

AFFIDAVIT

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 68/2014
(21434660)

BETWEEN:

DELIA PHOEBE LAWRIE

Plaintiff

AND:

JOHN LAWLER

Defendant

DEPONENT: ALISTAIR WYVILL SC

AFFIRMED: 26 MAY 2015

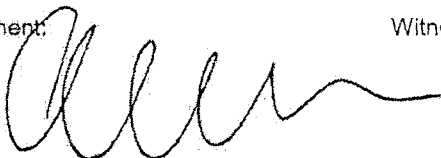
I, ALISTAIR WYVILL of William Forster Chambers, 26 Harry Chan Avenue, Darwin, Northern Territory, barrister at law, MAKE OATH AND SAY as follows:

1. I refer to my two previous affidavits filed in this matter dated 12 November 2014 and 27 January 2015. I confirm that, subject to the corrections or additions made by the affidavit of 27 January 2015 to the affidavit of 12 November 2014 and to correcting the references in paragraphs 13.1 and 20.5 of my affidavit of 27 January 2015 to the cabinet meeting of 10 (not 19) July 2012, both are true and correct. I have included some sections from these affidavits in the paragraphs below where I have considered it necessary in order to make this affidavit easier to follow.
2. In this affidavit, my references to documents by way of an "AD" reference pertain to the four volumes of Agreed Documents comprising Exhibit P1 in the trial of this matter. The other documents referred to below are annexed hereto in a paginated bundle being the documents now shown to me and marked AW2 and referred to below as "**AW2/(page)**".

AFFIRMED this 26th day of May 2015.

1

Deponent:



Witness:



3. In a number of respects, this affidavit is incomplete as some matters remain subject to my clients' legal professional privilege, which – in the relevant respects – has not been waived as far as I am aware.

Initial involvement in the Stella Maris Inquiry

4. On 2 December 2013, I attended a meeting at Ms Lawrie's office. I do not recall how this meeting was arranged. It probably was a result of a request from the plaintiff or someone at her office. It is probable that I had already discussed details of this matter with the plaintiff, Mr McCarthy and/or members of the plaintiff's staff, although I do not recall the detail of these discussions.
5. I do not recall for certain who else was at the meeting of 2 December 2013. However, it is likely that the plaintiff, Mr McCarthy, Ms Spurr and some of the plaintiffs' advisors were also present.
6. I had been provided with a limited number of documents by the time of this meeting including the letter to Unions NT of 3 August 2012 offering a lease, the Unions NT document entitled "*Proposed re-development of the Stella Maris Site*" (AD3/615) and a number of press releases and other publicly available documents. I had no means of access at that time to the records which related to Ms Lawrie's and Mr McCarthy's respective periods as Minister for Lands and Planning, or to the cabinet decision of 10 July 2012.
7. A letter dated 2 December 2013 was sent by Mr McCarthy to the Chief Minister (AD3/644-648). This letter was drafted by me based on the material I had received and the discussions I had had about the matter as referred to at 4 and 6 above. The letter set out what, based on my instructions at the time, I considered at the time to be an answer to the complaints about cabinet's decision to offer the lease to Unions NT.

The announcement of the Inquiry

8. The Inquiry was established by the Legislative Assembly on 5 December 2013.
9. On 18 December 2013, the Administrator appointed the defendant Commissioner of the Inquiry (**the Commissioner**).

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



10. I attended a meeting at Ms Lawrie's office on Thursday 19 December 2013 with Ms Lawrie, Mr McCarthy (I think), Cathy Spurr, and others from Ms Lawrie's office to discuss how they should respond to and prepare for the Inquiry.
11. By about this time:
- (a) It was clear to me that the plaintiff and Mr McCarthy would require formal representation in the Inquiry by solicitors and counsel;
 - (b) Cathy Spurr and I had agreed with the plaintiff and Mr McCarthy that we would represent the plaintiff and Mr McCarthy in the Inquiry as solicitor and counsel respectively. We agreed that we should seek funding from the Government for our costs but would act on a pro bono basis if necessary. I do not recall now how this occurred.

