34):

> Telephoned Wolf Loeneker [sic] at the Minister's office regarding the options for this Cab Sub as it was understand [sic] that one option was to be offering the site to Unions NT.
>
> Wolf advised as follows –
>
> > Has been discussed and although the original Cab decision was to provide a Cab Sub outlining options, it is now agreed that the site will be offered to Unions NT and not as an expression of interest.
> >
> > Unions NT would make the buildings available to other community groups.
> >
> > Unions NT would take on responsibility for all the buildings.
> >
> > The accommodation block should stay (even though the plan was to remove, landscape and provide more parking).
> >
> > We should mention the itinerant problem in the Cab sub but not a recommendation to remove the accommodation block.

No need to include Tourist NT [sic] or NRETAS in preparing this updated Cab sub.

[152] Ms Lawrie was asked by Mr Lawler about the reference in the telephone conversation to Unions NT (Appeal Book Vol 1 at p 86):

Q She's recorded that's what Wolf Loenneker told her?

A Yeah, for one option in the cab sub

Q It's now agreed that the site will be Unions NT and not as an expression of interest?

A Well again, I go back to what I said earlier today. I didn't think it was fair to the Union Movement to go out for an expression of interest on a site that they invested in, cooperated – – – –

[153] After the events of 2009 the future of the Stella Maris site was left in abeyance for some time. However the issue arose again in 2011 when, on 17 August 2011, the draft Cabinet Submission as it then stood was forwarded to Mr Gerry McCarthy who had replaced Ms Lawrie as Minister for Lands and Planning on 4 December 2009.

[154] The draft which was sent to Mr McCarthy referred to the following options:

Option 1: Offer the site as freehold title through a competitive process for Commercial/Residential development or low scale community use.

Option 2: Offer the site as Crown Lease in Perpetuity for low scale community/commercial use.

Option 3: Offer the site as Crown Lease Term for 10 years for low scale community/commercial use.

> Option 4: Offer leasehold tenure (Term or Perpetuity) of the site to the National Trust of Australia (Northern Territory) or Unions NT.

[155] The draft Submission stated that Option 3:

> ...is the preferred option as the call for an expression of interest will likely attract a broad range of community and commercial interest and ensure the site's future use as low-impact and supportive of the heritage values.

The Submission went on to say that this option would enable Unions NT to participate in the process.

[156] Referring to Option 4, the draft Submission stated:

> This is not the preferred option as any decision to offer the site to one particular group does not reflect government transparency policies and is likely to attract criticism. It should be noted that Option 3 would provide the National Trust and Unions NT the opportunity to submit an Expression of Interest along with other groups for consideration.

[157] After the draft Cabinet Submission was sent to Mr McCarthy on 17 August 2011 it was circulated to relevant departments for comment. According to Mr Lawler's Report these comments were largely supportive of the recommended option that included an expression of interest process being undertaken (Report p 36).

[158] At the time the revised Cabinet Submission was delivered to Mr McCarthy the Northern Territory election was due in three months. Mr Lawler found that in the lead up to the election, Mr McCarthy was travelling in a remote electorate and rarely returned to Darwin during this time. Ms Lawrie appears

to have taken over the task of ensuring that the matter was dealt with by Cabinet before the caretaker period commenced on 6 August 2012. A waiver of the time for lodgement of Cabinet proposals was obtained and on 9 July 2012 Mr Loenneker forwarded the following email to Mr McCarthy (Report p 37):

> Gerry The Cabinet submission on Stella Maris is on the business list for tomorrow. I discussed this with Delia [Ms Lawrie] on Friday [6 July 2012] and she asked that it go to Cabinet tomorrow so that Cabinet can approve the grant of the site to Unions NT. The recommendation in the submission is that Cabinet approve option 2 and release the site through an expressions of interest process for low scale community use or commercial development. However, to allow the site to be granted directly to Unions NT (Delia's preference). Cabinet needs to approve option 3 in the submission and approve the grant of a Crown lease for a term of ten years to Unions NT. I have advised Delia of this and hopefully it will all go through as planned. Regards Wolf.

[159] Ms Lawrie was asked by Mr Lawler about the reason for the waiver of time for the Cabinet proposal to be lodged (Appeal Book Vol 1 at p 99):

> Q And was this because of the upcoming caretaker provisions?
>
> A Yeah, definitely. My real concern was that if there was a change of government and we hadn't protected the Stella site then we would lose it. That was absolutely the concern and, you know, borne out I guess by the CLP Government's Cabinet decision to open up the options of commercial and residential again. I listened to the Chief Minister describing the commercial value of the site and realised that he doesn't appreciate the history of the site, he doesn't really seem that interested in the heritage of the site, he certainly doesn't accept the importance of the site to the union movement and he has a stated bias against the union movement. His words are pretty harsh, to say the least.

[160] After Ms Lawrie explained her reasons for favouring Unions NT as the future occupant of the site Mr Lawler questioned her about others who might have come forward if they had been given an opportunity (Appeal Book Vol 1 at p 106):

> Q Now, just on that, that's certainly from your perspective and as has been mentioned previously people will say that I have no knowledge about these things at all because I don't know the Northern Territory and I don't know Darwin – but it is also equally a fact that others weren't given that opportunity?
>
> A Birdwatchers had the capacity to take care of the site?
>
> Q Well I'm just saying as a statement of fact, others didn't have that opportunity. Now, your response to that is that – and Mr McCarthy's response yesterday – is that we have a very clear understanding as to who has the capacity within the Northern Territory and we made a judgment that Unions NT was the only organization who had the capacity.
>
> MR WYVILL; Capacity and attachment.
>
> MS LAWRIE: Both

[161] Mr Lawler continued the questioning on this topic and referred to option 2 in the Cabinet Submission (Appeal Book Vol 1 at p 107):

> Q And option 2 would provide the National Trust, Unions NT and any other community group the opportunity to submit an expression of interest for a lease for government consideration and would be a more transparent process. Was there anything to be lost by doing an expression of interest? What was in your view – what was the risk in doing an expression of interest?
>
> A We lose the site altogether because the caretaker mode happens. If there is a change of government and the new government comes in and says, 'You know what? This'll be commercial

residential', and we've seen that. We've seen that Commissioner, if you can get a commitment out of this from the Government that it will be community use, that would be a fantastic outcome.

[162] Ms Lawrie was asked further questions about offering 24HR Art an opportunity to express an interest. After she was shown a series of documents which indicated 24HR Art was interested in the site the examination continued (Appeal Book Vol 1 at p 55):

> Q Would you agree with the proposition to be reached from those documents that at the 30 August 2007, you were aware as Minister for Planning and Lands of a community group 24HR Art expressing interest in the Stella Maris site?
>
> A Yes
>
> Q And what would you say if I told you that the current director of the successor agency 24HR Art – it's changed its name now – has told the inquiry that they would have most definitely made a submission expressing interest in the site, had they been given the opportunity?
>
> A Look, I guess if someone thought that they could get it and the government would fund them and take care of the buildings, they would. But that wasn't going to be the situation.
>
> Q Would it have been fair and transparent, do you think, to have given an opportunity for 24HR Art to express an interest?
>
> A Look, I was of the firm view that the union movement had been intrinsically a partner in the (inaudible) of the operation of the site and, you know, evidence has been led to the tune of $300,000. So I was of the firm view that it would be unfair to the Union movement to say "well look, we'll just ignore your participation in the site, we'll ignore all the work and effort you have done over the years with the site and we're going to put it up to any taker." That would be like saying to another community organization who had been part-custodians of the

> site that we're just going to ignore your existing relationship and put it up to any taker. I didn't think that was fair.

[163] We return to the adverse findings to which our attention and that of the trial Judge were drawn in the course of argument.

[164] Mr Lawler stated in his Report that Ms Lawrie acted with bias over many years, forming a view in 2009 that Unions NT should be exclusively granted a lease over the site without an expression of interest process. He said the bias lay in favouring Unions NT over other community groups. Mr Lawler formed the view that, notwithstanding Ms Lawrie's knowledge of the Northern Territory, she could not have known who else might have expressed an interest in the site and what partnership arrangements that might have involved (Report p 50). He said she formed her view about Unions NT being entitled to the lease in 2009 after meeting with Unions NT representatives and receiving a redevelopment proposal for the site which became the application document for the lease.

[165] According to Mr Lawler, Ms Lawrie should have ensured that her office provided this application to the Department after her meeting with Unions NT. He said the first time the Department received the application was on 17 July 2012, by which time it was out of date and largely irrelevant.

[166] Mr Lawler stated that Ms Lawrie should have made it clear to the Department that it was her intention to grant the site to Unions NT without

an expression of interest process. He said there was no evidence to suggest that this was done.

[167] Mr Lawler stated that in July 2012, Ms Lawrie intervened to bring the Submission to the 10 July 2012 Cabinet meeting, despite the fact that Mr McCarthy was the Minister for Lands and Planning at that time. Mr McCarthy was not in Darwin at the time of the Cabinet meeting. Mr Lawler found it is unlikely that the Submission would have gone to the Cabinet meeting or that a letter of offer would have been made to Unions NT on 3 August 2012 without Ms Lawrie's intervention. The lease conditions and letter of offer were prepared and stamped on the last working day before the caretaker period. Mr Lawler stated in his Report that if Ms Lawrie was biased in this way so as not to allow other interested community groups to advance their proposals, she should have excluded herself from participating in the decision-making process.

[168] Mr Lawler drew attention to Ms Lawrie's explanation that her intervention in 2012 was as a result of her concern that an incoming government could sell the site for commercial or residential high rise development and that her long-standing preference was to grant the site to Unions NT. Mr Lawler stated that this concern and preference did not justify the decision that was ultimately made by Mr McCarthy after the Cabinet meeting of 10 July 2012, a decision that would not have been made without Ms Lawrie's intervention.

[169] Mr Lawler stated that, notwithstanding that Ms Lawrie may have genuinely believed that granting the site exclusively to Unions NT was in the public interest, the way she involved herself in the process was not proper and was unfair to the public and other community groups. He said she exerted influence over the Cabinet process, and Mr McCarthy and his office, in a way that was designed to further her view that Unions NT should be offered a lease without the opportunity for others to express an interest.

[170] Finally, Mr Lawler recommended that the Legislative Assembly consider whether there had been an alleged breach of the *Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act 2008* (NT) ('the Act') by Ms Lawrie and Mr McCarthy and whether under the provisions of s 5(1) it wished to refer any alleged breach of the code to the Privileges Committee.

[171] There is no attack on the findings of fact from which Mr Lawler drew inferences adverse to Ms Lawrie. She formed the firm view in 2009 that Unions NT should be granted a lease of the site. She gave reasons for adopting that attitude. She was also firm in her view that there should be no process whereby expressions of interest from other organizations should be invited. This continued to be her view from 2009 to 2012, when steps were taken to have the matter brought before Cabinet. Ms Lawrie ensured that the question of the lease would be taken to Cabinet as a matter of urgency as the election approached. She gave her reasons for embarking on that course.

[172] The thrust of the findings made in the Report was that Ms Lawrie was biased in favour of Unions NT in the sense that she was determined that the organisation would be offered the lease to the exclusion of all other organisations that might be interested in the site.

[173] The finding that Ms Lawrie's conduct was not proper and was unfair was based on Mr Lawler's view that whatever interest other organizations might have had in the site, Ms Lawrie ensured that no expressions of interest would be called for from the community.

[174] Mr Lawler's judgment in making these findings is not in issue on the hearing of this appeal. The issue to be determined is whether sufficient notice was given to Ms Lawrie that adverse findings might be made against her as a result of the Inquiry.

[175] Mr Wyvill took an active role in assisting Ms Lawrie during the taking of evidence. Furthermore, on the invitation of Mr Lawler, he made submissions at the conclusion of the evidence. In our view his submissions indicate that he was aware of the principal issues which could lead Mr Lawler to make adverse criticism of Ms Lawrie's role.

[176] He put to Mr Lawler that none of the documents suggest it would be improper to make a decision in favour of Unions NT. He said it was critical to consider the basis on which it was decided not to follow the expression of interest process. He then referred to the twin aspects of attachment to the

site and the capacity to maintain it. He added that attachment to the site "is the critical thing in looking at the propriety of this decision."

[177] In the light of our summary of the procedure adopted by Mr Lawler we now turn to our conclusions in relation to the submission that the trial Judge erred in finding that the procedure adopted by Mr Lawler accorded procedural fairness to Ms Lawrie.

[178] The content of the requirement of procedural fairness, when a statutory inquiry involving the exercise of compulsive powers is being conducted, is well-established.

[179] There is nothing in the provisions of the *Inquiries Act* to suggest that the requirement of procedural fairness does not apply, or that it applies in a manner particular to the legislation.

[180] The fundamental obligation of the inquirer exercising such statutory powers is to give to a person, whose interests might be affected by the decision of the inquirer, a reasonable opportunity to be heard before the decision which may affect those interests is made.

[181] The application of that principle would ordinarily require the inquirer to identify to the person in question, the subject matter of the inquiry and the relevant issues that arise on that subject matter. Ordinarily the inquirer will have to draw to the attention of the relevant person the nature and content of adverse material that may be considered by the inquirer, and also possible

bases for adverse findings. The inquirer will have to allow an opportunity for the relevant person to provide an answer or response to the matters raised, and to provide relevant material in support of that answer.

[182] What we have just said is no more than the application of the fundamental obligation to give to the person whose interests are affected, or likely to be affected, a reasonable opportunity to be heard.

[183] The purpose of these requirements, derived from the fundamental obligation to allow the person to be heard, is to make effective that right to be heard.

[184] We do not agree with the submission by Mr Davis that, in the case of a statutory inquiry such as the present one, the inquirer must always disclose proposed or tentative findings to the relevant person, or invite comment on them by the relevant person.

[185] In *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, (‘*Alphaone*’) the Full Court of the Federal Court said (at 590-591):

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.
> [Citations omitted]

[186] This passage from their Honours’ reasons was referred to with approval by the High Court in *SZBEL v Minister for Immigration and Multicultural and*

Indigenous Affairs (2006) 228 CLR 152 (‘*SZBEL*’) at [32]. Their Honours said:

> In *Alphaone* the Full Court rightly said:
>
> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues* and to be informed of the nature and content of adverse material. (Emphasis added.)(Citation omitted.)

[187] Later in their reasons, at 591-592, the Full Court of the Federal Court said:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

[188] In *Alphaone*, an argument had been put which sought to distinguish between issues critical to the decision in question, which might not be apparent, and on the other hand the “mental processes or provisional views” of the decision-maker. In *SZBEL* the High Court said at [31] that such an argument set up a false dichotomy. It was immediately after that that the High Court specifically approved the first extract set out above from the reasons of the

Full Court in *Alphaone*. In *SZBEL* the High Court made the point at [31] that to approach the issue on the basis of such a dichotomy raised:

> … a very real risk that focussing upon these two categories will distract attention from the fundamental principles that are engaged.

Those fundamental principles were those identified by the Full Court of the Federal Court in the first passage set out from its decision in *Alphaone*.

[189] That is not to say that there will never be cases in which the duty to give an opportunity to be heard will call for the inquirer to identify proposed or tentative adverse findings, and to invite comment on them.

[190] Whether such a duty arises in the particular case will turn on the terms of the statutory provisions in question and on the circumstances of the particular case. As the High Court said in *SZBEL* at [26]:

> It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case. As Kitto J said in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*:
>
> [T]he books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity [‘to correct or contradict any relevant statement prejudicial to their view’] *in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place.*
> (Emphasis added.) (Footnotes omitted.)

[191] If the issues under consideration, or the relevant materials, are not known to, nor foreseeable by, the subject of the inquiry, it may be that the only way to satisfy the fundamental obligation to give an opportunity to be heard will be to outline or summarize, before a decision is made, the proposed or tentative findings to be made by the inquirer.

[192] But, if the subject matter, and issues and relevant considerations are sufficiently clear, there is no obligation for the decision-maker to provide a preview of proposed or tentative conclusions or findings. This is because the disclosure of proposed or tentative findings is not a free-standing element of the obligation to accord procedural fairness. Disclosure of this kind is merely a means, in particular circumstances, of satisfying the entitlement to be heard. This reflects the fact that the content of procedural fairness will always turn on the proper construction of the statute in question and on the facts and circumstances of the particular case.

[193] To proceed on the basis that there is a free-standing obligation to provide a preview of findings or conclusions in inquisitorial inquiries is to create the kind of false dichotomy to which the High Court referred to in *SZBEL* at [31].

[194] As we have said, we reject the submission by Mr Davis that in the case of a statutory inquiry that is open-ended, or to be conducted in an inquisitorial manner, there is always an obligation to disclose tentative findings and provisional conclusions, and to invite comment on them. Each case is to be

approached by reference to fundamental principles, and then by reference to the requirements of the particular case.

[195] We agree that in the present case the Terms of Reference were, standing alone, open-ended, and we accept that the Inquiry was to be conducted in an inquisitorial manner.

[196] But the Report discloses how the Inquiry by Mr Lawler immediately focussed on the conduct of Ms Lawrie between 2000 and 2012 in relation to the Stella Maris site, and in particular on Ms Lawrie's involvement in the process that led to the Cabinet decision of 10 July 2012. Once Mr Lawler had been provided with relevant documents and papers, relating to the Stella Maris site, it became clear that Ms Lawrie had played a significant, and possibly decisive role, in relation to the process followed and in relation to the putting of the matter to Cabinet, when and how it was put. Very early in the piece, if not from the very outset, the focus of the Inquiry became in substance the conduct of Ms Lawrie, although the conduct of other participants in the process was also to be subjected to scrutiny. But once Mr Lawler had the relevant documents, and before Ms Lawrie was called upon to provide any answers, the focus of the Inquiry became her conduct in relation to the Stella Maris site. The focus was whether her conduct was open to criticism.

[197] In particular, was she to be criticised in relation to the exclusion of other possibly interested applicants for a grant of an interest in, or lease over, the

site, and in relation to whether it was in the public interest to make the grant of a lease to Unions NT? Also evidently calling for scrutiny was the failure to follow accepted or established procedures for the grant of a lease to Unions NT. Also calling for consideration was the manner in which the proposed grant of a lease over the Stella Maris site was brought to Cabinet in circumstances suggestive of some urgency, because of the imminent commencement of the caretaker period, which was to precede the election due to take place in August 2012.

[198] These issues were identified to Ms Lawrie, along with the relevant documentation, in the course of the interview which Mr Lawler conducted before Ms Lawrie gave her evidence. The same issues were identified and canvassed when Ms Lawrie gave evidence to Mr Lawler. One need do no more than read the relevant portions of Mr Lawler's Report, extracts from which we have set out above, to see that it was clear to Ms Lawrie that the focus of scrutiny was her conduct, the process that was followed, the merits of the decision and the propriety of Ms Lawrie's conduct.

[199] With reference to that point we observe that it is relevant that Ms Lawrie was a senior and experienced member of the Northern Territory Government. When the Cabinet decision in question was made she was Deputy Chief Minister, Treasurer, and had been Minister for Lands and Planning from 2007 to 2009. In that capacity she had had a direct involvement in the proposed grant of a lease to Unions NT over the Stella Maris site.

[200] The transcript of the proceedings before Mr Lawler demonstrates that the subject matter of his Inquiry was obvious, had become quite specific, and that the issues and relevant materials were known to Ms Lawrie and were put to her. She must have known the potential criticisms of her conduct, and the possible adverse findings that might be made. That was what the Inquiry was all about, namely, establishing her involvement (as to which there was no dispute of any significance), and whether her conduct was consistent with good government and proper process, or open to criticism.

[201] The transcript showed that as to the question of bias, Ms Lawrie was asked why she gave a briefing to Unions NT in the early stages of discussion about the future of the Stella Maris site. She was asked why she did not brief 24HR Art, and it was put to her that this was a very deliberate decision. It was pointed out to her that another organisation, the National Trust, was not briefed but believed that it should have been involved in relevant discussions. Mr Lawler confirmed with Ms Lawrie that she had made up her mind in 2009 that she wanted Unions NT to be granted a lease of the site. Ms Lawrie was asked by Mr Lawler whether she had any biases in favour of the union movement. She was questioned about her involvement in the apparent urgency in bringing the lease proposal to Cabinet before the commencement of the caretaker period, and in relation to the efforts which she made at this time to ensure that the site would be leased to Unions NT.

[202] The failure to call for expressions of interest was a related issue on which Ms Lawrie was questioned extensively. It was pointed out to her that others

were not given an opportunity to apply for consideration as potential lessees. She was reminded of the fact that Option 2 of the Cabinet Submission prepared by the Department of Lands and Planning recommended an expression of interest process for the lease. Mr Lawler noted in his questioning that this would have produced a more transparent process. He asked Ms Lawrie whether there was anything to be lost by such a process, and what was the risk involved in asking others for an expression of interest. He asked her whether it would have been "fair and transparent" to have given 24HR Art an opportunity to express an interest.

[203] The Terms of Reference provided the basis for the scrutiny of the conduct of Ms Lawrie, once it became apparent that she had played a central, and possibly decisive role in relation to the Stella Maris site. By this we mean that once the circumstances of her involvement were identified, the Terms of Reference pointed the way for the Inquirer. Term of Reference 2 refers to "the public policy and public accountability considerations" that were involved. Term of Reference 3 refers to the application of "proper accountability processes". Term of Reference 4 refers to "ensuring transparency, good governance and community input". Term of Reference 5 refers to the availability "of relevant information to affected stakeholders and the public".

[204] It is not surprising that the Terms of Reference are as general as this. No doubt they reflect a desire that the Inquirer consider all aspects of the matter.

[205] The underlying concepts are good government, transparency, sound procedures and propriety of conduct. These are the concepts that were to be applied by the Inquirer.

[206] Ms Lawrie must have known this also. She was an experienced politician. The criticisms of her by Mr Lawler are based on the considerations that we have identified. For example, Mr Lawler criticised Ms Lawrie's fixed determination that the Stella Maris site be granted to Unions NT, and that to this end other possible grantees be shut out of the process. Ms Lawrie had an explanation, but Mr Lawler did not accept it. However, the issue that he addressed, and canvassed with her, is readily identified. The issue is whether her conduct, and the process, reflected good governance.

[207] There was no need for more precision for Ms Lawrie to know what she faced. The answer that she made was appropriate, and she addressed relevant issues. She put her response to Mr Lawler on a broad basis reflecting what one finds in the Terms of Reference. She raised matters such as the link between Unions NT and the Stella Maris site, Unions NT being the only realistic choice as grantee, and the proposed grant of a lease having the backing of the Cabinet as a whole. She did not need Mr Lawler to identify more precise grounds or reasons for criticism.

[208] The issue was the propriety of the fixed determination to prefer Unions NT, and the way in which she went about achieving that result.

[209] Ms Lawrie had the opportunity to answer possible criticisms of her conduct. That also emerges from the material we have set out above.

[210] Ms Lawrie took the opportunity that Mr Lawler offered to her, and gave answers to possible criticisms of her conduct. As appears from our summary, she said it was in the public interest to favour Unions NT, to exclude other bodies from consideration as possible recipients of a grant, to deal directly with Unions NT, and to influence the Cabinet process, or at least the timing of the decision-making, so that a decision was made and able to be implemented before the caretaker period began. She said that the timing reflected the need to avoid the risk that if there was a change of government as a result of the upcoming election, the opportunity to grant a lease over the Stella Maris site to Unions NT would evaporate.

[211] Ms Lawrie expounded these points to Mr Lawler in a clear and forthright manner.

[212] As it transpired, the arguments that Ms Lawrie put forward in support of what she had done and the process that was followed were not accepted by Mr Lawler. But Ms Lawrie cannot complain that Mr Lawler did not accept her arguments, or the rationale that she put forward for the events the subject of scrutiny. The soundness of Mr Lawler's conclusions is not in issue in these proceedings. The Judge at trial, and this Court on appeal, are concerned with the process that Mr Lawler followed, and the fairness of that process. The Court was not and is not concerned with the soundness of

Mr Lawler's conclusions, nor with the strength or lack of strength of the arguments put forward by Ms Lawrie.

[213] The conclusions reached by Mr Lawler will appeal to some, and not to others. But the Court must avoid an approach that becomes, in effect, an assessment of the soundness of his approach. He approached the matter on a broad basis, a basis that might satisfy some and not others. But there was no need for him to spell out to Ms Lawrie, in more precise terms, a basis for adverse findings. Nor was there any need for him to identify to her the possibility that the conclusions that he reached might be reached.

[214] In short, there is no reason to think that Ms Lawrie was not able to put her response or answer to the issues that arose for consideration in the Inquiry, and to support what she said as she saw fit, with reference to relevant materials.

[215] Mr Lawler made it clear that if, after having given her evidence, Ms Lawrie later wished to supplement her evidence, she would be given the opportunity to do so.

[216] In fact, from about 31 March 2014, relying on advice from Mr Wyvill, Ms Lawrie had made a decision not to supplement her evidence. Ms Lawrie did not want to give Mr Lawler any opportunity to strengthen the case against her arguments, or to attack arguments that she might put forward. Ms Lawrie had no desire to supplement the material she had put before Mr Lawler.

[217] Mr Lawler did not rely on material not known to Ms Lawrie.

[218] Mr Lawler did not deal with issues that were not apparent on the known facts. Perhaps Ms Lawrie was surprised that her explanations and rationale were not accepted. But, in these proceedings, that is neither here nor there. Ms Lawrie knew that the soundness of her explanations and rationale were in issue. She knew that Mr Lawler might reject her explanation for what had occurred. That is clear from what passed between Ms Lawrie and her advisers.

[219] In all these circumstances, procedural fairness did not require that Mr Lawler disclose tentative adverse findings, or provide a preview of his conclusions, before making his findings and completing his Report.

[220] Quite apart from this, there is the question of the practicality, in a case like this, of the course of conduct which Mr Davis now urges should have been followed. Was Mr Lawler required to provide a preview of his conclusions, then hear further submissions from Ms Lawrie, and then revisit his conclusions?

[221] The letter of 14 February 2014 from Ms Spurr, the solicitor for Ms Lawrie, to Mr Lawler, is of some interest. This letter was written before Ms Lawrie had been interviewed and before she had given evidence. In this letter, through Ms Spurr, Ms Lawrie identified some of the issues that in due course arose, and provided her answers to certain possible adverse conclusions. This is not to say that the letter provided a comprehensive

response. The point we make is that it is apparent that the letter was written on the basis of a reasonable understanding of the issues that were likely to arise. There were some discrepancies between what was put in the letter and the evidence that Ms Lawrie later gave. But that is of no particular significance to the point presently made.

[222] We refer to the letter of 17 February 2014 from Mr Lawler to Ms Spurr: reasons at [78]. We are not persuaded that this letter offered to Ms Lawrie the disclosure of draft or tentative findings. We consider that the reference to "notice" means only notice that the person in question might be subject to adverse findings and was entitled to be heard. This is something that Ms Lawrie knew. The letter contemplated that the relevant person might wish to be given access to relevant documents and materials, to the extent that they were in the possession of Mr Lawler. So understood, what was contemplated in the letter of 17 February 2014 occurred, in due course. Ms Lawrie was given relevant documents, had the opportunity to provide other documents, was given the opportunity to explain her conduct, and took that opportunity.

[223] It is apparent that Ms Lawrie and her advisers had forgotten about the letter of 17 February 2014. It came to light, in circumstances dealt with by the Judge, on 26 May 2014: reasons at [197]. This was the very day that Mr Lawler presented his Report, to be made public on 19 June 2014: reasons at [203]. But even when the letter came to light, Ms Lawrie maintained her strategy of making no contact with the Commissioner. She preferred to keep

open the possibility of arguing that she had been misled by the letter, in the sense of being led to think that there would be no adverse findings made before she was given an opportunity to view draft findings and comment on them.

[224] In any event, in the proceedings before the Judge, Ms Lawrie disavowed reliance on the letter of 17 February 2014 as having influenced her conduct: see transcript of proceedings 27 January 2015 page 8, Appeal Book Volume 1, page 209, reasons at [183].

[225] Ms Lawrie had no entitlement to have proposed findings or conclusions disclosed to her. Mr Lawler could have withdrawn the offer made in the letter of 17 February 2014, unless the withdrawal of itself gave rise to a lack of procedural fairness. Ms Lawrie's disavowal of reliance on the letter of 17 February 2014 eliminates any argument that this letter put her at a disadvantage in some way, or, to be more precise, that the failure to give notice of proposed adverse findings (if that is what the letter meant) caused her to act to her disadvantage.

[226] When the letter came to light she had already given her answers to the issues raised by Mr Lawler. She had had access to relevant documents, and had been given the opportunity to supplement her answers or to provide further documents if she so wished. She chose not to do any of these things.

[227] A somewhat similar issue arose before the High Court in *Lam*. There is no need to go into the facts in any detail. It suffices to say that this was a case

in which an officer in the Minister's Department, preparing material for submission to the Minister, had indicated that, if provided with contact details, the officer would approach a person for information relevant to the matter under consideration. For reasons that were not explained, although the contact details were provided, the person in question was not contacted by the officer. At [34] Gleeson CJ said:

> And it is clear that the content of the requirements of fairness may be affected by what is said or done during the process of decision-making, and by developments in the course of that process, including representations made as to the procedure to be followed. So, for example, if a decision-maker informs a person affected that he or she will hear further argument upon a certain point, and then delivers a decision without doing so, it may be easy to demonstrate that unfairness is involved. But what must be demonstrated is unfairness, not merely departure from a representation. Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation. In some contexts, the existence of a legitimate expectation may enliven an obligation to extend procedural fairness. In a context such as the present, where there is already an obligation to extend procedural fairness, the creation of an expectation may bear upon the practical content of that obligation. But it does not supplant the obligation. The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed. (Citation omitted.)

[228] His Honour then said at [36]:

> The more fundamental problem facing the applicant, however, relates to the matter of unfairness. A statement of intention, made in the course of decision-maker, as to a procedural step to be taken, is said to give rise to an expectation of such a kind that the decision-maker, in fairness, must either take that step or give notice of a change in intention. Yet no attempt is made to show that the applicant held any subjective expectation in consequence of which he did, or omitted to do, anything. Nor is it shown that he lost an opportunity to put any information or argument to the decision-maker, or otherwise suffered any detriment.

[229] And finally, at [38] he said:

> No practical injustice has been shown. The applicant lost no opportunity to advance his case. He did not rely to his disadvantage on the statement of intention. It has not been shown that there was procedural unfairness. And, as I have already indicated, there is no warrant for a conclusion that there was a failure properly to take into account the interests of the applicant's children.

[230] To a like effect were the reasons of McHugh and Gummow JJ at [105]-[106].

[231] In our opinion, in the present case Ms Lawrie has not demonstrated any unfairness arising from the letter of 17 February 2014, attributable to the failure to provide notice of possible adverse findings, if that is what the letter meant. Ms Lawrie has not shown that she lost an opportunity to put forward any information or argument, or suffered any detriment, as a result of the relevant circumstances.

[232] One can be confident, in our opinion, that if Mr Lawler had informed Ms Lawrie that he no longer intended to follow the procedure outlined in his letter, Ms Lawrie would not have made further submissions to him. She would have said nothing. She would have waited until the Report was published, and then would have mounted a complaint about the failure to disclose draft findings. That is the strategy that she and her advisers had adopted.

[233] For reasons we have explained, in the circumstances no unfairness is demonstrated.

[234] Accordingly, there having been no failure to accord procedural fairness, the Judge was right to dismiss the action.

[235] There are two other short points to be made.

[236] It was argued that unfairness resulted from Mr Lawler's failure to give notice of Recommendation 6 in his Report which was as follows (Report p 60):

> I recommend that the Legislative Assembly consider whether there has been an alleged breach of the Northern Territory of Australia Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act 2008, by Ms Delia Lawrie MLA …. and whether under the provisions of s. 5(1) it wishes to refer any alleged breach of the code to the Privileges Committee.

[237] The Schedule to the Act sets out a "Code of Conduct and Ethical Standards" for Members of Parliament. The Code is established pursuant to s 4 of the Act. Included in the Code is a requirement of fairness in official decision-making. Section 5 of the Act provides that the Legislative Assembly may refer an alleged breach of the Code to the Privileges Committee for inquiry and report. If the Privileges Committee finds that the Code has been breached the Legislative Assembly may punish the breach as a contempt.

[238] Mr Lawler's Report was tabled in the Legislative Assembly on 19 June 2014. In the days leading up to the tabling of the Report there was correspondence between Ms Lawrie, Mr Wyvill and others concerning the response which might be made to the Report. On 12 June 2014 Mr Wyvill

forwarded an email to Mr Michael Gleeson, Ms Lawrie's Chief of Staff. Attached to it was a document headed "Stella Maris Enquiry – Key Points".

[239] Paragraphs 4 and 5 of the attachment state:

> 4. As the proposed lease expressly stated that no NT Government funding would be provided for Stella Maris, it imposed a substantial financial burden on Unions NT. No other organisation (including the National Trust or Music NT) had this commitment to Stella Maris or access to such resources to cover these costs.
>
> 5. Delia and Gerry, as experienced Ministers, knew this. This is why they and all other members of the Henderson Cabinet did not consider it necessary to go through an application process. Nor were they advised by any public servant at any stage that it would be unlawful or improper not to hold an application process. In fact, Parliament has given the Minister for Lands the express power to determine, should he wish to, that an application process need not be undertaken prior to the grant of a Crown lease: see section 12(3) of the *Crown Lands Act*.

[240] On 18 June 2014 Ms Lawrie emailed Mr Wyvill thanking him for his "Writ preparation" and advising:

> I have Charlie Phillips working further on responses for Parliament. We have received no advice, despite requests, from Government as to when it appears on the Parliament notice agenda but suspect it is first up.
>
> The advice I received today from Michael Gleeson is that there is nothing in the law that prevents a NT Government referral to the Privileges Committee. (We suspect they will rely on a Recommendation from Commissioner Lawler the LA Code of Conduct Act 2008).

[241] We agree with the view of the trial Judge that the comments in paragraphs 4 and 5 of the attachment from Mr Wyvill indicate an awareness of the areas of criticism which Ms Lawrie faced. Furthermore, the reference to a

recommendation by Mr Lawler for referral to the Privileges Committee reveals an awareness of the possibility of this taking place.

[242] However that may be, it is important to note that Mr Lawler makes a clear distinction in his Report between findings and recommendations. It was not for him to make any finding by reference to the Code of Conduct. In our view the recommendation for the referral cannot be regarded as an adverse finding of which notice was required.

[243] Nor do we agree that the Judge took the wrong approach. The Judge paid close attention to Ms Lawrie's knowledge of the facts. That was relevant to determining the requirements of procedural fairness in the particular case, as we have shown. The Judge was not wrong in paying close attention to Ms Lawrie's knowledge.

Waiver

[244] We agree with Heenan AJ that the Judge erred in relation to what he described as the alternative defence of waiver.

[245] Like Heenan AJ, we are content to proceed on the basis (without deciding the point) that compliance with aspects of the entitlement to procedural fairness can, in a case like this, be waived by the person entitled: Reasons at [419]. However, we note that there is some difficulty in treating this case as one involving waiver.

[246] We proceed on the basis of the summary by Heenan AJ of the circumstances relevant to the Judge's consideration of waiver.

[247] As to the letter of 15 April 2014, sent by Ms Spurr to Mr Lawler, we respectfully differ from Southwood J. We find nothing on the face of the letter to suggest that Ms Lawrie was relinquishing any unfulfilled entitlement to procedural fairness. If anything, the statement in the letter that "... our clients remain vitally interested in the outcome ..." suggests the contrary.

[248] The meaning and effect of the letter are to be assessed in light of the text of the letter, not by reference to the motive or strategy that prompted the letter.

[249] Nor can such a motive or strategy, of themselves, affect Ms Lawrie's entitlements. There is no evidence suggesting that Mr Lawler was deceived by the letter, nor that it had any effect on the conduct of the Inquiry.

[250] As the letter was to be assessed at face value, there was no reason to enquire into the conduct of Ms Lawrie, Mr Wyvill and Ms Spurr, in the detail to which Southwood J descended.

[251] We have said earlier in these reasons at [232] that if Mr Lawler had offered Ms Lawrie an opportunity to supplement her evidence, she would not have done so. But the effect of the letter does not turn on the motive or strategy that the Judge explored, and did not call for close scrutiny of the motives and strategy that lay behind the letter. The effect of a failure to utilise an

opportunity to give further evidence would have depended on the surrounding circumstances at the time, not on the motive or strategy that led her to decline to give further evidence.

[252] For these reasons we consider, with respect, that Southwood J erred in this respect. He should not have upheld the alternative defence of waiver. There was no reason to explore the motives and strategy that lay behind the conduct of Ms Lawrie and her advisers.

The appeal on costs

[253] The Judge ordered Ms Lawrie to pay Mr Lawler's costs, assessed in part on an indemnity basis, to the end of the trial in January 2015. He ordered costs against Ms Lawrie on a party and party basis for the application by Mr Lawler for costs, including the costs of the recusal application to the Judge.

[254] The Judge fixed those costs at $214,876. He explains in his reasons how he arrived at that amount. Ms Lawrie did not dispute the reasonableness of the total fees and disbursements claimed by Mr Lawler, in the amount of $245,857.74, nor the allocation of those costs as between the trial and the cost of the recusal hearing. That being so, once the Judge decided to what extent the costs should be on an indemnity basis, the rest was a matter of calculation.

[255] The order for indemnity costs must be set aside. That decision rests on the Judge's finding that such an award was justified because, having waived her right to what the Judge called "further procedural fairness", Ms Lawrie should not have contested the trial. We have found that the Judge erred in upholding the so-called waiver defence. The basis for that order goes. We must reconsider the costs of the trial and the other costs orders.

[256] We reject the submission that Mr Lawler was disentitled from recovering costs by operation of the so-called indemnity principle. It suffices to say that we agree with the reasons of Heenan AJ on this point: Reasons at [478].

Conclusions and orders

[257] For the reasons given, we propose the following orders.

[258] As to the first appeal, an order that the appeal be dismissed and that the parties provide written submissions on the costs of trial and of the appeal in accordance with directions to be given.

[259] As to the second appeal, that the appeal be dismissed, and that the parties and Mr Wyvill provide written submissions on the costs of the application for recusal in accordance with directions to be given.

[260] As to the third appeal, that the appeal be allowed, that the order made on 14 August 2015 be set aside, and that the parties provide written submissions on the costs of the trial and appeal in accordance with directions to be given.

[261] In relation to the application by Mr Wyvill to be joined as a party to the appeal or to be heard on the appeal, the parties should provide written submissions on the costs of the application in accordance with directions to be given.

[262] In relation to costs, the following points are pertinent.

[263] Mr Lawler has succeeded at trial and on appeal on the challenge to his Report based on a claimed failure to accord procedural fairness to Ms Lawrie.

[264] Mr Lawler has failed on the alternative defence of waiver. That defence generated a number of contested applications leading up to the trial, and occupied considerable time at trial and on appeal.

[265] Mr Lawler has succeeded on the recusal application, and *prima facie* should recover the costs of that application.

HEENAN AJ

Contents

[266] There are three appeals. They are from judgments or orders of Southwood J in *Lawrie v Lawler* [2015] NTSC 19; *Lawrie & Anor v Lawler* [2015] NTSC 40 and *Lawrie v Lawler (No 2)* [2015] NTSC 46. Originally there was one appeal and two applications for leave to appeal and/or an extension of time to appeal. By consent, orders were made on 1 March 2016 for leave to appeal and to extend time to appeal. All three appeals therefore now proceed together.

[267] All decisions have arisen as the results of an application by the appellant, Delia Phoebe Lawrie (Ms Lawrie), to seek judicial review of a Report entitled "Inquiry into Stella Maris – 2014" made by the respondent, Mr John Lawler, (Mr Lawler) to the Administrator of the Northern Territory and presented on 26 May 2014. Mr Lawler had been appointed to conduct an Inquiry and thereafter to report to the Administrator upon a variety of matters concerning a decision by a former Minister of Lands and Planning to grant a lease over certain land in Darwin known as the Stella Maris site, to Unions NT in August 2012. The respondent had been appointed to conduct that Inquiry under s 4A of the *Inquiries Act*.

[268] In the Report there is a series of findings and observations critical of the appellant in her role as a former Minister leading up to, and participating in, the decision by the former Cabinet to grant the lease of the Stella Maris land to Unions NT. As a consequence, Ms Lawrie applied to the Supreme Court of the Northern Territory by originating motion filed on 30 July 2014 seeking relief, either in the form of a declaration that the respondent's

Report following his Inquiry failed to observe the requirements of procedural fairness and/or, an order, in the nature of *certiorari*, to quash the Report.

[269] In seeking this relief the appellant claimed that she had been denied an opportunity to be informed of potential adverse findings against her or reflecting badly upon her during the course of the Inquiry. As such, she claims she was deprived of an opportunity to address, in an attempt to refute, those potential adverse findings either by adducing or calling further evidence or by submissions from her counsel directed to the substance of those allegations. She claims that the findings against her were made in breach of the requirements of procedural fairness, and, that she is entitled to the relief sought.

[270] The application for judicial review was heard by Southwood J over four days from 27 to 30 January 2015. The appellant was represented by counsel, although not the same counsel who had appeared for her at the Inquiry before the respondent. The respondent appeared by counsel and actively contested the claims of the appellant, submitting that procedural fairness, to the extent required, had been afforded to her. He also raised, for the first time, an alternative submission that, if to any extent the full requirements of procedural fairness had not been afforded to the appellant, she was not entitled to any relief because she had, by her conduct and that of her counsel and solicitors in the course of the Inquiry, waived any right she otherwise might have had to procedural fairness.

[271] It cannot escape notice that in pursuing such an active role in opposing the appellant's application for judicial review, both before Southwood J and again on the hearing of these appeals, the respondent has disclaimed the conventional role of neutrality on the part of the decision maker which has traditionally been the stance of such an official or body performing executive or statutory functions whose decisions are subject to challenge or review in court. This point was raised in written submissions by the appellant but neither party made further submissions about this subject during oral argument. The traditional position has been identified in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 ('*Hardiman*') at 35 – 36; *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446 and, more recently, in *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [44]. Such a traditional role for a commission, which had delivered its final report, conforming to the *Hardiman* principle, was assumed in *Wells v Carmody* [2014] QSC 59.

[272] The consequence of the respondent's choice of eschewing observance of the *Hardiman* principle means that the learned Judge at first instance, and this court, have not had the benefit of the degree of detachment, independence or breadth of view which are advantages that flow from the adoption of that less partisan approach by a respondent in comparable circumstances.

[273] This is especially so when allegations of severe impropriety against the appellant and her legal representatives were made to the learned Judge and strongly maintained on these appeals. None of this is to say that this Court is

in any way relieved from the requirement to decide these appeals on all the issues raised by the parties, including issues advanced by the respondent already briefly mentioned. Rather it means that the Court is required to scrutinise all the submissions made, including those on behalf of the respondent, in full knowledge that they have been advanced on behalf of a respondent who is exercising, somewhat unusually, a fully adversarial stance commonly adopted by ordinary litigants who naturally seek to highlight their own self-interest.

[274] On 1 April 2015 Southwood J delivered his decision on the application for judicial review. For the reasons then published his Honour dismissed the application and directed that the parties would be heard about costs at a later date. That decision is *Lawrie v Lawler* [2015] NTSC 19 and for convenience can be called "the principal decision".

[275] Subsequently, the respondent made an application for costs including indemnity costs against the appellant and also sought orders that the counsel and solicitor who appeared on the appellant's behalf in the course of the Inquiry, Mr A Wyvill SC (Mr Wyvill) and Ms CL Spurr, (Ms Spurr) should be jointly and severally liable with the appellant for the costs which were being sought. As a result of that application, the appellant, Ms Lawrie, and her former counsel Mr Wyvill (but not Ms Spurr) each applied for an order or other relief to the effect that Southwood J should not hear or determine the costs application because of certain material which had then recently come to light which, so they contended, gave rise to a reasonable perception

of bias. That application was heard by Southwood J on 5 June 2015 and, for reasons published on 22 July 2015, his Honour dismissed Ms Lawrie's application and also dismissed Mr Wyvill's application to the extent that it relied on the same grounds as the appellant's application. His Honour otherwise adjourned for future hearing and determination the remaining grounds of Mr Wyvill's application. That decision is *Lawrie & Anor v Lawler* [2015] NTSC 40 and, again for convenience, it may be termed "the recusal decision".

[276] The respondent's application for costs against Ms Lawrie came on for hearing before Southwood J on 10 August 2015. For reasons published by his Honour on 14 August 2015 it was ordered that Ms Lawrie pay Mr Lawler's costs fixed in the amount of $214,876. His Honour's reasons explained that this amount had been calculated, as to its greater component, on an indemnity basis and, as to the remaining component, on a party and party basis. The component generating the order for indemnity costs was that associated with the review application itself - the principal decision.

[277] It is common ground that the respondent has since abandoned his applications for Mr Wyvill and/or Ms Spurr to be made jointly and severally liable for the costs which have been ordered to be paid by the appellant. Those claims are no longer being pursued by the respondent although they have a sequel, in that Mr Wyvill has foreshadowed an intention to claim an order for the payment of his costs in opposing that application against the respondent. The significance of this will be examined later.

Grounds of Appeal

The Principal Decision

[278] The notice of appeal as amended in relation to this decision specifies the following grounds of appeal and the orders sought upon the appeal namely:-

Grounds

(1) The judgment was attended by an apprehension of bias.

(2) The learned judge at first instance erred:

a. by considering the wrong question, namely whether the findings made in the respondent's report as to the inquiry were true;

b. by further considering whether the appellant had notice of "issues";

c. by not considering whether the appellant had notice of particular possible adverse findings;

d. otherwise found that procedural fairness had been afforded to the appellant when it had not; and

e. by finding against the weight of the evidence that the appellant waived any breach of the rules of natural justice.

Orders sought

(1) Allowing the appeal;

(2) Setting aside the orders made;

(3) Declaring "that in reporting adversely to the plaintiff [appellant] in his report entitled "Inquiry into Stella Maris – 2014" purportedly pursuant to s 4A(3) of the *Inquiries Act*, the defendant [respondent] failed to observe the requirements of procedural fairness*";*

(4) That the respondent pay the appellant's costs of the proceedings before Southwood J and of the appeal.

The Recusal Decision

[279] The grounds of appeal and the orders sought by the appellant in relation to this judgment of 22 July 2015, the recusal decision, are as follows:

Grounds

(1) The Honourable Judge erred in law in his interlocutory judgment by not finding there was an apprehension of bias and by not disqualifying himself from hearing the application of costs.

(2) The interlocutory judgment was attended by an apprehension of bias.

Orders sought

(1) Set aside the interlocutory judgment and refer the hearing and the application of costs to a different judge.

The Costs Decision

[280] The grounds relied on by the appellant for this appeal and the orders being sought are as follows:-

Grounds

(1) The judgment is affected by apprehended bias;

(2) There was no liability by the respondent for costs and therefore no liability for which he could or should have been indemnified against by a costs order;

(3) There was no basis or no reasonable basis, to award costs to the respondent on an indemnity basis.