Initial involvement in the Inquiry: early February 2014

12. I was away for most of January 2014 and did not return to the Northern Territory until 27 January 2014. I was then involved in preparing for and the hearing of an appeal which was heard interstate on 4 and 5 February 2014 in an unrelated matter. I was unable to look at this matter until after I returned to Darwin on 6 February 2014.
13. On 13 February 2014, I drafted a letter from Halfpennys to the Commissioner (AD 1/12/17). Under the heading "*Request for submissions*" I set out my assessment at that time of the merits of the plaintiff's Ms Lawrie's and Mr McCarthy's position:
- "1. *The decision to offer a lease of Stella Maris to Unions NT was a decision made by cabinet. You will appreciate that both of our clients are obliged to maintain cabinet confidentiality and cannot say anything about what cabinet considered and what was discussed by its members unless and until that confidentiality is waived by the Northern Territory. Our clients will be writing to the Attorney seeking that waiver [see 18(a) below regarding that request].*
 - 2. *When Mr McCarthy wrote to Unions NT on 3 August 2012, he was fulfilling his duty as a minister to carry out a decision of cabinet. If the decision to make the offer set out in that letter is to be criticised, that criticism should be directed towards cabinet.*

AFFIRMED this 26th day of May 2015.

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Deponent:

Witness:



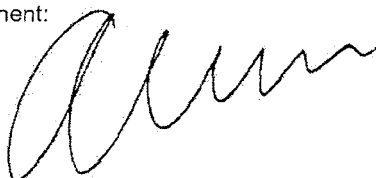
3. *In discharging their functions as members of cabinet in this respect, neither of our clients acted otherwise than bona fide and, they believed, consistent with Government policy on community land grants. They believed at the time – and still believe – that this decision was in the best interests of the Territory in order to best preserve and promote the heritage values of Stella Maris. They did not believe that they were offering Unions NT an asset which was likely to generate any substantial net financial benefit or which could be sold to realise a substantial net return. They had no knowledge at the time of any agenda on the part of Unions NT to obtain any such benefit.*
4. *Unions NT was not in fact receiving an asset which was likely to generate any substantial net financial benefit or which could be sold to realise a substantial net return. If a lease of the kind proposed had been entered into between the NT Government and Unions NT, it is unlikely to have produced any substantial net financial return for Unions NT, quite the opposite. Further, the proposed lease did not have any value as a saleable interest in real property and could not have been sold to generate any funds.*
5. *As subsequent events demonstrate, the acceptance of the letter of 3 August 2012 and the payment of the fee mentioned in that letter by Unions NT did not give rise to an agreement to enter into a lease between the NT Government and Unions NT enforceable by action in the courts. The offer was a non-binding indication of an intention to exercise a statutory power for a public purpose on terms which were insufficiently precise (particularly in relation to the development proposal referred to in paragraph (c) of the letter) to create enforceable contractual rights. Consistent with this legal position, the new NT Government has decided not to proceed with the transaction and Unions NT has not demonstrated any appetite for contesting that decision. The result is that whatever view one may take of cabinet's decision to offer a lease of Stella Maris to Unions NT and Mr McCarthy's letter communicating that offer to Unions NT, it was left to be implemented by the new Government, it was not implemented by the new Government, and, as a result, nothing came of it."*

Early concerns and the Commissioner's undertaking of 17 February 2014.

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



14. One of my concerns in early February 2014 after the Inquiry had commenced was that no attempt had been made to articulate to Mr McCarthy or Ms Lawrie the precise allegations of wrongdoing which were being made against them and which the Commissioner intended to investigate, and the basis on which those allegations were being made. For this reason, I drafted the letter of 14 February 2014 sent by Halfpennys on behalf Ms Lawrie and Mr McCarthy to the Commissioner (see 13 above, and AD1/12/17) noting, amongst other matters, that *"no warning has been given that you are considering making any particularly finding of wrong-doing against either of our clients"*.
15. On 17 February 2014, I received and read a copy of the Commissioner's letter of 17 February 2014 to Halfpennys (AD1/15/23). It said at page 2:

"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.**"* (emphasis added).