Orders sought

(1) The judgment be set aside.

(2) The respondent pay the appellant's costs of the appeal and the principal application.

[281] The Court has had the benefit of extensive written submissions by the appellant and by the respondent in relation to each of the three appeals. At the hearing of the appeals each party relied fully on her or his written submissions but confined the oral submissions to issues arising on the appeal from the principal decision.

Application by Mr Wyvill SC for leave to intervene and/or to be joined as a co-appellant

[282] This application was heard on 1 and 2 March 2016 and the decision of this Court was given on 4 March 2016, refusing the application. At that time the court announced that detailed reasons for refusing the application would be given later.

[283] At the Inquiry Ms Lawrie was legally represented for most of the time, but not for the final stages of the Inquiry, by counsel, Mr Wyvill, (the present applicant for leave to intervene or to be joined) and by her solicitor, Ms Spurr.

[284] In each of the three sets of reasons for decision for these matters there are extensive criticisms of Mr Wyvill in regard to the role which he played in, and associated with, the conduct of the original Inquiry before Mr Lawler. It is unnecessary to recount all these criticisms in full but they are severe. They include findings that Ms Lawrie and her lawyers made a conscious decision to change strategy and withdraw from the Inquiry on 31 March 2014 as part of a strategy to ignore, disengage and discredit the Inquiry. There is also a finding that Mr Wyvill settled a letter later written by

Ms Spurr on 15 April 2014 to the respondent that was untrue and that it was "deliberately and knowingly false" [181] of Southwood J's judgment *Lawrie v Lawler* [2015] NTSC 19. There is a finding [221] that Mr Wyvill recommended that Ms Lawrie make a false statement; and a further finding [223] that by filing the originating motion for judicial review on 30 July 2014, the allegations contained in it and the accompanying statement of facts and contentions were known to be untrue. In the costs decision there is a finding [8] that Ms Lawrie and Mr Wyvill and Ms Spurr swore affidavits which contained plainly false statements. There was also a finding [17] that in instituting the application for judicial review the appellant and Mr Wyvill acted in wilful disregard of known facts and should not have commenced those proceedings.

[285] Mr Wyvill now submits that the findings made against him in the several reasons for decision are so serious that they are likely to have an adverse effect upon his professional reputation and career. He submits that these adverse effects mean that he has an interest sufficient to enable him to obtain leave to intervene or to be joined as a party to Ms Lawrie's three appeals. His application in this respect is supported by Ms Lawrie. It is opposed by the respondent on the grounds that Mr Wyvill has no legal interest sufficient to be allowed to intervene or to become a party to the appeals.

[286] Although Mr Wyvill had been counsel for Ms Lawrie for much of the hearings, at the original Inquiry he did not appear on her behalf, or

otherwise, at the judicial review application before Southwood J, or on either of the two following applications when she was then represented by other counsel. Nor did Mr Wyvill appear as a witness, or, for that matter, as a party at the judicial review application. Affidavits in support of the application for judicial review had been affirmed by Mr Wyvill and filed in the registry, as had similar affidavits by Ms Spurr. However, none of those affidavits was actually read or tendered at the hearing of the judicial review application.

Introduction of allegations against Wyvill SC

[287] As originally formulated and pleaded, none of the issues in the judicial review application, or in the answering pleadings by the respondent, raised any allegations of impropriety, let alone dishonesty, against Mr Wyvill or for that matter against Ms Lawrie or Ms Spurr. The issues raised questions as to whether, in the particular circumstances, adequate procedural fairness during the conduct of the Inquiry had been afforded by the respondent to Ms Lawrie. However, by an amendment by the respondent, made to his statement of facts, issues and contentions on 27 January 2015 (the first day of the hearing before Southwood J) (transcript page 9), three paragraphs were added; 27A, 27B and 27C. It is sufficient now to state only the last two:-

> 27B On 15 April 2014 and at all times until Mr Lawler's report was made public on 19 June 2014, the plaintiff and her legal representatives adopted a deliberate strategy of not engaging in dialogue with Mr Lawler about the substantive issues in the inquiry

affecting the plaintiff. The motivation for the plaintiff's strategy was to avoid prompting Mr Lawler to provide additional measures of procedural fairness, so that once the report was made public the plaintiff could complain that she had been denied procedural fairness.

27C In the circumstances, the plaintiff waived any additional entitlement she had to procedural fairness.

[288] Until then no allegation as to the adoption of any deliberate strategy of not engaging in dialogue with the respondent or otherwise had been raised by the respondent. Neither had the allegation of waiver been previously raised.

[289] That pleading was further amended by the respondent on the morning of 28 January 2015 (the second day of the hearing) (transcript page 12) by adding to paragraph 27B the words "and deceptive" so that the paragraph then read:-

27B On 15 April 2014 and all times until Mr Lawler's report was made public on 19 June 2014, the plaintiff and her legal representatives adopted a deliberate and deceptive strategy of not engaging in dialogue with Mr Lawler about the substantive issues in the inquiry affecting the plaintiff. The motivation for the plaintiff's strategy was to avoid prompting Mr Lawler to provide additional measures of procedural fairness, so that once the report was made public the plaintiff could complain that she had been denied procedural fairness.

[290] There was no objection by counsel for Ms Lawrie to either of the proposed amendments. The second amendment was the first time that "deception", later relied upon to support the findings of dishonesty, was advanced. Mr Wyvill was not present when the applications to amend were made nor had he been informed of the nature or significance of the proposed amendments.

Power to join a party or to grant leave to intervene

[291] On this application counsel relied upon r 85.11(2) of the *Supreme Court Rules (NT),* or alternatively, upon the inherent jurisdiction of the Court, as the source of power to grant leave to Mr Wyvill to intervene or to be joined as a co-appellant. As there was no submission that the court did not have power to grant leave to intervene or to order joinder in the present circumstances, it is unnecessary to address this issue further. In particular, it is unnecessary to consider whether the observations in *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 have now been overtaken and displaced by subsequent decisions including *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 (‘*Hokit*’) at 379 – 381, *Rushby v Roberts* [1983] 1 NSWLR 350 or *R v GJ* (2005) 16 NTLR 230.

[292] The criteria with regard to which intervention or joinder by a non-party may be permitted have been described in *Levy v Victoria* by Brennan CJ who said at 601 – 602:

> None of the constitutional or statutory provisions which confers jurisdiction on this Court contains an express grant of jurisdiction to allow non-party intervention save s 78A of the *Judiciary Act* 1903 (Cth). If there be jurisdiction apart from s 78A to allow non-party intervention, it must be an incident of the jurisdiction to hear and determine the matters prescribed by the several constitutional and statutory provisions which confer this Court’s jurisdiction. It is of the nature of that jurisdiction that it should be exercised in accordance with the rules of natural justice. Accordingly, its exercise should not affect the legal interests of persons who have not had an opportunity to be heard. Therefore, a non-party whose interests would be affected directly by a decision in the proceeding – that is, one who would be bound by the decision albeit not a party – must be entitled to intervene to protect the interest liable to be affected. This,

> indeed, is the explanation of many of the cases in which intervention has been allowed in probate and admiralty cases and in other cases where an intervener and a party are privies in estate or interest.
>
> But the legal interests of a person may be affected in more indirect ways than by being bound by a decision. They may be affected by operation of precedent – especially a precedent of this Court – or by the doctrine of *stare decisis*. Apart from the obsolete exception contained in s 74 of the Constitution, an exercise of the jurisdiction conferred on this Court is not subject to appeal nor to review by any other court. As this Court's appellate jurisdiction extends to appeals, whether directly or indirectly, from all Australian courts, a decision by this Court in any case determines the law to be applied by those courts in cases that are not distinguishable. A declaration of a legal principle or rule by this Court will govern proceedings that are pending or threatened in any other Australian court to which an applicant to intervene is or may become a party. Even more indirectly, such a declaration may affect the interests of an applicant either by its extra-curial operation or in future litigation. Ordinarily, such an indirect and contingent affection of legal interests would not support an application for leave to intervene. But where a substantial affection of a person's legal interests is demonstrable (as in the case of a party to pending litigation) or likely, a precondition for the grant of leave to intervene is satisfied. Nothing short of such an affection of legal interests will suffice … [citations omitted]

and at 603

> However, where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceeding may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene. The grant may be limited, if appropriate, to particular issues and subject to such conditions, as to costs or otherwise, as will do justice as between all parties.

[293] And, more recently in *Roadshow Films* the test in *Levy v Victoria* was applied. In a judgment of the Court delivered by French CJ it was said at [2]:-

> In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria*, are relevant. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court will satisfy a precondition for leave to intervene. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation. [citations omitted]

and later at [6]

> In considering whether any applicant should have leave to intervene in order to make submissions or to make submissions as amicus curiae, it is necessary to consider not only whether some legal interests of the applicant may be indirectly affected but also, and in this case critically, whether the applicant will make submissions which the Court should have to assist it to reach a correct determination ...

[294] It is fundamental that any appeal must be from an order or judgment of the court and not from any passage or finding in the reasons for decision. That an appeal lies only against a judgment, order or decree and not against reasons for decision is exemplified by *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64; and *Ah Toy v Registrar of Companies (NT)* (1985) 10 FCR 280 at 281 - 282 and 285. Consequently, it is essential to consider in which way Mr Wyvill may be bound or affected by the orders made by Southwood J in any of the three decisions.

[295] At this point it is necessary to note that, although not closely scrutinised in the course of submissions or at the hearing of the application, Mr Wyvill

does appear to have been a party to the proceedings leading to the recusal decision and so, both bound and affected by his Honour's order dismissing that application. However, the application for an order for costs against Mr Wyvill was not heard and determined by Southwood J in the decision given on 5 June 2015, and the respondent's application for costs against him has since been abandoned. Consequently, the order made by Southwood J refusing to disqualify himself from hearing and determining the costs application against Mr Wyvill can no longer have any effect upon the applicant as there is no prospect of any order for costs now being sought against him. As earlier mentioned, that such an order for costs was originally sought against him but has since been abandoned has left Mr Wyvill in the position where he has now foreshadowed an application against the respondent for his own costs thrown away by that abandoned application. Mr Wyvill relies upon this prospect as evidencing an interest sufficient for him to be granted leave to intervene or to be joined as a party to the appellant's appeals.

[296] None of the findings in the principal decision or in the costs decision in the proceedings between the appellant and the respondent is binding against Mr Wyvill. He was neither a party to that litigation nor a privy of the appellant and hence is not bound by any of the findings – *Ramsay v Pigram* (1968) 118 CLR 271; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 per Lord Upjohn at 945.

[297] Before us counsel for Mr Wyvill acknowledged that the applicant was not bound or directly affected by the orders made by Southwood J on the principal application or on the costs decision. However, he did submit that he was indirectly affected because the criticisms against him in the learned Judge's reasons for decision in both those matters were damaging to:

(a) his reputation;

(b) his position and standing as an officer of the court which required that he should be recognised as deserving the trust and confidence of the court in his role as an advocate; and

(c) his prospects for recovering costs against the respondent for his costs thrown away by the latter's abandoned costs application against Mr Wyvill.

[298] In his foreshadowed application for costs against the respondent following the latter's abandoned costs application, Mr Wyvill will not be bound or impeded by any of the findings made by his Honour either in the reasons for the principal decision or in the reasons for the costs decision. Consequently, the third of the interests claimed by Mr Wyvill to sustain his claim for intervention or joinder, is not established.

[299] The first and the second interests said to support an entitlement to be granted leave to intervene or be joined are essentially the same. The second is one particular, but special and valuable, aspect of the applicant's general

reputation so it is convenient to consider those two bases for the intervention together.

Damage to reputation as a sufficient basis for leave to intervene or join a non-party

[300] Reputation has long been recognised as an important right and one which the law protects by a variety of remedies. The entire law of defamation provides remedies in the form of damages, or occasionally by injunction, for certain publications or statements which damage a person's reputation.

[301] There can be no doubt that the possibility that an administrative decision or a report may reflect adversely upon the reputation of some person is a factor which gives that person a right to be accorded appropriate procedural fairness before the administrative tribunal or officer. In *R v Ludeke & Ors; Ex parte Customs Officers' Association of Australia, Fourth Division* (1985) 155 CLR 513 Brennan J said (at page 528):

> There can be no universal criterion by which to determine whether a repository of a statutory power is bound to hear a person who is not directly involved in its proceedings before making an order that indirectly affects that person's interests; see de Smith, "*Judicial Review of Administrative Action*" 4th ed. (1980) p 196. Regard must be had to all the circumstances of the case, including the language of the statute, the nature of the power and of the body in which the power is reposed, the nature of the proceedings, the procedural rules that govern the proceedings (especially any provision for intervention by a person not directly involved in them), the interests which are likely to be affected, directly or indirectly, by the exercise of the power and the stage the proceedings have reached when the repository of the power learns of those interests. Generally speaking, a decision that will affect adversely a person's legal rights or his proprietary or financial interests or his reputation ought not to be taken without first giving him an opportunity to be heard provided such an opportunity can reasonably be given (*F.A.I. Insurances Ltd v*

> *Winneke* (1982) 151 CLR 342 at pp 411 – 412), even if that person is not directly involved in the proceedings which lead to the making of the decision (cf *Reg. v Town and Country Planning Commissioner*; *Ex parte Scott* [1970] Tas SR 154 at pp 182 – 187). But that is not an absolute rule.

[302] Similar observations are to be found in *J v Lieschke* (1987) 162 CLR 447 at 457 – 459 and 462 – 463. The principle recognising damage to reputation as a basis for according any person so affected appropriate procedural fairness emerges unmistakably from *Annetts v McCann* which adopted and applied the principles outlined in *Mahon* at 820. In *Annetts v McCann* it was noticed that the law and principles relating to procedural fairness had progressed very considerably over the years before that decision in 1990 because Mason CJ, Deane and McHugh JJ observed, at p 599:

> Many interests are now protected by the rules of natural justice which less than 30 years ago would not have fallen within the scope of that doctrine's protection. Thus it was not until 1969 that the common law rules of natural justice were extended to the protection of legitimate expectations … . It was even later that common law rules of natural justice were held to apply to public inquiries whose findings of their own force could not affect a person's legal rights or obligations. [citations omitted]

This progression has continued and it is a reason for caution in applying principles or doctrines which were current in the past but which have been overtaken by more recent developments.

[303] In *Ainsworth* at pp 577 – 578 the Court held that reputation is an interest sufficient to attract natural justice and that the law proceeds on the basis that reputation itself is to be protected.

[304] Those three cases demonstrate that jeopardy to reputation is a sufficient interest to require that the person affected be accorded procedural fairness before an administrative body, tribunal or officer. No doubt it was this principle which was observed when the respondent allowed Ms Lawrie to appear by counsel before his Inquiry.

[305] However the proceedings before Southwood J in the course of the judicial review were not administrative proceedings. They were judicial proceedings between identified parties, the appellant and the respondent, and were determined by the issues raised in the application for review and the response. They expanded by reason of the amendments already described which led his Honour to make findings and observations critical of Mr Wyvill and others who were not represented or heard before him.

[306] The question of whether or not Mr Wyvill could, or should, have been heard in the proceedings before his Honour once such adverse findings were being sought or contemplated is a matter which has been the subject of submissions at the hearing of this application but the answer is by no means clear nor is it necessary, for present purposes, to attempt to find it. The question for consideration is whether, in the events which have happened, Mr Wyvill should be granted leave to intervene or be joined on the hearing of the appeals because of findings made in the review proceedings but not in the original Report by the respondent.

[307] Counsel for the respondent tendered, by consent, certain affidavit evidence which he submitted was material to Mr Wyvill's application for leave to intervene or to be joined. The evidence comprised: the whole of the affidavit of Ms Bernadette Raumteen sworn 24 February 2016; certain portions of affidavits of Mr A Wyvill, of 12 November 2014 ([12] – [14]) and of 27 January 2015 ([2] to [11]); and, a portion of the affidavit of Ms Catherine Louise Spurr of 13 November 2014 ([7] and [8]). The relevance of this material, so it was submitted for the respondent, was that it showed that Mr Wyvill had learned, by various indirect means including from media broadcasts, and communications from professional colleagues, on 29 January 2015 that serious allegations, including allegations of dishonesty, had been made against him on behalf of the respondent at the hearing before Southwood J which was then in its third day (the hearing concluded on 30 January 2015). Furthermore, it was submitted for the respondent that the portions tendered from the affidavits of Mr Wyvill and from Ms Spurr demonstrated that each was aware, during the course of the hearing of the judicial review before Southwood J, that controversy over their affidavit evidence would arise insofar as they had deposed that reliance had been placed by them, on behalf of Ms Lawrie, on a letter from the respondent Commissioner of 17 February 2014 and their evidence that, before the publication of the Report, they did not expect any adverse findings to be made against Ms Lawrie. As this submission by the respondent continued, it advanced the contention that (if contrary to the

respondent's principal submission that Mr Wyvill was not entitled to appear or be heard in defence of his own interests before Southwood J) he was aware that his professional reputation had been called into question and, by not applying to be heard before Southwood J, he had thereby waived any entitlement which he may have had to be heard in defence of the allegations which were being made about him in his absence.

[308] There are several reasons why these submissions by the respondent should not be accepted. The first is that it would be quite premature to do so. At this stage the court is considering whether or not Mr Wyvill has a sufficient interest to be granted leave to intervene or be joined as a party. If he does have that interest he would be entitled to be heard and then it might be appropriate to consider whether by his conduct or alleged neglect he had waived any right to be heard before Southwood J. That question would go to the merits of whether or not any relief then being sought by Mr Wyvill should be granted, not to the question of whether he should be heard at all. Furthermore, the question of alleged waiver sought to be raised by the respondent by these submissions is one, which if Mr Wyvill does have an interest sufficient to be heard on the appeal, he should be entitled to answer, if necessary by affidavit evidence and certainly by submissions. Because at present, he is not a party with any right of audience on the merits of the issue of alleged waiver it is clearly inappropriate to determine the respondent's submission at this point. Thirdly, and significantly, the evidence relied upon by the respondent for the submission of waiver by

Mr Wyvill is, at its highest, only circumstantial. It is reliant upon inferences to be drawn in the absence of explanations but where there are, at least, arguably, inferences to the contrary which could be drawn, namely that the entire question (of whether or not Ms Lawrie and/or Mr Wyvill and/or Ms Spurr relied, and if so to what extent, upon the letter from the respondent Commissioner Lawler dated 17 February 2014) was a false or irrelevant issue, particularly in view of the observations of Southwood J made at the hearing on 27 January 2015. These, so the applicant submits, led to the decision not to tender or read any of the affidavits of Ms Lawrie, Mr Wyvill or Ms Spurr.

[309] Accordingly, none of the affidavit material sought to be relied upon by the respondent upon the present application raises any fact or circumstance which, at this stage, should determine the question of whether or not the applicant should be granted leave to intervene or be joined as a party to the appeal.

[310] For present purposes the question is not whether Mr Wyvill, had his reputation been aspersed in the course of proceedings at the original inquiry before the Commissioner, would have been entitled to be heard before the Commissioner or, for that matter, to institute proceedings for judicial review challenging the ultimate Report of the respondent. The present question is whether the reflections on his reputation in the review proceedings before Southwood J are sufficient to constitute an interest entitling him to be granted leave to intervene or be joined as a party to the present appeals.

[311] The importance and value of reputation do not, of course, change according to whether the person concerned is facing an administrative hearing or discovers that his reputation has been damaged by reason of the orders made after a judicial hearing.

Occasions for the grant of leave to intervene to a non-party

[312] The authorities dealing with intervention by, or joinder of, a non-party in an appeal recognise that on occasion damage to reputation may be a sufficient interest to justify intervention or joinder. Several cases expressly acknowledge this. They include *Harmer* where, at [35], the court accepted that reputational damage arising from a judgment or orders could, in some circumstances, provide sufficient standing for a non-party to seek leave to appeal. This was also acknowledged by Siopis J (with whom Mansfield and Gilmour JJ agreed) in *Ashby v Slipper* at [325]. It was clearly the damage to the reputation of the witness which was regarded by the Court of Appeal of Victoria as a sufficient basis for Mr Wilson to be heard in support of the appeal – *Wilson*, and *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524.

[313] In *British American Tobacco Australia Services Ltd* at first instance, grave findings had been made against a solicitor who was a witness. These findings were that he had engineered and implemented a strategy to destroy material documents of the defendant in effect to frustrate and prevent proof by the plaintiff of her claim that the defendant had knowingly sold tobacco

products fully aware of their carcinogenic properties and effects. This resulted in a decision, that the defendant's defence be struck out and judgment for the plaintiff be entered followed by an assessment of damages. Before the hearing of the appeal, the solicitor Mr Wilson, sought leave to intervene or to be joined in order to support the respondent's appeal and to vindicate his reputation in the face of findings upon allegations which had never been put to him as a witness. On the application for leave to intervene two Judges (Charles and Batt JJA) sitting as the Court of Appeal granted Mr Wilson leave to appear and be heard on the hearing of the appeal. When doing so their Honours relied on *Hokit* at 379 – 381 – see paragraph [6]. However, it is not entirely clear what status was accorded to Mr Wilson on the appeal, whether or not he was heard as an intervener, as a party, or as *amicus curiae*. In the Court of Appeal's judgment; at [528], his counsel is referred to as appearing by leave for the intervener but at [11] the Court stated that it also heard in support of the appeal argument on behalf of Mr Wilson a solicitor whose conduct was much criticised by the trial Judge, but his status does not appear to have been identified precisely.

[314] In the present case the findings against Mr Wyvill are also very grave and, as already stated, he was neither a party nor a witness. As assessed from the standpoint of the degree of adverse effect upon personal and professional reputation the findings are plainly comparable with the findings which had been made against Mr Wilson in the *British American Tobacco Australian Services* case and, for that matter, against Mr Harmer in *Ashby v Slipper*. It

is not easy to discern or to explain the different results in granting audience on the appeal in the first and refusing it in the second of those two cases. We were invited, by the applicant, to conclude that *Ashby v Slipper* was wrongly decided or that it should not be followed. By contrast, it was submitted on behalf of the respondent that *British American Tobacco Australian Services*, in so far as it granted leave to Mr Wilson to be heard on the appeal, should not be followed because (so it was submitted) it was not a fully reasoned judgment and did not have regard to all the authorities examined in *Ashby v Slipper*.

[315] As the decision to grant or withhold leave to intervene or to allow joinder by a non-party to appeal is, in the end, discretionary, the Court should not embark on a critical comparison of those cases but should rather treat them as exercises of discretion in particular instances. It may well be material that the strength of the case for the appellant in *Ashby v Slipper* was itself a factor which rendered it less important for the overall disposition of the case to hear from the non-party in support of the appeal.

[316] Also, as described in *Levy v Victoria* it is necessary, on an application by a non-party for leave to intervene or be joined to an appeal, for the applicant to show that some additional assistance or different perspective may be advanced in support of the appeal by the applicant rather than by the appellant alone. This requirement exists in order that some overall utility may come from the intervention or joinder rather than simple repetition of

the arguments in support advanced by the appellant. This is also conducive to efficient conduct of the business before the court.

[317] In support of this aspect of this application, counsel for Mr Wyvill submitted that he would be in the position to advance grounds in support of the appeal which were not open to the appellant, Ms Lawrie. The late amendments to the respondent's statement of facts, issues and contentions which had been made, first to introduce the plea of waiver, and later to introduce the plea of deception had been consented to by counsel for Ms Lawrie. No such consent was sought from or given by Mr Wyvill. The submissions which had been made by counsel for the appellant on the allegations against Mr Wyvill were succinct because of the position which Ms Lawrie adopted that waiver as a defence could not and had not been established. There was very little attempt by counsel for the appellant to address or refute the allegations which had been made against Mr Wyvill. Having regard to the manner in which the appellant's case was conducted before the learned trial Judge, it may not have been open on the appeal for the appellant to take up those matters but, if Mr Wyvill were allowed in, he would have been able to do so (and foreshadowed that intention). It follows from this that some material additional aspects of the case might well have been advanced by counsel for Mr Wyvill were he to have been granted leave to intervene or be joined on the appeal.

[318] Nevertheless, the position remains that Mr Wyvill is not bound by the order dismissing the appellant's application for review nor by any of the findings

which were made by his Honour in his reasons for decision. He remains free to pursue his foreshadowed application for costs against the respondent. The findings of waiver and the bases for them, are under challenge in the appeal by Ms Lawrie and it can be expected that these will be fully addressed and canvassed by her counsel so it is not as if those matters will go unchallenged.

[319] In all the circumstances having regard to the tests in *Levy v Victoria* and *Roadshow Films* we decided that, as a matter of discretion, this was not an occasion to grant leave to Mr Wyvill as a non-party to intervene or be joined as a party to the appeal as his presence was not necessary to enable the Court to consider fully all the relevant issues. These conclusions also led to the decision not to allow Mr Wyvill to be heard as an *amicus curiae* because the court had all the detail of the grounds of the appeals fully available and did not require further assistance to consider and determine them. The result is that his application was refused.

The Inquiry before Commissioner Lawler

[320] The history of the events leading to the appointment of the respondent as Commissioner to conduct this Inquiry, the course of the Inquiry and the adverse findings made by the Commissioner are set out in the reasons for decision of Doyle and Duggan AJJ at [107] to [170]. I accept and agree with their Honours' account of those events. Their Honours also summarise the

adverse findings made by the respondent and again I agree with their Honours' account.

The findings made by the respondent Commissioner

[321] However, for reasons which will follow, it is necessary that I set out the full extent of the findings made by the Commissioner which were the subject of examination by Southwood J. These have been set out by Southwood J in [91] of his Honour's reasons in *Lawrie v Lawler* [2015] NTSC 19 (the "Principal Decision"). His Honour identified the following adverse findings which Ms Lawrie submits were ones to which she had no opportunity to address before Mr Lawler finalised his Report and presented it to the Administrator:

1. Minister Lawrie directed her office to brief Unions NT over another community group that had expressed an interest in the site when it was surrendered to the government in 2007.

2. Minister Lawrie acted with bias over many years, forming a view in 2009 that Unions NT should be exclusively granted a lease over the site without an expression of interest process.

3. Ms Lawrie formed this view in 2009 after a meeting with Unions NT representatives and receiving a redevelopment proposal for the site, which became the application document.

4. Minister Lawrie should have ensured that her office provided this application to the Department following this meeting. This did not occur. The first time the Department received the application was 17 July 2012, by which time it was three years out of date and largely irrelevant.

5. Minister Lawrie should have made it clear to the Department that it was her intention to grant the site to Unions NT without

an expression of interest process. This should have been done in writing from either the Minister or a member of staff.

6. The Inquiry has found no evidence to suggest that this was done.

7. Years after the 2009 meeting with Unions NT, in July 2012, Minister Lawrie intervened to bring the submission to the 10 July 2012 cabinet meeting, even though Minister G McCarthy was the Minister for Lands and Planning at the time. It is unlikely that the submission would have gone to that Cabinet meeting or that the letter of offer would have been made on 3 August 2012 without Minister Lawrie's intervention.

8. Minister Lawrie maintained that this intervention was due to her concern that the incoming government could sell the site for commercial or residential high rise development and her long standing preference was to grant the site to Unions NT.

9. This concern and preference did not justify the decision that was ultimately made by Minister G McCarthy: a decision that would not have been made without Minister Lawrie's intervention.

10. Notwithstanding that Minister Lawrie may have genuinely believed that granting the site exclusively to Unions NT was in the public interest, the way she involved herself in the process was not proper and was unfair to the public and other community groups.

11. The fact remains that Minister Lawrie acted with bias in favouring Unions NT over other community groups.

12. From her time as Minister for Planning and Lands in 2007 up until the Cabinet meeting of 10 July 2012, Minister Lawrie acted in a biased way by favouring Unions NT in its attempts to be granted a lease of the site.

13. Mr Loenneker's interventions, on Minister Lawrie's behalf, with the Department in 2009 were not proper.

14. Notwithstanding her knowledge of the Northern Territory, Minister Lawrie could not have possibly known who else might

have expressed an interest in the site and what partnership arrangements that might have involved.

15. If Minister Lawrie was so biased as to be unable to allow other interested community groups to advance their proposals to be compared and properly assessed against Union NT's application, then she should have excluded herself from participating in the Cabinet decision-making process.

16. The approaching caretaker period, the potential for a change of Government and a view that this would mean the site would be used for commercial/residential high rise, does not adequately justify Minister Lawry's conduct.

17. As such I find that Minister Lawrie exerted influence over the Cabinet process and over Minister G McCarthy and his office in a way that was designed to further her view that Unions NT should be offered an exclusive lease to the site. By acting in such away, Minister Lawrie deprived the public and other community groups of an opportunity to have their claims for the site properly and fairly considered.

18. As the Minister for Planning and Lands, Minister Lawrie must also take responsibility for the actions of her senior lands advisor at the time, Mr Loenneker, whose conduct was not of the highest standards expected.

19. I find that notwithstanding Minister Lawrie may have genuinely believed that granting the site to Unions NT was in the public interest, the way she involved herself in the process was not proper and was unfair to the public and other community groups.

20. I recommend that the Legislative Assembly consider whether there has been an alleged breach of the Northern Territory of Australia *Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act* 2008, by Ms Delia Lawrie MLA … and whether under the provisions of s 5(1) it wishes to refer any alleged breach of the code to the Privileges Committee.

The appeal from the Principal decision

[322] Now it is at last possible to turn to the appeal against the principal decision. The grounds have already been set out. The first ground is that the judgment was attended by an apprehension of bias. The same or similar ground is advanced in the two other appeals. For that reason it is convenient to deal with that ground in relation to each of the three appeals together. It has been addressed in the reasons for decision of Doyle and Duggan AJJ when dealing with the appeal from the recusal decision. I agree with the reasons given by their Honours for concluding that that ground of appeal in each of the three appeals has not been established. I also agree with the reasons given by their Honours for reaching those conclusions.

Procedural Fairness

[323] The parties have accepted at all stages that Ms Lawrie was entitled to be accorded procedural fairness by the respondent when conducting his Inquiry and making his Report. She was a person whose conduct, with others, was subject to investigation and report. From the outset it was recognised by the respondent that findings adverse to her might potentially be made – *Kioa v West* (1985) 159 CLR 550 (‘*Kioa*’) per Mason J at 584 – 585.

[324] Ms Lawrie was called as a witness before the Inquiry and was represented by counsel. Through her solicitors she had access to transcripts of all the evidence received and, with her counsel, she participated in a prehearing interview with the respondent. At this interview he drew attention to a series

of documents about which it was likely she would be questioned and to various aspects of her past role in supporting proposals for the Stella Maris site to be leased to Unions NT and to her role in accelerating the consideration of a Cabinet decision to approve a lease to Unions NT without first calling publicly for expressions of interest by other parties known or expected to be interested in the site.

[325] In the judicial review proceedings and on this appeal her case is that she was not accorded the requisite degree of procedural fairness because she was not informed or otherwise sufficiently apprised of the nature and extent of the various adverse findings against her ultimately made by the respondent. The full details of these have already been set out and many are related. It will be necessary to return to the substance of them in due course.

[326] Accordingly, the principal focus of this appeal is upon the content or measure and the duty to accord procedural fairness in the course of the respondent's Inquiry. The court has been taken to many cases, which it will be necessary to examine in detail, dealing with questions about whether or not a party affected is entitled to be informed of potential adverse findings which may be made against him or her so as to be in a position to make submissions or to call evidence to refute the allegation or dissuade the tribunal from actually making those findings. The following analysis of the authorities shows that the answer to such questions about the nature and extent, if any, of the duty to give prior notice of adverse findings is that the obligation may or may not exist. When it does, it may vary and depend on

the nature of the particular inquiry, any relevant statutory provisions, the extent to which potential adverse findings may have been identified by the Terms of Reference of the inquiry, any opening statements made by the person conducting the inquiry or counsel assisting, by the disclosure of evidence or documents and by the evolution of the inquiry which may progressively narrow the focus of its investigations and so identify questions of obvious significance.

[327] Mr Davis QC for the appellant submitted that there were noticeable differences in the extent to which courts have recognised an obligation to give notice of potential adverse findings to a party or parties affected between what he termed “adversarial inquiries” on the one hand and “inquisitorial inquiries” on the other. In the former category are those administrative inquiries or investigations between contesting parties over well-defined issues, such as disciplinary inquiries before professional tribunals, or contested applications for property or other rights, such as applications for mining licences, where usually there would be a party pressing for one cause and another or others pressing for contrary causes. In those cases, so the submission developed, the very nature of the contest itself usually highlights the issues for decision and ultimate resolution, not uncommonly by a statement of issues with more or less resemblance to pleadings, or by statements by the parties of their respective positions on the controversies.

[328] The second category, “inquisitorial inquiries”, so it was submitted, was more open-ended. Typically, these were where the inquiry was to investigate what had happened in some unknown or poorly understood chain of events; or was examining past conduct of public importance with a view to isolating the causes or responsibilities for what had happened and recommending reforms. Into this broad category of inquisitorial inquiries were placed many of the inquiries conducted by well-known Royal Commissions; Coroners’ Inquests, or other inquiries into some major disaster or catastrophe such as the collapse of a bridge; a major railway accident or a financial collapse – such as the HIH Royal Commission. Many other examples could be given.

[329] The distinguishing feature of the so called inquisitorial inquiries category, so it was contended, is that they are very broad and open-ended. These may, and often do, develop an impetus of their own as various lines of inquiry are discovered and pursued so that the focus of the inquiry and the areas upon which findings are ultimately needed, may not be known, or well understood, at the commencement of the inquiry. Instead they will often develop and evolve progressively as more information is gathered and a greater understanding is acquired of factors germane to the ultimate report.

[330] In this second category of inquiries, so it was submitted, due to the often amorphous nature of the inquiry at the early stages, the parties affected by the inquiry may not know or appreciate how the inquiry may impact on them until well into its course and often not until towards the end – such as the

Coroner's inquiry in *Annetts v McCann* or, for that matter, the Royal Commission into the Mount Erebus Disaster – *Mahon*.

[331] In this second category of inquiries, so the appellant submitted, the importance and consequent need for notification of potential adverse findings to a party affected was greater. However, it was freely acknowledged by Mr Davis that the obligation could be satisfied in a variety of ways.

[332] Coming back directly to the present case, the submission for the appellant was that the Stella Maris Inquiry was of the second type and the requirement to notify the appellant of potential adverse findings against her before they emerged in the Report were never satisfied.

[333] This dichotomy between adversarial inquiries and inquisitorial inquiries bearing on the extent of the obligations of procedural fairness does have a certain degree of support in the authorities and, for that matter, in the leading texts – see "Judicial Review of Administrative Action" 5th edn (Law Book Co) by Aronson and Groves at [8.250] to [8.270]. Nevertheless, modern authority shows that it is neither possible nor desirable to adopt any rigid or formulaic approach because the ultimate question must always be whether or not the hearing or inquiry was conducted fairly – *SZBEL*.

[334] At this point it is important to note that the learned Judge recognised the existence and nature of the requirements of procedural fairness and that,

there does not appear to have been any controversy over his Honour's broad formulation of them.

[335] At [7] and [8] his Honour recorded submissions made by counsel for the appellant at the judicial review. At least so far as they relate to the nature and content of those duties and principles, there does not appear to have been any reservation by his Honour about that formulation. Nor do there appear to have been any contrary submissions on behalf of the respondent. His Honour said at [7]:

> … Mr Lawler was required to define the issues: *Annetts v McCann* (1990) 170 CLR 596 at 601 and give Ms Lawrie (1) adequate notice of any adverse findings which he tentatively reached, *National Companies and Securities Commission v News Corporation* (1984) 156 CLR 296, and (2) a further opportunity to show whether findings should not be made; *Annetts v McCann* at 608 – 609. Mr Lawler failed to do so and Ms Lawrie was left in the dark as to the risk as to the adverse findings being made and thus deprived of the opportunity to make further submissions which might have deterred him from making those findings; *Mahon v Air New Zealand*.

[336] Obviously, his Honour did not accept that Mr Lawler had left the appellant in the dark or that she was deprived of the opportunity to make further submissions but the underlying need to avoid the appellant being uninformed and deprived of the opportunity to address potential adverse findings was accepted.

[337] Generally speaking a decision maker is not obliged to expose his or her mental processes or provisional views to comment before making the

decision in question; *Alphaone* at 590 – 591 although there are exceptions where the obligation:

> Extends to require the decision maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material – *Alphaone* at 591.

[338] The question, therefore, is whether or not this was an inquiry in which advance notice, by some effective and informative means, had to be given to the appellant of the adverse findings ultimately made against her and, if so, was this done.

[339] In the course of the reasons given by his Honour, there is a very detailed review of the evidence which had been received by the Inquiry, which, upon analysis, his Honour concluded, amply satisfied the findings which were made. Counsel for the appellant submits that this approach failed to address the critical question of whether sufficient and appropriate notice of these eventual findings had been given to the appellant and that a scrutiny of the evidence which leads to upholding the findings, simply does not address the question of whether necessary anterior notice was given. However, Mr McLure SC, for the respondent, submitted that this challenge to the methodology adopted by his Honour was not warranted. The identification of the evidence and its support for the ultimate findings, he submitted, as it evolved, was known to the appellant and her advisors, so providing clear indication of the progressive focus of the Inquiry and the issues upon which

findings would eventually need to be made. He submitted that there could be no lack of appreciation by the appellant that, from this progressive emergence of evidence and the issues so identified, this pointed to the possibility of findings which would be adverse to her.

[340] One must be careful in the use of terms because in many instances his Honour found, and counsel for the respondent submitted, that the procedural progress of the Inquiry readily identified the “issues” whereas counsel for the appellant was submitting that none of this amounted to adequate prior disclosure of potential adverse “findings”. Mr Davis QC submitted that identification of “issues” did not provide the necessary notice.

[341] Again there is a danger that use of these terms may become semantic. Scrutiny of what may constitute an “issue”, and what may constitute a “finding”, does not go very far. There may be an assumption that an “issue” points incontrovertibly to a possible finding, or at least, to a narrow range of positive or negative findings – such as whether or not the minister or the Cabinet had acted on Departmental advice or, even, whether or not a particular decision or pattern of conduct was “improper”. But is not always so unless the content of the alleged impropriety is adequately identified or defined. There is a danger that such a broad term does no more than cover a wide spectrum of behaviour or conclusions without specifying how, or at what point, some of it is wrong or unacceptable.

[342] No general answer can be given to such contending submissions nor should one be attempted. The significance of these controversies will almost always depend on the context in which they arise; the nature of the inquiry being conducted; its Terms of Reference; and the manner in which critical issues have been identified, and whether that is done in a manner which reveals why a particular finding might be said to be "adverse". In this case, therefore, it will be necessary to take up the burden of outlining the context at this Inquiry; how it developed having regard to the statutory provisions; the Terms of Reference; and the manner in which the Inquiry itself was being conducted.

[343] Before doing that, however, it is timely to attend to some of the many authorities cited by both counsel bearing on these questions.

[344] *Mahon* concerned a royal commission, being an investigative inquiry of the second category mentioned which was in marked contrast to ordinary civil litigation. It was of the kind in which (per Lord Diplock p 814):

> the emergence of facts, and the realisation of what part they played in the disaster under investigation and of their relative importance is more elusive and less orderly as one unanticipated piece of evidence or other suggests to the commissioner, or to particular parties represented at the inquiry, some new line of investigation that it may be worthwhile to explore; …

and, as said (at 821):

> the second rule requires that any person represented at the inquiry who will be adversely effected by the decision to make the finding should not be left in the dark as to the risk of the finding being made

> and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.

because certain witnesses had not had an opportunity to answer criticisms made against them by the Royal Commission, ultimate relief was given by the Privy Council in *Mahon*.

[345] In *National Companies & Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 (‘*National Companies & Securities Commission v News Corporation*’) at 312, Gibbs CJ reviewed the authorities which established that the requirements of natural justice must depend on the circumstances of the case and do not require the inflexible application of a fixed body of rules but rather fairness in all the circumstances, which includes the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise and how, as in *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 444 Stephen J had said, that the rules of natural justice may also vary from case to case even before the same tribunal. Affirming, for appropriate cases, this second rule, the court held that the enquiry by the NCSC as to whether or not a person may have committed an offence against the relevant legislation so as to decide whether it should make an application to the Supreme Court for orders, was not an enquiry in which the suspected person was entitled to natural justice because in such a case there is no issue to be decided between contending parties, no finding of fact or decision of law had to be made and the procedure was inquisitorial and not adversarial.

[346] The significance of the decision for the present is the affirmation of the second rule rather than the outcome because here there is no doubt that Ms Lawrie was entitled to procedural fairness.

[347] *Kioa* also confirms that the content of the rules of procedural fairness may vary from situation to situation but in general the real question is to determine what the duty to act fairly requires in the way of procedural fairness in a particular case – per Mason J at 585. *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648 is an example of where procedural fairness was required and demanded. This is a case where a person who had been subject to a deportation order, but who had applied for a review of the deportation order and where there was a recommendation from the review tribunal that it should be revoked, was entitled to be provided with details of such exceptional circumstances as might lead the Minister to exercise his statutory power to disregard the tribunal's recommendation. It is an example of a situation where, even after an initial hearing, at a subsequent stage of investigation, questions arise upon material which has not been previously made known to the person affected, he is entitled to be apprised of that material before any ultimate decision is taken.

[348] *Annetts v McCann*, as well as being an example of the second category of cases of open ended inquiries, contains the passage by Mason CJ, Deane and McHugh JJ (at 559) saying of an entitlement to procedural fairness that:

> It also created a legitimate expectation that the coroner would not make any finding adverse to the interests which they [the parents of

> the deceased] represent without giving them the opportunity to be heard in opposition to that finding.

[349] Their Honours held that the parents had a common law right to be heard in opposition to any potential adverse finding in relation to themselves and the deceased.

[350] In *Ainsworth* at 576, Mason CJ, Dawson, Toohey and Gauldron JJ held that the duty of procedural fairness arises because of the power involved which may destroy, defeat or prejudice a person's rights, interests or legitimate expectations. What is decisive is the nature of the power and not the character of the proceeding which attends its exercise.

[351] There is a passage, upon which the appellant placed considerable reliance, regarding the recommendation by the respondent that the adverse findings which he had made against the appellant should be considered by the Legislative Assembly with a view to determining whether or not they should be referred for consideration by the Privileges Committee in order to determine whether contempt of parliament had occurred. In *Ainsworth* per Brennan J at p 594:

> A failure by the Commission to accord natural justice to a person whose reputation is damaged, by a Commission report is not 'cured' by subsequently giving the bearer of the damaged reputation an opportunity to attack the finding and to defend the reputation in proceedings before the Parliamentary Committee. Indeed, an obvious danger against which the rules of natural justice are designed to protect is the production and publication of the report that might damage a person's reputation leaving that person with no remedy save for the prospect of persuading the Parliamentary Committee to

> re-examine the matter and express for itself a conclusion contradicting the finding by the Commission.

[352] In this present case the appellant submitted, and examination of the record confirms, that it had never been put to her or suggested in the course of the Inquiry that any of her conduct might be the subject of a recommendation that the Legislative Assembly might consider whether or not the matter should be referred to the Privileges Committee for report and recommendation of adverse action. This was a potential jeopardy for the appellant which had never been signalled to her by the respondent at any stage of the Inquiry. It was one which, so it was submitted, the principle in *Ainsworth* showed that prior disclosure in order to satisfy procedural fairness was necessary.

[353] The passage in *Alphaone* upon which the appellant laid stress, has already been quoted. It is also relied upon by the respondent. Conflicting submissions were put over whether or not the adverse conclusions or findings made by the respondent against the appellant were, or were not, obviously open on the known material or could not have been expected by her. I have already indicated that subsequent authorities have warned against laying too great a stress upon such inexact distinctions and that, rather, the emphasis must be to assess the overall question of whether, having regard to all the circumstances, the hearing was fair or whether, in a real sense, there had been some practical injustice to the appellant "which is the gravamen of procedural fairness" per Middleton J in *Telstra Corporation Ltd v Smith* (2008) 105 ALD 521 at [61] and [62] – see also *Lam* at [37].

[354] I shall return to the *Alphaone* formulation, once this outline of the conduct of the Inquiry has been completed, to address the question of whether or not these findings made by the respondent were, having regard to all the circumstances, ones which were not obvious from the known material or unexpected.

[355] The court was also referred to the decision of Doyle CJ in *Chiropractors Association of Australia (South Australia) Ltd v Workcover Corporation of South Australia* [1999] SASC 120 (‘*Chiropractors Association’*) where the learned Chief Justice said at [79]:

> If an individual chiropractor were to apply for recognition, and the Corporation proposed to refuse recognition on the basis of information in its possession that was adverse to that person in particular, I consider it likely that the Corporation would be under a duty to bring that information to the attention of the applicant. In that respect I am inclined to agree with the views of the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revue v Alphaone Pty Ltd … .*

[356] Counsel for the respondent advanced a submission to the effect that, both before Southwood J and again on this appeal, the appellant had failed to discharge an onus resting upon her that, if what she asserted was necessary procedural fairness in the form of advance notice of potential adverse findings had been given to her, she must show that she would have acted differently or adduced evidence or made submissions of a different or more extensive nature than she had in fact done. In short, this was a submission that there was no entitlement to relief because no prejudice or injustice was occasioned by the absence of the notice which was said to be necessary. It

will be necessary to return to the submission after examining the course of proceedings, but McPherson JA observed in *Queensland Police Credit Union Ltd v Criminal Justice Commission* [2000] 1 Qd R 626 that such a proposition did not emerge from any of the judgments in *Ainsworth* and then went on to address the principle by saying (at 634 – 635):

> once it is shown there is a right to procedural fairness in the form of an opportunity of being heard in a proceeding, a person aggrieved is ordinarily entitled to relief against adverse consequences of being denied that right without having to establish in detail how the opportunity would have been made use of. The position may, in some instances, be different where it is shown that the opportunity even if granted, would in fact or law have been of no avail. In practice, however, cases of that kind are, for the reasons referred to by Megarry J in *John v Rees* [1970] Ch 435, at 402 necessarily rare. Insofar as they turn on onus of proof or persuasion, they are in substance an appeal to the discretion of the court to refuse relief on the ground that granting it would be futile. In the present case there is no reason for supposing that use of the opportunity which was withheld in this instance would have had no perceptible impact on the conclusion or remarks, or on the form in which they were expressed, in the portion of the Report complained of; or that the plaintiff would not have made use of the opportunity if it had been presented. Indeed, it is only on being afforded the opportunity that the plaintiff would have been alerted to the need to take the requisite advice that would have enabled it to decide whether or not it was worth availing of the opportunity of being heard.

Pincus JA and Derrington J agreed with those reasons.

[357] Another example of the need to notify a person affected of a potential adverse decision of an administrative tribunal is *Victims Compensation Fund Corporation v Nguyen* (2001) 52 NSWLR 213. In that case Mr Nguyen had been awarded an amount of compensation by the Director of the Tribunal under the *Victims Support and Rehabilitation Act* 1996 (NSW) but appealed

to the tribunal about the amount of the award and the appeal was dealt with on the papers. Without hearing from him further the tribunal reduced the amount of compensation. That order had been set aside by the District Court and the *Victims Compensation Fund Incorporation* then applied to the Court of Appeal for *certiorari* to quash the decision of the District Court. The application failed. The Court of Appeal held unanimously that the obligation of procedural fairness required that the tribunal not set aside the determination and award less compensation than previously awarded without first adverting to the possibility that this might happen. After acknowledging that procedural fairness does not normally require the decision maker to disclose his or her thinking processes or proposed conclusions and referring to applicable authorities including *Chiropractors Association* at [87] and *Alphaone* at 590 – 591, Mason P addressed, at [44], the proposition that Mr Nguyen had full opportunity to place whatever material he wanted to place before the tribunal and that he had availed of this by his written submissions and then said:

> this finding does not, however, foreclose the issue in the claimant's favour. The dictum of Doyle CJ quoted above [*Chiropractors Association Australia (SA) Ltd*] reminds that the scope of an opportunity to make submissions may depend on the issues reasonably perceived as being 'in the ring'… when it came to procedural fairness a possibility of such an outcome, was not in contemplation until somebody raised it…

[358] Observations made in that case are also relevant to the respondent's submissions about onus because, with the approval of the other members of the court, Mason P also said at [37]:

> the obligation of procedural fairness is concerned with providing a person whose rights are potentially affected in a matter with the *opportunity* to deal with relevant issues. A party's failure to make proper use of that opportunity is not the concern of this branch of the law; *Alesch v Mauntz* (2000) 203 CLR 172 at 185 [38] (Kirby J), re *Minister for Immigration and Multicultural Affairs Ex Parte Miah* (2001) 75 ALJR 89; 179 ALR 238 (at 906) [99]; 260 [99]) (Gaudron J).

[359] One of the adverse findings made by his Honour against the appellant was that, because of her long support for the cause of Unions NT to obtain a lease over the Stella Maris site, she was under a conflict of interest and had a long standing bias in favour of the Unions' cause such that she should not have participated in promoting it to Cabinet, or for that matter, participated in the Cabinet decision to approve the grant of the lease. No attention was given to identifying the elements of "bias" in such a context or to examine the effects of adherence by a government minister to government policies. On the meaning of bias there is the explanation of Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 532:

> The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

and, further at 535 – 536 [86] their Honours explained that there is nothing irregular or unlawful about a minister taking a different view to a tribunal whose decision he was reviewing and which he had power to disregard, saying:

> The fact that the Minister disagreed with the decision of the Tribunal and ultimately decided to exercise his own powers in such a way as to produce a practical result different from that which followed from the Tribunal's decision, does not mean there was an abuse of power. The fact the Minister's powers extend to enabling that to be done is simply the consequence of the legislative scheme. There is nothing in the scheme which obliges the Minister to defer to the Tribunal, or to refrain from giving effect to his own opinions and judgment … .

[360] In the same vein it has been held that a minister may take a wide range of views and considerations into account when making an administrative decision; even those favouring a particular political policy which the minister favours. *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 ('*Hot Holdings*') was a case dealing with allegations of perceived bias by a minister making a decision concerning a mining tenement when advice to the minister had come from a departmental officer who, unknown to the minister, had a financial interest in the decision about the tenement. There was no suggestion that the minister himself had any such interest or was aware of the officer's interest or acted otherwise than honestly in the exercise of his own judgment. The earlier finding by the Court of Appeal of perceived bias was reversed. In the course of their reasons Gaudron, Gummow and Hayne JJ said at [50] (page 455):

> Further, the proposition is one which may mask the making of important assumptions about what are the interests which a particular decision-maker may properly take into account in reaching a decision. There may be cases in which a decision-maker, especially a Minister, may properly have regard to a wide range of considerations of which some may be seen as bearing on such matters as the political fortunes of the government of which the Minister is a member, and, thus, affect the Minister's continuance in office. It has been said that 'the whole object' of a statutory provision placing a power into the hands of a Minister 'is that he may exercise it

> according to government policy'; Wade and Forsyth, Administrative Law 8th edn [2000] p 464. It would be wrong to assume that in every case a decision-maker can only act if he or she has the same level of independence and security as a judge and, in that sense, has nothing to gain or lose from a decision made.

[361] Nevertheless, the need for unfairness to operate or emerge as result of the alleged breach of procedural fairness is essential before intervention by a court over the administrative decision may occur. One example of this is *Lam*. That is a case where a person who was subject to the prospect of deportation submitted reasons why he should not be deported including the adverse effect which such an order would have upon his two young children. His submissions were acknowledged by a departmental officer who advised that contact would be made with the carers of the children to assess the position. That never occurred and the deportation order was made, leaving Lam contending that there had been a breach of procedural fairness by the failure to communicate with the carers of the children when it had been represented to him that would be done. His challenge failed. The court decided that when a public authority represents that a particular procedure will be followed that may, but would not necessarily, affect the content of the requirements of procedural fairness. Before a breach of those requirements can be established it is necessary to show that the procedure actually followed was unfair, not that an expectation engendered by representation has been disappointed.

[362] This decision was the centrepiece of the submission for the respondent that this appeal should fail because no unfairness to Ms Lawrie had been or

could be demonstrated because she had had full opportunity to put all the submissions to the respondent that she wished and had been aware of the issues which were the focus of his Inquiry. An examination of the appellant's contentions in this regard follows later.

[363] An extensive examination of the rules of procedural fairness was undertaken by McClellan J in *Hall v University of New South Wales* [2003] NSWSC 669 ('*Hall*'). This was a case brought by a senior university medical research consultant seeking relief against the publication of a report of a university investigation into complaints about his research and the report of the university council following an inquiry. In [68] McClellan J identified a series of elements of the right to be heard which vary in particular cases but which would generally include some or all of:

> Notice of various matters … including … the subject matter (*Kanda v The Government of Malaya* [1962] A.C. 322 and 377) and potential adverse consequences of the decision (*Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282; *Roos v Director of Public Prosecutions* (1994) 34 NSWLR 254; *Powick v Commissioner Corrective Services* (1996) 87 A Crim R 565 (NSWCA); *Dixon v Commonwealth* (1981) 55 FLR 34 at 41 … disclosure of any adverse conclusion not obviously open on the known material; see *Commissioner for ACT Revenue v Alfaone Pty Ltd* (1994) 49 FCR 576 590-591.

[364] But his Honour acknowledged that appropriate measures will depend upon the circumstances of the case [76] and, significantly for this Inquiry and especially because of the respondent's letter to the appellant's solicitors of 17 February 2014:

> There will be occasions when a representation by an administrative decision maker is breached, in circumstances which render the process unfair and the intervention of the court is justified. See *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators Association and Another* (1972) 2 QB 299; *Cole v Cunningham* (1983) 49 ALR 423.
>
> However, it could not be the case that a representation that a hearing will be conducted in a particular manner cannot thereafter be departed from. Provided the hearing process ultimately adopted is fair there is no occasion for the court to intervene. There is no occasion for defining a "legitimate expectation" that the Inquiry will only proceed in the manner originally indicated: see *Attorney-General for New South Wales v Quin* (1990) 170 CLR 1; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 173 CLR 273. [298]

[365] The question of what relief should be granted by the court in circumstances where there has been a breach of procedural fairness at an inquiry, by denying a party affected notice of potential adverse findings or the nature of the adverse findings which might be made, is addressed in *Brinsmead v Commissioner, Tweed Shire Council Public Inquiry* (2007) 69 NSWLR 438 (*'Brinsmead'*).

[366] This was a case where a solicitor examined by the Inquiry had given evidence and in the ensuing report the Commissioner had made a series of adverse findings against the solicitor including findings that he attempted to mislead the Inquiry by offering a series of lies; that the solicitor ordained and fashioned responses of other witnesses which were lies, oversights, misinformation and deception; that he was not honest or had integrity and that he deliberately gave false evidence. Mr Brinsmead sought declarations that the relevant findings were made without according him procedural

fairness, that the Commissioner was not entitled to make any findings or express a conclusion or opinion that he had engaged in criminal or professional misconduct, and a declaration that the findings made without, or in excess of jurisdiction, were a nullity. At the hearing, counsel for the respondent acknowledged that notice of the potential adverse findings had not been given to Mr Brinsmead and that therefore he was entitled to relief but no more than a declaration that the report was arrived at without according him procedural fairness. That contention was rejected. Price J held at [50] that he was entitled to a declaration of invalidity in reliance upon *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125. The court also held that the statutory powers of the Commissioner under the relevant legislation did not include the power to make findings of criminal conduct or professional misconduct being confined to enquiring, reporting and, in cases of breach of the law, communicating with the appropriate authority [30]. However the court held that Mr Brinsmead was not entitled to a declaration that the entire report was invalid but rather that particular passages in it which contained the adverse findings against him, were invalid and made a declaration in those terms specifying that those passages were a nullity (for the details of the relief see [53]). On the basis of this decision, if Ms Lawrie were to succeed, a suitably fashioned declaration directed specifically to the invalid findings would therefore be the appropriate remedy.

[367] Counsel for the respondent placed reliance on the decision of Wilcox J in *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 19 FCR 494 (‘*Bond (No 2)*’) particularly upon the passage at 511 cited below. The respondent submitted that, so long as the focus and subject matter of the inquiry is clear and the issues defined, there is no obligation on the tribunal to provide a party affected with advance notice of any tentative adverse findings which may be under contemplation. The passage at 511 is:

> Notwithstanding the fact that the matter is not mentioned in *Mahon*, or in *Moore* [*R v Deputy Industrial Injuries Commissioner; Ex Parte Moore* [1965] 1 Q.B 456], it should, I think, be accepted that there are cases in which some specification of the issues is necessary if an inquiry is to be fair. A person potentially affected by the outcome of the inquiry is entitled to understand the nature of the inquiry and the issues being investigated; otherwise meaningful participation becomes impossible. The nature of an inquiry, and the relevant issue or issues, is often self-evident; but upon some occasions the document establishing an inquiry is couched in such broad terms that further information is necessary. Having regard to the width of the Tribunal’s substantive powers, this situation may occur in ’an inquiry’ under s 17C of the *Broadcasting Act*. In such a case fairness requires the Tribunal to take such steps as may be necessary to identify the subjects to be addressed. Any such refinement of the subject-matter of the inquiry can, and should, be framed in terms of issues and relevant powers; the Tribunal indicating no view, however tentatively, about the relevant facts or the likely outcome of the inquiry.

[368] For reasons set out on pages 511 and 512 Wilcox J said, referring to the observations of Gibbs CJ in *National Companies & Securities Commission v News Corporation Ltd* at 316:

> … there is no reason to think that the commission will not give to the respondents adequate notice of any adverse conclusions which it has tentatively reached, or of any criticism which it tentatively proposes to make …

such notice need not always be disclosed to the person potentially affected. In the circumstances of that particular inquiry before the ABT Wilcox J was of the view that the terms of the inquiry and of the statute sufficiently identified the issues and that further particulars being demanded by the Bond interests need not be given. It will be apparent from this that the question of whether such particulars, identification of issues, or notice of adverse findings in contemplation, are required and will depend very greatly upon the type of the inquiry, the enabling legislation, the Terms of Reference and the manner in which the inquiry is being conducted. All that is now emphatically established.

[369] Mr Davis QC for the appellant submitted that this decision of Wilcox J in *Bond (No 2)* could readily be seen to be explained on the basis that the legislation giving rise to that ABT inquiry identified distinctly the ultimate issue and the finding which would need to be made if the Tribunal were to exercise its powers to remove or restrict the broadcasting licences involved. Mr Davis QC did this by pointing to the subsequent decision of *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 (‘*Australian Broadcasting Tribunal v Bond’)* at p 381 where s 88(2)(b)(i) of the *Broadcasting Act* is set out. It specified that the Tribunal may suspend or revoke a commercial licence if it is satisfied that the licensee is no longer a fit and proper person to hold the licence. So the vital question for decision was identified by the legislation and needed no greater exposition to inform the parties concerned what was the vital decision of fact which conditioned

the exercise of the Tribunal's other powers. This explains Mr Davis's submission that the two *Bond* decisions, although involving administrative inquiries, are within the first of his two categories of cases namely, the "adversarial" type or category where the contest itself defines and supplies notice to the parties of the ultimate finding, positive or negative, to be made.

[370] The complexities of all these considerations and whether they are essential as opposed to advisable or unnecessary in any particular case has not escaped attention by law reform bodies. The Australian Law Reform Commission in its report "Making Inquiries: A New Statutory Framework" [2009] A.L.R.C. 111 has addressed many of these related issues in much detail drawing on experience in other comparable jurisdictions to recommend an *Inquiries Act* to provide greater certainty. Its report, of course, does not constitute the law nor has it yet been acted on but the A.L.R.C.'s attempted summary of the existing requirements is at least helpful in drawing attention to considerations which have emerged from the case law to date (see 15.26 – 15.31).

The Stella Maris Inquiry

[371] The Terms of Reference for this Inquiry were specified by the Administrator on 18 December 2013 and required Mr Lawler to inquire into and report on the following matters:

(1) The circumstances of the purported decision of the then Minister for Lands and Planning to grant a lease over Lot 5260 Town of Darwin known as Stella Maris (the site) to Unions NT on or about 3 August 2012.

(2) The public policy and public accountability considerations involved in making the purported decision to grant a lease of the site for Unions NT without putting the matter out for expressions of interest or public tender.

(3) The performance of relevant persons, including the then Minister for Lands and Planning, in carrying out their obligations under the relevant regulatory regime and ensuring the proper accountability processes were applied in the tenure management of the site.

(4) The adequacy and effectiveness of the regulatory regime in ensuring transparency, good governance and community input into the process of leasing or granting Crown land.

(5) The provision and accessibility of relevant information to affected stakeholders and the public in relation to the proposed and purported decision to grant the lease of the site to Unions NT.

(6) Any measures that might help ensure transparency, good governance and community input into the process of leasing or granting Crown land with particular reference to purported decision to grant the lease of the site to Unions NT.

(7) Any other suggestions or recommendations the Commissioner considers relevant to the above matters.

[372] These Terms of Reference were, therefore, of the inquisitorial kind which meant that the focus of the Inquiry and the ultimate issues would depend upon the evolution of the Inquiry and the evidence such as instanced in *Mahon* and *Annetts v McCann*. It was not one of those inquisitorial inquiries by which the Terms of Reference or the ultimate factual issue was identified by the legislation or the inquiry terms themselves such as *Bond (No 2)*or the *Australian Broadcasting Tribunal v Bond* or, for that matter, like the University disciplinary inquiry the subject of *Hall*.

[373] There are various dimensions to these Terms of Reference which required the Commissioner to address different aspects. Obviously the first term required him to carry out an investigation into the history and circumstances of the decision which, largely, called for an investigation of the historical facts. The second and fourth Terms of Reference required the respondent to undertake an evaluation of various policies and ministerial and departmental practices from the point of view of the general public interest, presumably in order for the Commissioner to make recommendations about the effectiveness and adequacy of existing regimes and practices. While largely calling for recommendations about the adequacy and utility of existing regimes, in order to consider future alternatives, these two Terms of Reference also support investigations and findings which are critical of the manner in which the decision to grant this lease was made and those

responsible for ensuring good governance. The fifth Term of Reference is similar in character to the second and fourth. The sixth term calls for recommendations for improvement of existing practices but directs attention to whether or not the decision to grant the lease to Unions NT was transparent, and an exercise of good governance involving community input.

[374] However, it is the third Term of Reference which most conspicuously requires scrutiny of the behaviour of relevant persons and requires the Commissioner to report on whether or not they carried out their relevant obligations under the relevant regulatory regime and whether, in performing those obligations, they ensured proper accountability. This obviously calls into question and requires scrutiny of the role of the ministers and others responsible for the decision including the appellant.

[375] These Terms of Reference clearly support general findings about the decision to grant a lease of the Stella Maris site which address the wisdom and utility of that decision. It would have been open to the respondent, if he had been of that opinion, to report that the decision was inadvisable; controversial or even bad. He could have reported that it was hasty or made because of the particular political sympathies or allegiances of the former government, or in the face of contrary recommendations from the Department of Lands and Planning. Any such finding would have been within the scope of the Terms of Reference and, more significantly, would have been presaged by the progress of the Inquiry; the pre-hearing interview with Ms Lawrie; the evidence taken from other witnesses and the questions

asked of Ms Lawrie during her oral examination. It was these types of prospective findings which were addressed by Ms Lawrie's counsel and by her solicitor in the letter to the respondent of 14 February 2014.

[376] However, the findings made and the recommendation by the respondent that the Legislative Assembly might wish to consider whether the appellant's conduct should be examined by the Privileges Committee went much further and ascended to a far more serious dimension. The findings amounted to personal fault by the appellant, involving serious impropriety, biased conduct, and conduct unfair to the public. There was the clearest intimation that her conduct might amount to contempt of the Legislative Assembly and be punishable by the House. Those findings elevated the gravity of the conduct from being ill-judged, unsuitable, unwise or even foolish, to serious personal misconduct. Why and how that dimension was invoked was never foreshadowed or even explained later by the Report. The appellant was never informed that her conduct was being assessed at that higher level of gravity or how it was to be so measured.

[377] The Terms of Reference of this Inquiry were quite broad and open-ended. They did not, either of themselves or by reference to any statutory or other criteria, identify any particular issues of fact which the Commissioner was to address or determine. Under the third Term of Reference the performance of certain persons was made subject to scrutiny but there was no direct identification of any relevant legislation, standard, or obligation by which that performance should be assessed. Indeed the obligations were not

specifically identified nor was the regulatory regime. In such circumstances the Terms of Reference left for identification and assessment by the Commissioner the performances of persons to be identified and how they carried out their obligations. It must follow that only if the relevant obligations, the regulatory regime and what were proper accounting processes are all identified so that any standard, norm of conduct or test of compliance with them can be found would it be possible for the respondent to determine whether or not the conduct of the persons under examination fell short. In other words, a requirement to assess the performance of relevant persons in carrying out certain obligations required the Commissioner to measure that performance against identifiable standards. If there is no norm or standard of conduct identified against which the performance of the persons investigated or their compliance with their unidentified obligations is to be assessed, then any observations or findings about their conduct or performance, couched in terms of impropriety or failure to perform an obligation, can be no more than subjective opinion. They will be conclusions reached without any comparison with a relevant yardstick or point of reference.

[378] This feature of the third Term of Reference, which also exists to some degree in the second, fourth and fifth Terms of Reference (although there not so conspicuously) presented the respondent Commissioner with an additional difficult task. This was the need to identify the applicable standards of performance, the relevant obligations, and the proper

accountability processes in such a way as would then allow him to evaluate the performance of the persons under investigation against those standards or obligations. However, there is no indication, nor was the Court referred to any aspect of the respondent's Report where this task of identifying relevant norms, standards or obligations was attempted, or the standards identified. Neither did this occur in the review proceedings although it is evident that the learned primary Judge was alive to aspects of this problem for his Honour said at [120] of the findings made by the Commissioner at [91] (8), (9), (14) and (16):

> these findings are essentially expressions of Mr Lawler's opinion.

[379] They include findings that the appellant's intervention in the decision process was due to her apprehension that a new government might sell the site for high-rise development; that this concern and her preference for the site to go to Unions NT did not justify the decision ultimately made; that the appellant could not have known who else might have expressed an interest in the site had an invitation for public expressions of interest been made; and that the impending caretaker period and potential for a change of government and the apprehension that the site might be granted for high rise development did not justify the appellant's conduct. Clearly, these are findings expressing matters of opinion by the respondent but, one may ask, upon what standards of comparison or obligations are they founded because, otherwise, they are merely subjective views. They are still serious criticisms

of the appellant's conduct without identifying any level of performance, particular obligation or standard which the appellant failed to observe.

[380] This present appeal is not against any particular finding or findings of the respondent, but rather is confined to examining whether or not procedural fairness was accorded in the course of the Inquiry. However, if findings are to be made on a subjective basis without identification of any obligations or standards neglected or disregarded, how can the person whose conduct is under scrutiny know and address the contemplated criticism?

[381] In this case the appellant fully addressed the facts which were being canvassed under the first Term of Reference and provided her explanations for why she, the Cabinet and her colleagues acted as they did. But at no point was it made clear on what grounds, or for what reasons, that conduct or those explanations were wrong or inadequate. She was not informed what was the alleged fault in her conduct or that of her colleagues or why her explanations for them were not acceptable. This was a very real inadequacy in notice to the appellant of why her conduct and explanations warranted criticism or how they fell short of proper performance of her obligations.

[382] There was no finding made by the respondent, nor any submission to this Court, that the decision to authorise the grant of the lease to Unions NT made by the Cabinet and recommended by the minister was illegal or *ultra vires*. There had been an opinion delivered to the Commissioner by his solicitor that there appeared to be grounds by which the decision could be

challenged for want of validity and set aside because of so called "*Wednesbury* unreasonableness" – *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 229 - 230 – a doctrine long recognised in Australia – *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 624 and *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. No finding was made by the Commissioner that the decision to grant the lease was void or voidable on that or any other ground nor was that pursued on this appeal. No breach of any law or regulation was alleged although it would not have been open for the respondent to make any finding on such a matter (see *Brinsmead*).

[383] It was within the power of the government of the Northern Territory to grant a lease of Crown land without first inviting applications for that lease – *Crown Lands Act* s 12(3). No examination of that power or why it was, presumably, thought to be inappropriate for exercise in this case was examined by the respondent or put by him to the appellant. However, the findings of which the appellant complains clearly proceed on the basis that this form of the exercise of the power was "not proper and was unfair to the public and other community groups" – [91] (10 and 19), and was not justified [91] (16 and 17).

[384] Again it is necessary to avoid being drawn into a scrutiny of those particular findings because to do so would be outside the grounds of this appeal. What they reveal, nevertheless, is that the respondent has rejected any possibility that what was done was authorised by Statute without identifying, either for

himself or in advance for the appellant, what features or circumstances rendered resort to the power under s 12(3) of the Act improper. It may be inferred that the respondent must have considered this aspect and rejected it by his findings that the appellant's long standing desire to have the site leased to Unions NT, and her apprehension that a failure to do so before an impending election might result in a new government making the land available for high-rise development, as an unacceptable explanation. But no notice was given as to why use of that power was improper.

[385] It is clear from the appellant's evidence, and obvious from the decision made by the Cabinet to approve this lease that this course of action, and the policy views of the appellant which it implemented, were consonant with the acceptable policy of the then government, notwithstanding that it was not recommended by the Department of Lands and Planning. She was, after all, a minister of the Crown and this was the collective decision of Cabinet in the implementation of the policy which she propounded. *Hot Holdings* (at page 455 [50]) endorses the ability of a minister or a cabinet to act in that fashion.

[386] Again, for present purposes, the Court is not concerned with the actual findings made by the respondent on this point but rather with the manner in which they were reached because there was no prior notice or disclosure to her of any grounds or circumstances assumed or relied upon by the respondent to characterise her actions or decisions in the exercise of these powers or obligations as wrong or improper.

[387] In short, the problem with the Terms of Reference and the conduct of the Inquiry, in certain crucial areas, was that the fault, neglect, or impropriety of the appellant underlying the findings made was not identified or put to her. It is true that she was aware of the evidence which was being received and had been received in the course of the Inquiry; what was asked about her role in the transaction; her long standing support for Unions NT as the ultimate lessee of the Stella Maris site; her activities in promoting and accelerating the decision by Cabinet to approve the lease; and to do so without first calling for public expressions of interest. But she was never informed or confronted with any indication of the reasons or grounds for concluding that her actions were wrong or improper or a failure of good governance except for the contention that the course of action she followed excluded consideration being given to other interests, a matter which the appellant addressed by her explanations of reliance upon government policy. That explanation was rejected but again without reference to any objective comparison of why so doing was improper.

[388] Although the Terms of the Reference and the conduct of the Inquiry by the respondent made no express reference to any actual breach of law, the final finding of the respondent [91] (20) was his recommendation that:

> the Legislative Assembly consider whether there has been an alleged breach of the Northern Territory of Australia *Legislative Assembly (Member's Code of Conduct and Ethical Standards) Act* 2008 by Ms Delia Lawrie MLA… and whether under the provisions of s 5(1) it wishes to refer any alleged breach of the code to the Privileges Committee.

[389] A breach of that Code is, by s 5(2), susceptible to punishment by the Assembly as a contempt. The Act also contains a prohibition against members being involved in conflicts or apparent conflicts between their private interests and official functions (Schedule; Part 2 paragraph 2) and requires members to be accountable to the Assembly, their constituents and the public generally (Schedule Part 2 paragraph 9) and, by paragraph 11:

> In performing official functions, members must act in what they genuinely believe to be the public interest.
>
> In particular, members must seek to ensure their decisions and actions are based on an honest, reasonable, and properly informed judgment about what will best advance the common good of the people of the Territory.

[390] Certain of the findings made by the respondent related to the appellant's involvement in the decision making process when she was "so biased" and when her involvement was unfair to the public and community groups. These have overtones of failures to comply with the Members Code of Conduct which, I infer, led to the recommendation in finding 20. It is not, of course, the function of the respondent to make any findings about breaches of the Code nor would he have been competent to do so. In this respect the limit of his power was to inquire, report and to communicate with the appropriate authority about any apparent breach of the law. If in this regard the respondent was communicating with the appropriate authority about an apparent breach of the law then his role was closely analogous to that of the CJC in *Ainsworth*. This meant that, especially when inquiring and reporting

upon apparent breaches of the law, the respondent was under an obligation to accord the appellant procedural fairness which, in such circumstances, entails informing the appellant, in a suitable fashion, that she was in jeopardy of a finding that by certain specified or identified conduct she was apparently in breach of an identified statutory or other obligation. That was never done. There was never any indication given to the appellant or to her lawyers that the respondent was contemplating a finding involving a recommendation that the Legislative Assembly might consider referring her conduct to the Privileges Committee with a view to determining whether or not there had been a breach of the Code which, if so determined, would expose her to punishment.

Whether adequate procedural fairness had been accorded by the practices adopted in the conduct of the Inquiry

[391] The respondent submits that there are several ways by which procedural fairness was accorded to the appellant. He submits that she was given notice of the issues which the Inquiry was investigating and of how they related to her conduct which was under scrutiny. The first is by the Terms of Reference which have already been examined. Additionally there were:

(a) the pre-hearing interview between the respondent and the appellant in the presence of her counsel at which she was informed of the subject matter of the investigation so far as it concerned her;

(b) the letter from the respondent to the appellant's solicitor of 17 February 2014, itself a reply to a letter from the appellant's solicitor of 14 February 2014;

(c) the evolution of the inquiry involving, as it did, the disclosure of all the evidence obtained from witnesses and other documentary evidence publically available;

(d) the questions asked of her at her oral examination.

The preliminary conference of 10 March 2014

[392] This was a conference at which the respondent explained informally to the appellant, in the presence of her counsel, the process by which he intended to conduct the Inquiry. It was, he assured her, a process involving no surprises. At this conference the respondent produced a quantity of documents, including exhibit P, (at the judicial review hearing – AB volume 2B pages 41 - 1064). The transcription of the interview appears at 2AB 449 - 463. The Commissioner explained to the appellant that the various documents that were there and then produced may be put to her during the course of her formal examination and questions asked of her about them and her appreciation of their contents and significance. Some, but not all, of those were put to her in her later examination. They included documents relating to the Community Land Grant business process as administered from time to time by the Department of Lands and Planning including the Department's standing policy manual relating to such applications. Also

included were documents relating to the Stella Maris site; the surrender of the previous lease by the Apostleship of the Sea; and notifications of interest in the site by several other organisations. The respondent also notified the appellant that she would be asked about the concept of a conflict of interest and what she understood by that. She was also told that she would be asked about the departmental recommendations to Cabinet about options to consider for the grant of a lease of the Stella Maris site. The preferred option of the Department was to call publicly for expressions of interest. She was also asked whether certain documents actually went to Cabinet.

[393] The respondent also informed Ms Lawrie that he was interested in why she was taking steps to brief Unions NT about the proposal. She was also informed that she would be asked questions about a memorandum from one of her officers, Mr Leonneker, in which he set out what he regarded to be her preference for the site to be leased to Unions NT.

[394] At the completion of the interview she was assured that the respondent did not intend to conduct the Inquiry as an adversarial process and that he was concerned about establishing the truth of past events. The transcript suggests that the interview was, on both sides, co-operative and amiable and that there were good interpersonal relations between the persons attending.

[395] Certainly this interview served to inform Ms Lawrie and her counsel of particular areas of the past transactions which the respondent intended to investigate. Having read, and re-read, the transcript there is nothing in it to

suggest that particular conduct by the appellant was thought or suspected to be improper or that there were any particular obligations which, as a Minister, she may have neglected or failed to perform. There was nothing which gave notice of any impending adverse finding or suspicion that improper conduct had been committed or what findings on particular issues, unidentified, may be open to consideration.

The letters of 14 and 17 February 2014

[396] By a letter of 14 February 2014 (also dated 13 February 2014), from the solicitors for Ms Lawrie, the respondent was notified that the firm of solicitors Halfpennys was acting for Ms Lawrie and also for Mr McCarthy, then the Deputy Leader of the Opposition and the former Minister for Lands. The solicitors had authority to accept service of any documents and requested that any enquiries of those clients be directed to the firm. The letter went on to note that the respondent had called for public submissions relating to the Terms of Reference and then set out, in general terms, their submissions of their clients' positions. The letter referred to the steps which had been taken by the Commissioner up to that date including the commencement of hearings and the taking of evidence from several witnesses without having communicated in any way with either Ms Lawrie or Mr McCarthy. Then follows the paragraph (2AB 436):

> … by proceeding like this, you appear to share the view that it is not open for you to reach any view on the evidence to the effect that either or both of our clients have been guilty of any misconduct. Given that the inquiry must be conducted in accordance with the

> rules of natural justice, were it otherwise the matter would have needed to have been approached by you very differently.

[397] The respondent replied by letter of 17 February 2014. This particular letter has been referred to repeatedly in relation to several issues concerning the Inquiry, in particular the waiver issue, and the abandoned plea by the appellant before the judicial review of reliance upon its contents. The letter addressed a number of topics including practical matters but, so far as is presently relevant the letter includes the following paragraphs:

> The conduct of the "Inquiry"
>
> The Inquiry has not at this stage engaged with witnesses who are to provide testimony other than through the formal processes under the *Inquiries Act* (NT) ('the Act'). The Inquiry is being conducted in 4 phases and we are still in Phase 2 – which is the information gathering phase. Until that stage has been completed, the Inquiry is not in a position to consider or form a view on whether there is any ground for making the findings of wrongdoing against any person or organisation. The suggestion that the Inquiry is considering making any adverse finding against either of your clients is clearly premature and without basis. For these reasons, I do not share or accept your view that it is not open to the Inquiry ultimately to make findings, some of which potentially could be adverse, in relation to any person or organisation, relevant to the Inquiry's Terms of Reference.
>
> The preliminary evidence gathering stage will be concluded and the relevant materials examined. Then and only then will I be in a position to determine whether there may be grounds to make any adverse findings against any person or organisation. Should that eventuate, I will provide any such person or organisation with notice, all relevant materials, and opportunity to make submissions in relation to the matter.

[398] Notwithstanding that Ms Lawrie formally withdrew any plea of reliance upon the assurances given by the respondent in this letter of 17 February

2014, it remains significant in several important respects. First, it is a recognition of the obligation by the respondent and an expression of his intention to provide any person against whom there may be grounds to make adverse findings with notice of all relevant materials and an opportunity to make submissions in relation to the matter (presumably upon the topic of the potential adverse findings). That is some indication of what the respondent took to be his obligations to accord to the appellant and others appropriate procedural fairness. Second, it is an express statement that at the stage of the Inquiry on 17 February 2014 there had been no occasion yet to consider whether any adverse findings against any person might or should be made. A clear implication from this is that, if there were to be notice of the kind which the Commissioner contemplated, it would be provided later.

[399] As already noted, the decision in *Lam* stands for the proposition that even if some assurance were given by an officer conducting an inquiry that certain subsequent procedural steps or investigations would be taken, but in the course of events, they were not, this does not necessarily mean that there has been a denial of procedural fairness. There may be reasons why the assurance given or the inquiries foreshadowed were not undertaken. Even if not, the failure to do so may not have occasioned any unfairness.

[400] The position of the respondent in this appeal is that the subsequent evolution of the Inquiry made the provision of such notice unnecessary. Alternatively, that the measures adopted of directing the attention of the appellant to "issues" under examination and the provision of evidence as well as

affording her a full opportunity to offer any explanations or evidence which she desired to advance meant that procedural fairness was accorded.

[401] It remains the case, however, that at no time after 17 February 2014 did the respondent expressly indicate to the appellant or to her advisors that there were grounds to make any adverse findings against her. Neither did he provide her with any relevant materials or opportunity to address such potential adverse findings, whether those which were ultimately made or any other which may have been under contemplation. No explanation for this inactivity nor any justification for departure from the assurance given in the letter of 17 February 2014 was given by the respondent in the course of the Inquiry or in his ultimate report. Nor was counsel for the respondent able to submit what the reasons for such a course of conduct were, apart from his submission that the subsequent evolution of the Inquiry rendered it unnecessary to do more.

[402] As already noted, the appellant does not assert any reliance upon the assurances contained in the letter of 17 February 2014. How and why the withdrawal of her plea of reliance upon that letter came about is explained elsewhere in these reasons. Nevertheless, the obligation upon the respondent to accord procedural fairness arose and continued quite independently of that letter and the letter is consistent with recognition by the respondent of such an obligation. It is, therefore, curious that no explanation has been given by the respondent for not adhering to his foreshadowed course of procedure.

[403] The letter prompts another question, namely: if the stage at which the possibility of making any adverse findings against any person had not arisen by 17 February 2014, when did it arise? There is nothing to identify with any confidence when that stage was reached. It seems very unlikely that it had been reached at the time of the respondent's interview with Ms Lawrie on 10 March 2014 because no warning or specific advertence to any such prospect was raised in the course of that interview. In considering that inference I do not overlook the submission by counsel for the respondent that, by implication, this third stage of the Inquiry had been reached on or before 10 March 2014 because the respondent had specifically provided Ms Lawrie and her counsel with the many relevant documents at that interview and indicated that she would be questioned about them.

[404] There are passages in *Annetts v McCann* at 600 – 601 (in the reasons of Mason CJ, Dean and McHugh JJ) and at 610 (in the reasons of Brennan J) to the effect that the obligation to give notice so as to afford an affected party an opportunity to address the possibility of a potential adverse finding only arises when the issues have crystallised to the extent that the possibility of making such a finding has been identified and recognised or, as Brennan J observed:

> The coroner's duty to allow a person to make such a submission arises only when the coroner has reached the stage of contemplating the making of an unfavourable finding against that person. It is only at that stage that the coroner is bound to give that person notice of the possible finding and to allow that person an opportunity to submit why the finding should not be made.

[405] This leads to an inference that the prospect of making adverse findings against the appellant, of the kind ultimately made by the respondent, is most unlikely to have arisen until she herself was examined before the Commissioner and completed that examination on 14 March 2014 (transcript pp 51 – 127 in 1AB). Again, no express notice of any such adverse finding was then, or subsequently, given. Counsel for the respondent submitted that it is unnecessary to determine when that stage had been reached because anterior provision of the requisite notice by the identification of issues would be sufficient and that this was provided by the manner in which the Inquiry was conducted.

[406] This is a convenient point to return to the observations of his Honour and the submissions of counsel for the respondent that procedural fairness was accorded in this case in the manner by which the "issues" were identified and that this identification was clear and sufficient notice to the appellant that adverse findings against her on these "issues" might be made.

[407] As already noted his Honour accepted the submission that Mr Lawler was required to define the issues [7]; that it was apparent from the closing submission of Ms Lawrie and Mr Wyvill that they understood what the issues were [9]; that in most cases a decision maker is not required to define issues which are obvious to a party who may be affected by any decisions [11]; that the issues in the Inquiry were very clear and must have been obvious to the appellants [12]; that the documents given to Ms Lawrie at the interview with the respondent on 13 March largely and clearly defined the

issues [14]; that it was only necessary to see what occurred to understand the issues [14]; that during her evidence the respondent painstakingly went through the documents and asked Ms Lawrie questions about the issues and that the documents defined the issues [14]; Ms Lawrie and Mr Wyvill elected to deal with the issues which obviously arose by putting forward a considered and well developed justification for the appellant's conduct [15]; and that, again, the facts of the narrative history defined the issues [140].

[408] Nevertheless, and with respect, I cannot accept that the so called identification of these "issues" amounted to notice of the potential for adverse findings to be made against the appellant of the kind which were made. In the context in which these references to "issues" is found the term is used in a manner to describe areas or topics of the investigation which were considered important for inquiry and report. This is an orthodox use of the word "issues" but in this setting it does not connote the identification of any point or points of controversy upon which rival contentions have been advanced, and which need to be decided one way or another to reach a finding within the scope of the Terms of Reference, as they may have been developed or evolved in the course of the Inquiry. This is perhaps best illustrated by example. As noted there is a considerable degree of overlap and inter-relationship between the 20 findings made by the Commissioner which were identified by Southwood J at [91] of his Honour's reasons. However, those various findings can all be said to emerge from investigation of the following "issues" by the respondent:

(a) the nature and extent of the appellant's long standing support for the view that the Stella Maris site should be the subject of a lease to be granted to Unions NT rather than leaving open the possibility that some future administration might decide to make the site available for high rise development;

(b) the role of appellant in promoting the cause for the grant of a lease of the Stella Maris site to Unions NT, without first calling for public expressions of interest in the site, and the steps which she took to accelerate consideration of the proposal by Cabinet;

(c) her (and Cabinet's) disregard of the recommendation of the Department of Lands and Planning to call for public expressions of interest;

(d) the role of her officer Mr Wolf Loenneker in making clear to her colleagues her preference for the site to be leased to Unions NT notwithstanding the recommendations of the Department of Lands and Planning;

(e) her participation in the deliberations of Cabinet which led to the decision to approve a grant of a lease to Unions NT when she had such a long standing strong opinion in favour of the proposal.

[409] There can be no doubt that these "issues" or what I prefer to term as "topics" were well identified and obvious to the appellant and to all

concerned from an early stage in the Inquiry. I do not doubt that their existence, and the importance which the respondent attached to them for the conduct of the Inquiry, were fully appreciated by the appellant from the outset. Most of them were indeed addressed and defended in the letter from the appellant's solicitors to the respondent of 14 February 2014 which has already been mentioned. This identification of "issues" however falls well short of notice to the appellant that her undisputed role in them amounted to failure or inadequate performance by her in carrying out her obligations under the regulatory regime or ensuring that the proper accountability processes were applied in the tenure management of the site (Terms of Reference par 3). The reasons for this have already been examined.

[410] The identification of these "issues" or "topics", does not foreshadow any impropriety because no standard of conduct or departure from a norm has been identified or suggested which would warrant such a conclusion. As earlier stated the failure to specify any element of fault in the conduct of the appellant, and especially the basis for any such fault, left her "in the dark" about the imminent potential of the respondent making adverse findings or observations about her conduct in relation to those matters.

[411] Further, at no stage during the course of the Inquiry did the respondent intimate to the appellant that:-

(a) her long standing view that Unions NT should be granted a lease over the Stella Maris site without an expression of interest process

amounted to improper bias, or that the appellant acted improperly by not making it clear to the Department of Lands and Planning that it was her intention to grant the site to Unions NT without an expression of interest process, and (by implication) that this was a failure of good governance and a failure to ensure that proper accountability processes were applied;

(b) the actions of the appellant in bringing the proposal for the grant of a lease to Cabinet was an improper intervention by her;

(c) the way that the appellant involved herself in the process was not proper and was unfair to the public and other community groups;

(d) Mr Loenneker's interventions on the appellant's behalf were not proper;

(e) the appellant was so biased that she should have excluded herself from participating in the Cabinet decision making process; and

(f) he proposed recommending that the Legislative Assembly consider whether the appellant had breached the Member's Code of Conduct and whether it wished to refer any breach which allegedly occurred to the Privileges Committee.

[412] These findings had not been preceded or accompanied by procedural fairness sufficient to alert the appellant to the prospect that such findings or recommendations might be made. She did not have an opportunity to address

that jeopardy and to adduce additional material or submissions that might have dissuaded the respondent from making those findings. For example, no attention had been given to identify criteria by which impropriety or failure of performance might be judged – a matter which deserved attention if such findings were in contemplation.

[413] There still remains the question of whether particular advance notice of the prospect that these adverse findings might be made by the respondent was unnecessary because, taken in the complete context, the possibility of such findings was obviously open on the known material or could not reasonably be regarded as having been unexpected by the appellant – *Alphaone* at 591. This proposition was relied on heavily by counsel for the respondent who submitted that, having regard to the "issues", or as I prefer to call them the "topics", which had been identified by the respondent and the very purpose of the Inquiry it was obvious that the appellant's role in the decision to grant the lease of Stella Maris was open to criticism especially in relation to her conduct in the various areas identified. So much, in a general way, can be accepted but the submission does not meet the requirement of putting the appellant on notice of how or in what respect her conduct was to be regarded as improper; biased; contrary to the relevant regulatory regime; unfair to the public and improper; or that there may be occasion for the Legislative Assembly to consider whether or not to refer alleged breaches of the Members Code of Conduct to the Privileges Committee. As already

mentioned the elements of fault supporting those findings were never identified.

[414] For reasons which can be found, among other places, in *Brinsmead* the Commissioner was not empowered to make any finding of a breach of the law or of contempt of the Legislative Assembly. Recommendation 20 reveals that he considered that his findings may amount to matters which the appropriate authority might wish to examine in order to consider punishment. That shows the gravity and significance which he attached to his findings of impropriety and lack of performance of obligations recorded in his other findings. It puts them into a category of gravity well beyond misjudgement, lack of wisdom, or decisions which are divisive or unpopular.

[415] Accordingly I consider that there was a failure to accord procedural fairness to the appellant before the Inquiry and in the preparation of the respondent's Report by the failure to provide her with any adequate notice or information of the findings made against her of impropriety, breach of obligation and failure to carry out her obligations under the relevant regulatory regime, acting in a biased fashion and participating in the Cabinet decision to grant the lease of the Stella Maris site and in recommending that the Legislative Assembly consider whether there has been a breach of the Legislative Assembly (*Members' Code of Conduct and Ethical Standards) Act*. It remains to consider whether these failures to accord the appellant procedural fairness had been waived.

Waiver

[416] Having concluded that the respondent Mr Lawler had accorded all necessary requirements of procedural fairness to Ms Lawrie, Southwood J went on to address the alternative defence. This was to the effect that, to the degree if any, by which the respondent had failed to accord the appellant procedural fairness, any obligation for him to do so, or any right by the appellant to be accorded that procedural fairness, had been waived [142] and such failure, would not provide any basis for a challenge to the ensuing report.

[417] This controversy over whether or not the appellant had waived any entitlement to procedural fairness which the respondent had failed to accord to her occupied a substantial time and part of the preparations for the hearing and resolution of the judicial review proceedings. It gave rise to great contention and grave allegations against the respondent and particularly her counsel and solicitor. In the end the learned Judge held that if, contrary to his earlier conclusion there had been any failure by the respondent to accord adequate procedural fairness to the appellant then that had indeed been waived. That finding is challenged by the appellant but has been defended with the same vigour and support for the allegations of misconduct by the respondent on this appeal as maintained at the judicial review hearing.

[418] The first question which, therefore, arises is whether or not a party affected by an administrative inquiry or decision can waive compliance or full

compliance with the hearing rule, as in this case, the requirement to be notified sufficiently of the extent of the Inquiry into his or her conduct so as to be able, adequately, to give or make answer in a fashion appropriate in the circumstances.

[419] Neither party submitted that this aspect of the hearing rule was incapable of waiver by a person affected but the authorities to that effect are rather limited. There is ample authority to the effect that the bias rule can be waived by a party and once waived is irretrievable: *Vakauta v Kelly* (1989) 167 CLR 568, *Smits v Roach* (2006) 227 CLR 423; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 449. However, on the question of whether this aspect of the hearing rule may be waived such authorities as there are, are rather more tentative. In *Escobar v Spindaleri* (1986) 7 NSWLR 51 a majority of the Court (Kirby P and Glass JA – Samuels JA dissenting) appears to have recognised that this aspect of the rule could be waived but waiver was not established by the evidence in that case. In *MH6 v Mental Health Review Board* (2009) 25 VR 382 it was held that there was no reason in principle or authority to doubt that the full observance of the hearing rule may be waived. (For other examples see Aronson and Groves 'Judicial Review of Administrative Action' (5th edn, Law Book Co, 2013) [7.400] p 485). As this point was not argued we should proceed on the footing that this aspect of the hearing rule is capable of being waived either expressly or passively by informed and deliberate action by

the party concerned. It is unnecessary and inappropriate to go into this question further on this appeal.

[420] At [144] his Honour found that the appellant and her lawyers made a conscious decision to change their strategy before the Inquiry and to withdraw from further participation in the Inquiry. His Honour found that they engaged in a deceptive strategy to ignore, disengage and discredit the Inquiry and by engaging in that strategy the appellant and her lawyers waived her right to any greater procedural fairness. His Honour found that:

> They intentionally and knowingly abandoned any further participation in the Inquiry by engaging in conduct inconsistent with the right to be further heard by Mr Lawler. Instead of further participation in the Inquiry Ms Lawrie chose a political course of action.

[421] His Honour found that an email from Mr Wyvill to Mr McCarthy of 31 March 2014 was the commencement of this strategy [150] and [151] and that:

> In my opinion the strategy is adopted because Mr Wyvill had formed the view that Mr Lawler could not be persuaded by Ms Lawrie's explanation why it was necessary to grant a Crown lease to Unions NT in the manner the decision was made' [151].

[422] His Honour considered that the strategy involved two components, first that the appellant and her lawyers would ignore the respondent in the future and disengage from the Inquiry and second that they would discredit the Inquiry by offering extra-curial explanations and justifications of a political nature [152]. This, his Honour concluded was a process of disengagement which

avoided the possibility that by continuing with the Inquiry the appellant may lose whatever opportunity she had to complain that she had been denied procedural fairness during the Inquiry [153]. The basis for these conclusions was documentary evidence, discovered only shortly before commencement of the review hearing involving communications between the appellant's lawyers, herself and Mr McCarthy in which the possibility and details of these tactics were exchanged and discussed. None of these was disclosed to the respondent or publicly at any time during the Inquiry.

[423] At [160] to [164] his Honour details various exchanges between counsel for the appellant at the Inquiry and the respondent in which strong submissions were made on behalf of the appellant calling into question the objectivity of the Inquiry and submitting that certain alleged conduct by the respondent was inappropriate and should cause him to withdraw. These passages were cited by his Honour as demonstrations of the tactics or strategies embarked upon by the appellant and her lawyers to seek to discredit the Inquiry. Then at [165] – [170] the learned primary Judge examined further communications passing between the appellant and her lawyers (none of which was published or disclosed at the time) in which they canvassed the possibility of withdrawing entirely from the Inquiry, but which, in the end, led to a decision that the lawyers would stop representing the appellant before the Inquiry. That led to a letter of 15 April 2014 sent by the appellant's solicitors to the respondent (Reasons [180]):

"Dear Mr Lawler

We refer to the above and to previous communications in relation to this matter, in particular to your letter of 28 March 2014.

Our Clients have exhausted their ability to access pro bono legal assistance. Accordingly, we will no longer be representing Ms Lawrie and Mr McCarthy in this matter. In those circumstances, we do not propose to respond to the advice of Mr Maher or the subsequent valuation report of Mr Harris.

It would be our view that the enquiry should seek Mr Scarborough's opinion on the advice of Mr Harris and at the enquiry's cost.

Please note that our clients remain vitally interested in the outcome of the enquiry.

Please ensure that further correspondence is provided direct to our Clients via post at the following address:

The addresses of Ms Lawrie and Mr McCarthy were then inserted."

[424] That letter was duly sent and received by the respondent at a time when the Inquiry was still continuing. Despite the invitation in the letter for the respondent to communicate with Ms Lawrie or Mr McCarthy at the address given from then on, there was no evidence of this ever being done by the respondent or by his staff. Nor was there any further communication from the respondent or the Inquiry to the solicitors who had up to that point been acting for the appellant and Mr McCarthy nor any intimation or suggestion that the letter was not genuine in expressing the information it contained.

[425] His Honour found that the whole of the second paragraph of this letter was "deliberately and knowingly false" [181] and that the statement that the

clients remain vitally interested in the outcome of the Inquiry was disingenuous and misleading [182]. His Honour considered that it was a device used to deflect any suggestion that Ms Lawrie had abandoned the Inquiry, a device capable of being used to suggest that the respondent failed to accord to her procedural fairness [182]. His Honour concluded that these statements were false. This was because other evidence emerged shortly before the commencement of the judicial review proceedings, demonstrating that Mr Wyvill and Ms Spurr had been continuing to advise the appellant in relation to the so called political strategy of attacking the Inquiry and any eventual report for some time after the letter of 15 April 2014 had been written. This was the basis for the conclusion that the statement that the solicitors were no longer able to provide *pro bono* legal assistance to the appellant was untrue. It must be said, however, that acting for and advising the appellant in relation to collateral or related matters is not the same as appearing for and representing the appellant as counsel at the hearings before the Inquiry. For these reasons [184]:

> By abandoning participation in the Inquiry at this critical stage, Ms Lawrie not only abandoned opportunities to respond to (1) Mr Maher's letter and the conclusion stated in the letter which were of some significance and (2) Mr Harris's further valuation report which dealt with an issue that was of some significance to Ms Lawrie's position, but, most importantly, she also gave up the opportunity to be notified by Mr Lawler of any adverse findings and an opportunity to respond to them before Mr Lawler's report was finalised.

[426] Then at [186] to [225] the learned primary Judge examined a series of further correspondence between the appellant and her advisors, both legal

and political, leading up to the eventual decision to initiate the judicial review proceedings on 30 July 2014. This correspondence, so his Honour held, was further demonstration that her strategy was to withdraw from the Inquiry and to seek to discredit any ensuing report. Further, his Honour found that during that period the lawyers for the appellant had rediscovered the letter from Commissioner Lawler to the appellant's solicitors of 17 April 2014 in which the Commissioner gave his assurance that:

> Then and only then will I be in a position to determine whether there may be grounds to make any adverse findings against any person or organisation. Should that eventuate, I will provide any such person or organisation with notice, all relevant materials, and opportunity to make submissions in relation to the matter" (see Reasons [78] p 585).

[427] His Honour found, and this was not challenged on this appeal, that the appellant's lawyers had not placed reliance on that letter in relation to the conduct of the Inquiry [2001]. However, in commencing the application for judicial review and filing documents in support of that the appellant alleged that reliance had been placed on that letter and the absence of any notification of potential adverse findings by the Commissioner which induced her to believe that no such findings were likely or imminent. Affidavits were filed in support of the application for judicial review, verifying, among other things, the allegation that, in fact, reliance had been placed by the appellant and her advisors on the letter of 17 February 2014 and that, in the absence of any notice of any potential adverse findings, the appellant and her advisors had not expected an adverse report. His Honour concluded that these statements in the affidavits to that effect were

knowingly false because in fact no reliance had been placed by the appellant or her advisors on the letter of 17 February 2014 and because internal communications between the appellant and her advisors indicated they were expecting an "ugly report". By the commencement of the hearing of the judicial review on 27 January 2015 the appellant formally withdrew the allegation of reliance upon the letter of 17 February 2014 and announced that none of the three affidavits verifying the allegation of reliance upon that letter and the absence of expectation of an adverse report would be read. None was.

[428] Of this series of events his Honour concluded at [225] that:

> I am satisfied that, until the allegations pleaded in par 6 to par 12 of the Plaintiff's Statement of Facts Issues and Contentions were abandoned, there was a conscious and deliberate strategy adopted by Ms Lawrie to abandon her participation in the Inquiry to enable her to come to this Court and wrongly maintain that she had been denied procedural fairness on the basis of Mr Lawler's letter of 17 February 2014.

and at [226]

> In the circumstances, as I have stated in [142], I find that Ms Lawrie has waived her right to any greater procedural fairness than she was accorded by Mr Lawler.

[429] These are the main findings of waiver by the appellant contained in the reasons for judgment on the principal decision. However, they are repeated and reinforced in his Honour's reasons for decision in the costs decision *Lawrie v Lawler (No 2)* (2015) 35 NTLR 106 at [9], [10], [14] and [17] which culminated in his Honour's finding that the proceedings for judicial

review were commenced in wilful disregard of the known facts and ought not to have been commenced.

[430] It is necessary to explain how the communications between the appellant, her solicitors, counsel and political advisors which, to a significant degree, led to these findings being made came to be disclosed. At first they were not discovered and were generally made the subject of claims for legal professional privilege. In late December 2014 the lawyers acting for the respondent examined the affidavits which had been filed on behalf of the appellant and, so they submitted, during the subsequent interlocutory proceedings, were surprised at the statements that none of counsel, solicitor or appellant had been expecting adverse findings in the respondent's Report. The respondent then sought discovery of all documents in any way relating to the beliefs or statements of mind of the appellant and her advisors over the period when the Inquiry was being conducted and before the Report was published. They submitted that any legal professional privilege in relation to such materials had been waived by the affidavit evidence deposing to the absence of any expectation and reliance on the respondent's letter of 17 February 2014. After contested interlocutory applications his Honour ordered discovery, and then further discovery, of those materials.

[431] Once those materials had been discovered counsel for the respondent foreshadowed an intention to seek to cross examine Mr Wyvill upon his affidavit, and possibly, the other deponents as well. For several reasons this had repercussions for the anticipated length of the hearing before

Southwood J, by then fixed and imminent, and whether or not counsel retained for the respondent could, in view of his personal circumstances, conduct such a cross examination. These matters were aired at the interlocutory hearings before Southwood J on 9 and 14 January. On the first day of the hearing, 27 January 2015, his Honour raised with the appellant's counsel why reliance on the letter of 17 February 2014 had been pleaded at all and pointed out that potentially quite serious factual findings may be open at the end of the day as a result of the proposed cross examination. The Court then adjourned to allow the parties to consider their positions. After the adjournment counsel for the appellant stated that he did not propose to rely on any of the affidavits of the appellant, her solicitor or counsel or rely on the respondent's letter of 17 February 2014. It was at this point that the respondent amended his statement of facts issues and contentions adding paragraphs 27A, 27B and 27C raising the point of waiver which was later further amended to add the allegation of deceit.

[432] It is apparent, therefore, that his Honour's overall finding that the appellant had, by her own conduct and that of her solicitors and counsel, waived any further entitlement to procedural fairness contains within it several components namely:

(a) the adoption of the strategy to ignore, disengage and discredit the Inquiry from 31 March 2014 by which the appellant intentionally and willingly abandoned any further participation in the Inquiry by

engaging in conduct inconsistent with the right to be further heard [144];

(b) counsel, Mr Wyvill, making submissions before the Inquiry on 1 April 2014 in an attempt to discredit the Inquiry and the respondent [160] to [163];

(c) writing the letter of 15 April 2014 to the Commissioner which included the paragraph:

> Please note that our clients remain vitally interested in the outcome of the Inquiry.

which was deliberately and knowingly false and disingenuous and misleading [181], [182]; and

(d) commencing the judicial review proceedings based on allegations known to be false, supported by affidavits containing untrue statements because, without the allegation of reliance on the respondent's letter of 17 February 2014 which had originally been pleaded in the appellant's statement of facts, issues and contentions that claim was doomed to fail (Costs decision [12]).

[433] The last of these four components may appear to resemble a finding of abuse of the process of the Court by the commencement of the judicial review proceedings in circumstances where they were completely untenable. However, the question of abuse of the process of the Court was never raised as an issue either in the course of the principal decision or on the costs

question and these various components all were treated as various facets of the waiver of the entitlement to procedural fairness alleged and found against the appellant. Indeed, counsel for the respondent before Southwood J expressly disavowed submitting that the commencement of the judicial review proceedings was an abuse of process (transcript 29 January 2015 page 147).

[434] Several matters arise out of the identification of these various components in the finding of waiver. The first is whether the judicial review proceedings were, or were not, commenced on any false premises, or without any reasonable prospects of success or, even supported by false testimony (a subject to which I must later return). None of that would be relevant to the question of whether or not necessary procedural fairness had been accorded to the appellant at the original Inquiry. Either it had or it had not been accorded to her and the decision on that an issue would depend entirely upon circumstances and events associated with the conduct of the Inquiry and not later events associated with the commencement of legal proceedings to challenge the validity of the respondent's Report on Inquiry. However, that conduct of the appellant and the manner in which the judicial review proceedings were commenced and pursued may show an attempt to persist in the strategy of abandonment and discrediting of the Inquiry which had been alleged. Even that would not bear on the question of whether there had been a waiver of any entitlement to procedural fairness in the conduct of the Inquiry and Report.

[435] Secondly, none of the communications between the appellant, her solicitors, counsel and other advisors over the period 31 March to late May 2014, which had been disclosed by orders of the Court in January 2015 had earlier been known to the respondent, his advisors or to the public. Accordingly, to the extent that any such strategy may have been discussed or formulated, it was unknown to the respondent during the course of the conduct of the Inquiry. No submission was made to him nor did he make any observations to the effect that attempts or strategies were being contemplated to discredit the Inquiry or for the appellant to abandon her role in the Inquiry. Nor was it submitted on this appeal that this conduct or strategy had any detrimental effect upon the conduct of the Inquiry.

[436] As for the submissions made by Mr Wyvill to the Inquiry on 1 April 2014 several other related matters arise. It is clear that those submissions were put in strong terms, perhaps unusually strong terms and that they did challenge certain decisions of the respondent as Commissioner. However, the learned Commissioner dealt with those submissions in the same way that many an experienced Judge would deal with disagreeably assertive submissions, namely, he received them and addressed them in measured fashion, rejecting them where he thought it necessary to do so and proceeded with the conduct of the Inquiry without disruption or any loss of focus or attention. There was certainly no attempt by the respondent to warn Mr Wyvill of any imagined impropriety on his behalf. There was no suggestion raised that Mr Wyvill may be the subject of any complaint of

unprofessional or improper conduct to any legal professional disciplinary tribunal because of those submissions or that the Commissioner's approval for him to represent a party before the Inquiry might be revoked (*Inquiries Act 1945* (NT) s 7).

[437] This leaves the letter from the appellant's solicitors to the respondent dated 14 April 2014 as the only communication from the appellant to the respondent which may constitute a waiver of the entitlement to procedural fairness. Nothing in that letter suggests any waiver or abandonment of any entitlement to procedural fairness nor any abandonment by the appellant of participation in the Inquiry. In fact it suggests the very opposite by the sentence:

> Please note that our clients remain vitally interested in the outcome of the enquiry.

and by the preceding suggestions by the solicitors as to how the Inquiry might deal with the valuation evidence of Mr Harris which had then been recently disclosed. It is only if that letter is recognised as false and deceitful or disingenuous in saying the appellant remained vitally interested in the Inquiry that any adverse finding against the appellant could be justified. Even then it is difficult to see how that could amount to waiver unless, in the entire context, it conveyed an unambiguous message that the appellant had done with the Inquiry and did not wish to participate in it any further and was indifferent to any findings which might be made on the evidence

which she had given or submissions which had been made on her behalf up to that point.

[438] There is no suggestion from any quarter that the letter from the appellant's solicitors of 15 April 2014 was regarded with any form of suspicion when it was received or that the veracity of its contents was doubted by the Commissioner. Nor is there any suggestion that in reliance upon that letter the Commissioner regarded the appellant as having abandoned the Inquiry or to have been disinterested in its outcome, its findings or whether or not she received procedural fairness. The letter simply does not support any such conclusion.

[439] On this appeal we were invited to consider a number of authorities bearing on the doctrine of waiver and its association with the doctrine of election. At [143] the learned Judge observed that waiver is an intentional act or conduct done with knowledge, whereby a person abandons a right by acting inconsistently with that right, citing in support *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326 and *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 658 (Latham CJ). Counsel for the appellant submitted that this was too wide a definition and that it more closely corresponded with the slightly different doctrine of election more fully described in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 ('*Sargent*'). That case involved an examination of what conduct, which might loosely be described as amounting to "waiver", in reality

amounted to an election to abandon or not to enforce or take advantage of some particular right - see per Mason J at [655].

[440] There can be nothing in the present circumstances to support a conclusion that the appellant elected to abandon any entitlement to procedural fairness either by the letter of 14 April 2014 or otherwise. Unlike in *Sargent,* this was not an occasion when the appellant was faced with a choice between competing rights or entitlements or acted inconsistently with the preservation of her entitlement to procedural fairness.

[441] The need for waiver to be binding upon the person abandoning any right or alternative opportunity was emphasised in the *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 (‘*Verwayen*’) especially at 421 – 424; 449 – 450; 470 – 472 and 491. Counsel for the appellant referred to *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390 and to the observations of Fitzgerald P at 403 to the effect that there is no material doctrine of waiver wider than the doctrines of estoppel and election referring to *Verwayen* in support. Pursuing this submission, counsel for the appellant advanced the proposition that there could be no species of estoppel by any conduct of the appellant or her lawyers before the Inquiry because nothing which she did could give rise to an estoppel in the sense of causing the respondent to act differently than he might have otherwise done or to his detriment in reliance upon some species of representation conveyed by the appellant or by her conduct. In view of the lack of communication of any part of the proposed “strategy” to the respondent during the course of the

Inquiry, I accept that estoppel could not have arisen nor provided any basis for a conclusion of waiver.

[442] Counsel for the appellant further submitted that the statements made in the letter from the appellant's solicitors to the Commissioner of 15 April 2014 were not in any sense binding and could have been withdrawn at any stage. For example, according to this submission, the appellant may have reengaged her solicitors and counsel, or for that matter retained other solicitors and counsel and by them reappeared before the Inquiry when, if she had done so, all her rights to procedural fairness would have been undiminished.

[443] It is evident, however, that his Honour gave considerable attention and weight to the existence of the formulated but undisclosed strategy to ignore, disengage and discredit the Inquiry and treated that as inconsistent with the right to receive procedural fairness from 31 March 2014 onwards.

[444] Such strategy may be disrespectful to the Inquiry but, unless it goes as far as to constitute open defiance of the Inquiry and refusal to comply with the demands or requirements of the Inquiry, it would not absolve the Inquiry from conducting its affairs lawfully including the observance of the requirements of procedural fairness. Of course, if in attempting to comply with the requirements of procedural fairness the Inquiry offered a party the opportunity to be heard and/or to be represented by counsel and gave notice of issues or adverse findings likely to effect that party, and those

opportunities were rejected or ignored then that party could not complain because he or she had simply not availed itself of the opportunity to be heard or to address the issues which had been offered.

[445] Furthermore, there is no doubt whatever that the subject matter of this Inquiry, the personnel being investigated and any report by the Commissioner to the Administrator was very much associated with then current political controversy in the Northern Territory upon which the rival political parties were sharply divided and opposed so that, whatever the result, the Inquiry and the Report were likely to lead to significant political consequences between political rivals. However much one may be inclined to deplore it, in such a setting it is almost inevitable that concerned members of a political party whose interests were likely to be significantly affected by such a report, would be likely to prepare in anticipation a series of strategies which might be used in an attempt to counter, or alternatively to promote, findings emerging from the Inquiry. There is no doubt on the evidence examined by his Honour that interests associated with the appellant and her counsel were in April and May 2014 making preparations for a political strategy to deal with whatever findings the Inquiry might eventually make, and to do so in a manner which would bolster their own interests even if the Inquiry and the Report were to be adverse to them. This, unfortunately but realistically, is rather common. History provides no shortage of examples where the reports of commissions of inquiry or even of royal commissions have been criticised publically by interested parties for

polemical purposes. Indeed there are many examples of reports of public inquiries, particularly on economic matters, being discarded, shelved or only partly implemented because of subsequent public criticism by parties advancing sectional interests. Preparation for such an attack, even if unjustified, by a witness or his or her associates involved in such an inquiry is no basis for the inquiry or the commission to depart from the obligation to conduct the inquiry according to law including by the provision of procedural fairness to those affected.

[446] For these reasons, therefore, I do not consider the finding made by the learned primary Judge that the appellant, by her conduct, had waived any entitlement or further entitlement to procedural fairness by the respondent can be upheld. If, as I consider it should be, that finding is regarded as wrong then all the consequences flowing from it, particularly with regard to its effect on the orders for costs, cannot stand either.

Findings of dishonesty and deceit

[447] It is difficult to disengage or to separate the findings of impropriety by the appellant, Mr Wyvill or Ms Spurr from the fate of the defence of waiver. There were findings that the statement in the letter of 15 April 2014 that the appellant remained vitally interested in the Inquiry were deliberately and knowingly false [180]; that Mr Wyvill recommended that Ms Lawrie make a false statement [221]; that pleading the allegations of fact in the statement of facts, issues and contentions was done when they were known to be

untrue [223]; and that, in the costs decision at [8], the appellant Mr Wyvill and Ms Spurr swore affidavits which contained plainly false statements and, further, that the judicial review proceedings had been commenced in wilful disregard of known facts and ought not to have been commenced [17].

[448] I consider that the arguments raised in support of the appeal on the question of whether or not procedural fairness was accorded adequately to the appellant and on the issues of waiver and costs raised serious, tenable and arguable issues. The extent of the obligation to accord procedural fairness resting upon the respondent never depended upon the letter of 17 February 2014 nor upon any claimed reliance upon that letter by the appellant. The obligation to accord procedural fairness exists at law independently and its content is prescribed by law, not by any measure or format outlined by the person conducting the inquiry. Accordingly the controversy over whether or not there had been reliance on the letter of 17 February 2014, and the associated controversy of whether or not the appellant and her advisors expected a report with adverse findings was largely unnecessary and, at most, of minor importance. Consequently, there was very little occasion to delve so deeply into allegations over whether or not the asserted reliance upon those matters was true when they were made or whether affidavits sworn in support of them were false in the sense of being dishonest. No attention seems to have been given to whether or not there were honest but mistaken grounds for believing that the allegations or statements were true

or that, while various less grave adverse findings may have been expected, findings of the gravity which were made were unexpected.

[449] That these allegations of impropriety and dishonesty were so forcibly pressed upon his Honour is explicable, in retrospect, by the vigour with which the issue of and waiver was advanced by the respondent when, as has since been revealed, the respondent had reason to fear that he was on weak grounds in contending that the appellant had been afforded her full entitlement to procedural fairness – (see Recusal decision *Lawrie v Lawler* [2015] NTSC 40 at [98] setting out the email from Mr Maher to the Department of the Chief Minister dated 14 January 2015 especially at [1](1) to (8)). That led to the issue of the alleged waiver. That introduced an element into the respondent's case which jarred with the traditional posture of detachment by the decision maker promoted by the *Hardiman* principle.

[450] As is now apparent, the facts and circumstances did not warrant any finding of waiver. The submissions to the learned primary Judge which led to the findings of impropriety and dishonesty were the result of inferences drawn from a variety of circumstantial evidence. None of Ms Lawrie, Mr Wyvill nor Ms Spurr was cross examined or confronted with any of the allegations advanced nor did any one of them give any evidence at all. It was strongly urged on the learned trial Judge and again on appeal, that their failure to give evidence, the absence of reliance upon the affidavits which had been filed but not read, and the consequent inability of the respondent to cross examine them upon these allegations gave rise to inferences that they were

unable or disinclined to answer them and that the inferences could, accordingly, be more confidently drawn.

[451] The ordinary standard of proof in civil litigation is proof on the balance of probabilities. This remains so even where the matter to be proved involves criminal conduct or fraud. The many authorities to this effect are collected in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at [2] where Mason CJ, Brennan, Deane and Gaudron JJ said

> On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what is sought to prove. Thus, authoritative statements have often been made to the effect that clear …
>
> … proof is necessary where so serious matter as fraud is to be found.

[452] Similarly in *Henderson v Queensland* (2014) 255 CLR 1 Gaegler J (although dissenting but not in regard to these principles) said at [87] to [91] that there were long standing principles, including those that [91]

> A court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been engaged in fraudulent or criminal conduct.

and that

> The reluctance of a court to infer fraudulent or criminal conduct is ordinarily somewhat stronger in respect of a person who is not a party to litigation and who is for that reason denied an opportunity to explain and justify his or her conduct as consistent with the conventional perception. (citations omitted).

[453] Any party advancing a serious allegation of professional impropriety, dishonesty or false swearing has the obligation to make that allegation clearly and distinctly and then, if possible, to prove it. Even the last amended statement of facts issues and contentions relied on by the respondent (as amended on 29 January 2015) made no allegation that:

(a) the statement of facts issues and contentions filed by the appellant in support of the originating motion contained statements known to be false by the appellant and her solicitors and counsel;

(b) that the affidavits sworn by the appellant and her counsel and solicitor in support of the application contained statements known to be false;

(c) that Mr Wyvill had advised Ms Lawrie to make a false statement;

(d) that the contents of the letter from the appellant's solicitors Mr Lawler of 15 April 2014 were deliberately and knowingly false and that the statement that the appellant remain vitally interested in the inquiry was misleading and disingenuous; or

(e) that the judicial review proceedings had been commenced in wilful disregard of known facts and ought not have been commenced.

[454] No notice of any of those allegations was given to Mr Wyvill or to Ms Spurr who were not parties to the proceedings before Southwood J. Although Ms Lawrie was, of course, represented by counsel before Southwood J these

submissions were only made in the course of the closing address by counsel for the respondent. Counsel for the appellant had, for reasons already described, contended that there was no basis for waiver and that the issue of reliance on the letter of 17 February 2014 was not material.

[455] It is unfortunate that these allegations were entertained having regard to the state of the pleadings and the absence of any notice to Mr Wyvill or Ms Spurr. That one or both of them may have learned about them indirectly through colleagues or the media is not to the point because the primary position of the respondent is that neither had any right to be heard on his or her own interests which, however, was followed by the alternative contradictory submission that if Mr Wyvill did have a right to be heard it had been waived by his inaction. It is not necessary to dwell on that alternative plea other than to observe shortly that the requirements of waiver were not present in that situation.

[456] The allegations made against Mr Wyvill and Ms Spurr, like the allegations in *Ashby v Slipper* which affected the solicitor witness Mr Harmer, were serious and the potential consequences grave. As was said by Mansfield and Gilmour JJ in *Ashby v Slipper* at [141]:

> In such circumstances there was need for caution in drawing adverse inferences against Harmer particularly where such inferences and their significant consequences have not been specifically put to Harmer

and then, at [142]

> Where serious issues are raised in proceedings concerning a non-party solicitor in relation to the professional conduct and which go to that solicitor's integrity, the matters alleged require careful consideration. Where, as here, there has been no specific pleading or identification of those issues and no cross examination of the solicitor upon material issues which the solicitor has explained by affidavit, the opportunity to elucidate or explain such matters is very important.

and then, at [143]

> The denial of this opportunity and lack of personal representation, rendered Harmer in an effectively defenceless position in relation to the concerns as to his professional integrity raised by the primary Judge. In our view his Honour ought to have refrained from making serious findings about Harmer's professional conduct and integrity.

[457] In the present case whatever suspicions or doubts might have arisen from the allegations advanced by the respondent against the personal integrity of the appellant, Mr Wyvill and Ms Spurr, there was no direct evidence upon which findings of impropriety or dishonesty could be made. Having regard to the manner in which the allegations had been advanced at the very end of the proceedings and had not been pleaded and when none of the three persons concerned had been confronted with those allegations, such findings should not have been made.

[458] The allegations of impropriety and dishonesty, could at the most have demonstrated that the content of the letter of 15 April 2014 was not true or was disingenuous but even that would not have established waiver. It was therefore, unnecessary for these allegations of impropriety or dishonesty against the appellant and her lawyers to have been pursued. Having regard to

the conclusion which has been reached on the issue of waiver generally and the circumstances under which they were raised they should not be accepted. The direct effect of this conclusion is that the findings cannot be regarded as standing against Ms Lawrie. Because they were not parties, those findings never bound Mr Wyvill or Ms Spurr but, in all the circumstances, especially in view of their gravity and effect upon reputation, it is necessary to say that these findings as to their conduct and motivation should not be accepted either.

Relief

[459] For these reasons I consider that the appeal against the dismissal of the application for review should be allowed. The Court should declare that in making the findings of improper conduct and other adverse observations against the respondent more particularly identified in the Schedule to these reasons, the Inquiry was conducted without necessary procedural fairness being accorded to the appellant and that, consequently, those findings were not made in accordance with law and each is thereby a nullity.

[460] The identification of the particular findings listed in the Schedule which had been made without procedural fairness being accorded to the appellant has been determined by the character and consequence attributed by the respondent to certain conduct, although the historical account of facts and events was not in dispute. It is the attribution of fault, inadequacy of performance in carrying out obligations under the relevant regulatory

regime, failure to ensure the application of proper accountability processes, findings of impropriety which have been made in breach and the requirements of the procedural fairness. That is because notice of that fault, impropriety, inadequacy of performance and failure was not given to the appellant. Nor were the sources or the contents of those obligations identified. Most of the historical facts were never in dispute but the significance placed on them amounting to serious misconduct was not disclosed.

Recusal Decision

[461] This is the subject of the second appeal, which is from the decision in *Lawrie & Anor v Lawler* [2015] NTSC 40. The grounds for this and the orders sought have already been set out. As I have already observed they include a ground that the judgment was attended by an apprehension of bias. I have had the advantage of reading the reasons of Doyle and Duggan AJJ dealing with the Recusal Decision and the ground of apparent bias. I agree with their Honours decision that this appeal should be dismissed for the reasons which they give, and that the conclusion of this appeal also disposes of the grounds of apprehended bias advanced in the two other appeals.

Costs Appeal

Was the respondent ever under a liability to pay his solicitor's costs resulting in an entitlement by him for payment of costs by the successful appellant?

[462] This third appeal is from the decision in *Lawrie v Lawler (No 2)* (2015) NTLR 106. The grounds of appeal and the relief sought have already been set out. The first ground is that the judgment is affected by apprehended bias. As explained this ground must fail. The two remaining grounds of appeal raise, respectively, issues of whether the respondent was ever under an actual or potential liability personally for costs arising from the judicial review proceedings including the recusal and costs applications, and, if so, whether there was a sufficient basis for some of those to be ordered against the appellant on an indemnity basis.

[463] By order dated 14 August 2015 Southwood J directed that Ms Lawrie should pay Mr Lawler's costs fixed in the sum of $214,876. That amount is an aggregate of the appellant's liability for costs arising from the principal decision, the recusal decision and the costs decision. However, his Honour considered that the costs for the principal decision should be assessed on an indemnity basis while the costs for the recusal application and of the costs applications themselves should be assessed on a party/party basis (see [30] of the costs decision).

[464] The basis for ordering costs on an indemnity basis for the principal decision was the findings, in the principal decision and in the costs decision, that Ms Lawrie had engaged in a deliberate strategy to disengage from the

Inquiry and wrongly to maintain that she had been denied procedural fairness [12]; and that the judicial review proceeding had been commenced in wilful disregard of the known facts and ought not to have been commenced [17]. These findings reflect his Honour's findings in the principal decision that by the conduct of the appellant and her counsel and solicitor from 31 March 2014 the appellant had commenced a strategy to ignore, disengage and discredit the Inquiry – (principal decision [150] and [151]). This led his Honour to conclude at [17] in the costs decision:-

> … this is an appropriate case to make a specific lump sum order for costs which are assessed on an indemnity basis up to the end of the hearing in January 2015 and on a party/party basis for the recusal applications and for the costs applications.

At [30] his Honour concluded:

> The position taken by Ms Lawrie in relation to the bias applications was arguable, as was her position in relation to costs, and those applications arose out of recent discovery by Mr Lawler's lawyers.

[465] The explanation for the sum of $214,876 is set out in [31] of the Costs decision. The evidence before his Honour showed that at 8 May 2015 the respondent's solicitor's total fees and disbursements, including counsel fees, was $168,408.38 excluding GST. Further evidence showed that the total of the respondent's solicitor fees and disbursements at 10 August 2015 was $245,855.74. That latter date was when the costs application was heard. The difference between those two figures is $77,447.36 which his Honour concluded represented the fees and disbursements charged to the respondent for the recusal applications and costs applications. His Honour then

concluded that a fair assessment of the costs and disbursements charged for the recusal and costs applications on a party and party basis would be 60% of that amount or $46,468.42. That added to the total of the fees and disbursements to 8 May 2015 gave the total of $214,876 rounded to the nearest dollar.

[466] Arithmetically, the calculation is as follows:

100% of the respondent's costs to 8 May 2015	$168,408.38	(a)
Extra costs from 8 May 2015 to 10 August 2015	$77,477.36	(b)
60% of this figure on a party/party basis	$46,468.42	(c)

a + c = $214,876.

[467] The relief sought by the appellant in this third appeal is that the judgment for costs should be set aside and the respondent pay the appellant's costs of the appeal [the Costs appeal] and of the principal application.

Was the respondent ever under a liability to pay his solicitor's costs resulting in an entitlement by him for payment of costs by the unsuccessful appellant?

[468] This submission that the respondent Mr Lawler had no obligation to pay the costs of the solicitors acting on his behalf, and therefore no entitlement to an indemnity for that liability in the shape of a costs order in the proceedings itself has two related aspects. The first is the contention by the appellant that the solicitors acting throughout the judicial review

proceedings for Mr Lawler were not retained by him but, rather, were retained by the Northern Territory Government which was, consequently, alone responsible for those solicitors costs.

[469] The second related aspect is that, by the terms of the retainer of the solicitors for the respondent, all invoices and fees, and liability which Mr Lawler might be found to have for costs, were to be met and discharged by the Northern Territory Government. This gave rise, according to the submission, to an implication that there would never be any circumstances under which Mr Lawler might himself be responsible for costs so that he would never require an indemnity. That latter aspect of the submission faces a large obstacle when considered in the light of the potential for an order for costs to be made by the court against Mr Lawler in the judicial review proceedings. This is because in that eventuality, as a party before the court, he would have a personal liability to meet those costs so that the assurances given to him by the Northern Territory Government must mean that, in such circumstances, he would be indemnified for his own personal liability. On the face of it there is little reason to suppose that this situation would have been different in relation to solicitor and client costs incurred by the solicitors acting for Mr Lawler in the judicial review proceedings.

[470] The findings in relation to the engagement of the firm of solicitors acting for the respondent, P Maher, are in several places throughout the reasons of the primary judge both in the recusal decision and in the costs decision. So far as is presently material the findings are as follows:

(a) Within the Attorney-General's Department of the Northern Territory there is a unit known as the Solicitor for the Northern Territory made up of four divisions. Within the litigation division the acting director has functions which include recommending the outsourcing of legal services to lawyers in private practice in appropriate circumstances – recusal decision [6] and [7].

(b) If outsourcing of particular services is approved in any particular case the legal services co-ordination unit prepares the appropriate documents and communicates with the private legal firm selected and proposes the financial terms of the engagement – recusal decision [9].

(c) When the judicial review proceedings commenced on behalf of the appellant her solicitor contacted the Department of the Chief Minister inquiring about service of the initiating process. This led to a departmental request for legal services to outsource the representation of the respondent to Mr Paul Maher a solicitor who had acted previously on his behalf in the inquiry and identified that the paying agency would be the Department of the Chief Minister – recusal decision [36].

(d) That request for outsourcing was duly approved by the appropriate officer. In due course that led to an email being sent from the appropriate officer within the Legal Services Unit to the solicitor Mr Maher:

> 'new instructions: Ad hoc Legal Referral: Stella Maris inquiry – our ref:20142426
>
> Further to my phone call of today, I attach the request we received from the Department of the Chief Minister to engage you to act on behalf of Commissioner Lawler in this matter.
>
> As advised on the phone we have not received the Originating Motion and Summons filed by Halfpennys but I will contact Cathy Spurr to let her know that you will accept service on behalf of Commissioner Lawler.

> Once you have received the documents and have had the opportunity to consider the matter, it would be appreciated if you could provide me with an estimate of your fees.
>
> Please note your invoice should be sent to the Legal Services Coordination Unit by email (legalservice.sfnt@nt.gov.au) but addressed to the Department of the Chief Minister as follows:
>
> Attention Terri Hart
> Department of Chief Minister
> GPO Box 4396
> Darwin NT 0801
> If you have any queries in regards to this engagement please do not hesitate to contact me on…' (see recusal decision [36 to 44].

(e) Later on 24 December 2014 Mrs Teresa (Terri) Hart who was Executive Director of the Office of the Deputy Chief Officer of the Department of the Chief Minister sent an email to the solicitor Mr P Maher as follows:

> "'On Mr Gary Barnes' [Chief Executive Officer of the Department of the Chief Minister] behalf, this email is to confirm the earlier verbal advice provided to you on 15 December 2015 that the Northern Territory Government indemnifies Mr John Lawler in respect not only of his own solicitor/client costs but also in respect of any adverse costs order which may be made in the present Supreme Court proceedings brought by Ms Lawrie" (recusal decision [77]).'

(f) Later at various points, officers of the Legal Services Department communicated with Mr Maher requesting estimates of fees and invoices for payment (recusal decision [112] to [118]) and incidental matters.

(g) Furthermore, it is common ground that the Northern Territory Government in fact paid all of Mr Maher's fees and disbursements associated with the judicial review proceedings (costs decision [18]).

(h) The learned Judge did not accept the submission on behalf of the appellant that under no circumstances might Mr Lawler be liable for Mr Maher's costs (costs decision [21] and [22]) his finding was that there had been an agreement between the Northern Territory Government and Mr Maher dealing in part with the liability for Mr Maher's costs. His Honour found that the request for legal services sent to Mr Maher on 5 August 2014 suggested that he was to be retained on the same or similar basis as he had been retained during the Inquiry and his services and his engagement had been requested by the Department of the Chief Minister. Mr Smyth who was the Case Manager within the Office of the Solicitor for the Northern Territory determined that Mr Maher was to be engaged by the Department of the Chief Minister to act for Mr Lawler and Mr Maher responded by an email on 6 August 2014 in which he stated:

> 'Thanks for these instructions.'

[471] At [22] of the costs decision his Honour found:

> In his email to Mr Lawler on 7 August 2014, Mr Maher stated 'Ms Hart of the Department of the Chief Minister has confirmed that all my invoices should be directed to the Department for payment'. This seems to be the only communication between Mr Maher and Mr Lawler about costs. On 14 August 2015, Mr Maher sent his costs disclosure statement and agreement to Legal Services SFNT. He then sent all of his costs estimates, revised costs estimates and invoices to the Department of the Chief Minister through the established procurement process. His costs estimates were approved … and his fees and disbursements were paid by the Northern Territory Government. Mr Maher did not send his costs disclosure statement and agreement to Mr Lawler nor did he copy any invoices to Mr Lawler or seek Mr Lawler's approval for his fees.

[472] Apart from these arrangements and documentation leading to the engagement of Mr Maher and the progressive submission of invoices and corresponding payments, there were no communications between the Legal Services Department or the Department of the Chief Minister or any other

organ of the Northern Territory Government and Mr Maher giving or directing instructions as to how Mr Maher should act or in relation to any points in the conduct of the litigation. It is also significant to note, as set out in [470](e)above that by the email of 24 December 2014 from Ms Hart to Mr Maher that the indemnity offered to Mr Lawler was "in respect not only of his own solicitor/client costs but also in respect of any adverse costs orders which may be made …" which clearly connotes that Mr Maher was to be Mr Lawler's own solicitor and that Mr Lawler would have a responsibility to Mr Maher for his own costs.

[473] This is where the so called indemnity principle as to costs needs to be considered. Southwood J cited the relevant passages in *Dyktynski v BHP Titanium Minerals Pty Ltd* (2004) 60 NSWLR 203 where McColl JA at [68] and [69] referred to the principle saying:

> The fundamental principle to be applied in deciding whether a costs order ought be made was stated by Lord Cranworth in *Clarke & Chapman v Hart* (1858) 6 H.L.Cas 632 at 67; 10 E.R.1443 at 1457; '… I think that the general principle upon the subject of costs is, and ought to be … that the costs ought never be considered as a penalty or punishment, but merely a necessary consequence of a party having created a litigation in which he has failed …
>
> Lord Cranworth's statement is reflected in the underlying rationale of a costs order that 'that it is just and reasonable that the party who has caused the other party to incur costs of litigation should reimburse that party for the liability incurred'; *Latoudis v Casey* (1990) 170 CLR 534 at 567 per McHugh J.

[474] At [28] of the costs decision the learned Judge held that the agreement between the Northern Territory Government and Mr P Maher about costs fell

within the first limb of *Adams v London Improved Motor Builders Limited* [1921] 1 KB 495 at 501 or that, in other words, it did not create a situation in which Mr Lawler might never have any personal liability for the costs of the judicial review proceedings either to his own solicitor or to the appellant were she to be successful.

[475] Counsel for the respondent referred to a series of cases in which a government officer, whether represented by a government lawyer or by a private lawyer, whose costs were to be met primarily by the government or some other official source was nevertheless entitled to an order for the costs if successful in proceedings. The cases include *Lenthall v Hillson* [1933] SASR 31 at 36; *Inglis v Moore (No 2)* (1979) 46 FLR 470 at 472 both approved in *Dtyktnyski;* see also *Noye v Robbins* [2010] WASCA 83 affirming the decision in *Noye v Robbins (No 6)* [2008] WASC 266; *Trevorrow v State of South Australia (No 7)* (2008) 251 LSJS 91.

[476] Very recently the indemnity principle has been examined and applied in *Marsh v Baxter (No 2)* [2016] WASCA 51 in a case between private litigants where the successful defendant had received an indemnity from a company marketing and promoting the use of genetically modified canola to assist the defendant in opposing a claim for damages alleged to arise out of his practice of growing GM canola on his farm adjoining the plaintiff's property. In upholding an order made by the trial Judge that the unsuccessful plaintiff should pay the defendant his costs of the action, McLure P, Newnes and Murphy JJA said at [37] and [38]:

> The onus of establishing that the respondent had no liability to Bradley Bayly Legal for their costs lies on the appellants. In the absence of proof of an agreement to the contrary, a solicitor who acts on instructions for a party on the record is taken to be entitled to look to that party for costs, even if the instructions have come to the solicitor from another party or from some non-party interested in the litigation; see *Davies v Taylor (No 2)* [1974] A.C. 225, 230; *Hudgson v Endrust (Aust) Pty Ltd* (1986) 11 FCR 152; *Halliday v High Performance Personnel Pty Ltd* (in liq) [1993] 113 ALR 637 at 639.
>
> In the present case, there is no doubt that Bradley Bayly Legal was instructed by the respondent to act on his behalf and act solely on his instructions. The respondent was therefore liable for their costs in the absence of an agreement between Monsanto [the purveyor of GM Canola] and Bradley Bayly Legal, or between the respondent and Bradley Bayly Legal, that in no circumstances could Bradley Bayly Legal look to the respondent for its costs. There is nothing to suggest any such agreement and there is no reason to believe that such an agreement might have been entered into …

[477] In the present case, while it is clear that the Northern Territory Government intended to indemnify the respondent, Mr Lawler, for any costs for which he may be liable in respect of the judicial review proceedings, there is nothing to suggest that under no circumstances might Mr Lawler incur a personal liability for costs. Indeed two features of the situation, already mentioned, suggest the contrary, namely that the government indemnity was in respect of his "own solicitors costs" and that this extended to any order for costs which might be made against the respondent in favour of the appellant or some other.

[478] For these reasons, I consider that the learned Judge was correct in concluding that the arrangements for the payment of his costs by the Northern Territory Government did not remove all potential liability which

Mr Lawler might have for costs arising from these proceedings and that, consequently, consistent with the authorities cited, he was entitled to an order for costs against the appellant where he was successful in the litigation. This does not mean the respondent is necessarily entitled to the whole of the costs awarded in his favour by the learned Judge but rather, that there is no impediment arising from the application of the indemnity principle, for an award of costs to be made in the respondent's favour on conventional principles. The second of the appellant's grounds in this appeal must, therefore, fail.

The award of costs on an indemnity basis

[479] The appellant, by her third ground of appeal, contends that even if she is otherwise liable for the costs arising from the principal decision, they should not have been awarded on an indemnity basis but rather upon a party/party basis.

[480] These reasons have already set out why the finding that the appellant had waived any applicable entitlement to procedural fairness cannot stand. It is therefore necessary to approach this ground in the costs appeal on the footing that there is no finding of waiver to support the decision to award those costs on an indemnity basis.

[481] The reasons for decision in the costs appeal repeat the findings in the principal decision which lead to the conclusion of waiver with some further elaboration. See the reasons for decision in the costs decision at [6], [8], [9],

[12], [14] and [17]. Included among these findings was the conclusion that without the appellant's alleged reliance on the letter from the respondent of 17 January 2014, her claim was doomed to fail (costs decision [12]). For reasons already given I do not consider that the appellant's case was ever one where the result turned upon whether or not there had been reliance on that letter. Otherwise these several findings have been examined in the section of these reasons dealing with the issue of waiver and the reasons for rejecting them are to be found there.

[482] This rejection of the respondent's alternative defence of waiver and the conclusions reached about why the findings concerning the conduct of Ms Lawrie, Mr Wyvill and Ms Spurr cannot stand mean that there is no sufficient basis to justify an award of indemnity costs. Consequently, if the appellant had brought the review proceedings but failed in them there would be no reason to depart from the usual practice of awarding costs against her in the normal way on a party and party basis.

[483] Consequently I consider that the third ground of appeal in this costs appeal should succeed, I would allow this appeal and set aside the order for payment of costs insofar as it directs the payment of costs on an indemnity basis. In this notice of appeal the appellant also sought an order the respondent should pay her costs of the appeal and the principal application. That, however, assumes that the appellant will be successful in her appeal from the principal decision but that expectation will depend on the ultimate decision of this Court. Therefore, I consider that the ultimate form of the

relief to be granted in relation to the costs of this third appeal and the appeal against the principal decision should await the final outcome of these three appeals.

Conclusions and orders

[484] For these reasons, therefore, I propose that this Court make the following orders on the three appeals:

A Appeal from Principal Decision:

- order that the appeal be allowed;
- set aside the order of 1 April 2015 dismissing the appellant's application for judicial review;
- declare that in making the findings of improper conduct and other adverse observations against the respondent more particularly identified in the Schedule to these reasons, the Inquiry by the respondent was conducted without necessary procedural fairness being accorded to the appellant and that consequently those findings were not made in accordance with law and are thereby each a nullity;
- direct that the parties exchange and file written submissions within a period to be fixed by the court, if not agreed, in relation to what orders should now be made in relation to the costs of the judicial review proceedings.

B The Recusal Decision:

- that the appeal by the appellant against the judgment and orders of 22 July 2015 be dismissed;

C The appeal against the Costs Decision:

- the appellant's appeal from the decision of 14 August 2015 be allowed;

- it be declared that the respondent is not entitled to any component of costs arising from the judicial review proceedings on an indemnity basis;

- otherwise, reserve for consideration after the decisions in each of these three appeals have been given the question of what orders for costs should be made in relation to the disposition of all three decisions the subject of these appeals.

SCHEDULE

List of certain findings made by the respondent in the Report dated 26 May 2014 entitled "Inquiry into Stella Maris", without according due procedural fairness –

The numbering of these findings adopts the numbering appearing in [91] of the reasons for decision of the Supreme Court of the Northern Territory in *Lawrie v Lawler* [2015] NTSC 19 delivered on 1 April 2015.

2. Minister Lawrie acted with bias over many years.

4. Minister Lawrie should have ensured that her office provided this application [a redevelopment proposal for the Stella Maris site prepared by Unions NT] to the Department after a meeting in 2009 with Unions NT's representatives.

5. Minister Lawrie should have made it clear to the Department that it was her intention to grant the site to Unions NT without an expression of interest process. This should have been done in writing from either the Minister or a member of staff.

9. This concern and preference [to grant the site to Unions NT] did not justify the decision that was ultimately made by Minister G McCarthy; a decision that would not have been made without Minister Lawrie's intervention.

10. Notwithstanding that Minister may have genuinely believed that granting the site exclusively to Unions NT was in the public interest, the way she involved herself in the process was not proper and was unfair to the public and other community groups.

11. The fact remains that Minister Lawrie acted with bias in favouring Unions NT over other community groups.

12. From her time as Minister for Planning and Lands in 2007 up until the Cabinet meeting of 10 July 2012, Minister Lawrie acted in a biased way by favouring Unions NT in its attempts to be granted a lease of the site.

13. Mr Loenneker's interventions, on Minister Lawrie's behalf, with the Department in 2009 were not proper.

15. If Minister Lawrie was so biased as to be unable to allow other interested community groups to advance their proposals to be compared

and properly assessed against Union NT's application, then she should have excluded herself from participating in the Cabinet decision-making process.

16. The approaching caretaker period, the potential for a change of Government and a view that this would mean the site would be used for commercial/residential high rise, does not adequately justify Minister Lawry's [sic Lawrie's] conduct.

17. As such I find that Minister Lawrie exerted influence over the Cabinet process and over Minister G McCarthy and his office in a way that was designed to further her view that Unions NT should be offered an exclusive lease to the site. By acting in such way, Minister Lawrie deprived the public and other community groups of an opportunity to have their claims for the site properly and fairly considered.

18. As the Minister for Planning and Lands, Minister Lawrie must also take responsibility for the actions of her senior lands advisor at the time, Mr Loenneker, whose conduct was not of the highest standards expected.

19. I find that notwithstanding Minister Lawrie may have genuinely believed that granting the site to Unions NT was in the public interest, the way she involved herself in the process was not proper and was unfair to the public and other community groups.

20. I recommend that the Legislative Assembly consider whether there has been an alleged breach of the Northern Territory of Australia *Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act* 2008, by Ms Delia Lawrie MLA … and whether under the provisions of s 51(1) it wishes to refer any alleged breach of the code to the Privileges Committee.