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



16. I was reassured by the emphasised statement in that letter that the Commissioner intended to follow what I understood to be the usual process for Commissions of Inquiry, particularly, to give a party specific notice that a particular adverse finding was being contemplated, to identify for the party the basis on which that finding was being contemplated and to give that party an opportunity to make submissions on the matter.
17. On the basis of the statement in the Commissioner's letter of 17 February 2014, I did not at any stage press him further for information concerning any particular adverse finding which he was contemplating making against Ms Lawrie and the basis on which that finding was being contemplated. I would have done so if he had not given this reassurance.

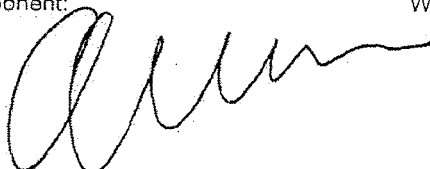
Representation at the Inquiry & issues of evidence and transcripts: Late February to March 2014

18. On 18 February 2014, I settled two letters to the Attorney General:
- (a) One seeking release from the oaths of confidentiality which Mr McCarthy and Ms Lawrie took under s.38(1) and s.38(2) of the *Northern Territory (Self-Government) Act 1978* as ministers (AW2/1); and
 - (b) One seeking the payment of legal costs (AW2/2).
19. On 18 February 2014, I saw a copy of a letter from Halfpennys to the Commissioner (AW2/4) seeking leave to represent Ms Lawrie and Mr McCarthy and advising that I had been engaged as counsel. It also requested a transcript and accepted the offer of "without prejudice" discussions.
20. On 18 February 2014, I saw a copy of a letter Halfpennys had received from the Commissioner advising that no transcript was being prepared (AW2/5).
21. On 19 February 2014, I received a copy of the Attorney General's letter to Halfpennys (AW2/6).
22. On 24 February 2014, I received a copy of the Commissioner's letter to Cathy Spurr chasing a response in relation to access to documents and audio files (AD1/31)

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



23. On 26 February 2014 I drafted Halfpennys' response (AD1/21/32) to the Commissioner's recent correspondence including his letters of 17 and 24 February 2014. The letter I settled said (*inter alia*):

"Please note that this firm is representing Ms Lawrie and Mr McCarthy on a pro bono basis. This means that we are not able to resource their representation anywhere near the level which an inquiry of this scale requires. We will respond to your correspondence when we are able to. We would much prefer to be able to represent our clients properly in this inquiry and to provide the assistance to you which that level of representation would enable us to do. However, until the Attorney agrees to meet the costs of that representation, we regret that that will not be possible."

24. This is critical context for understanding what followed until Halfpennys and I ceased representing the plaintiff and Mr McCarthy in the Inquiry on 15 April 2014. Ms Spurr and I did not have the resources to undertake on a pro bono basis all that was required to properly represent the plaintiff and Mr McCarthy in an inquiry of this kind. Our scarce pro bono resources needed to be used efficiently.

25. In relation to audio recordings/transcript, the letter said:

"Our clients do not have the resources to listen to and transcribe the hours of audio files which this inquiry has and will generate. It is only by the provision of transcripts of the evidence which is material to our clients' roles in the subject events that our clients can be treated fairly."

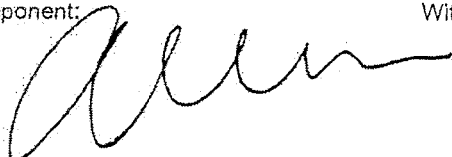
We are not aware of any public inquiry in modern times which has not transcribed its evidence and made the transcripts available to those who might be affected by the evidence. This is an essential requirement in order to provide procedural fairness to our clients, particularly given their lack of resources. We ask you to reconsider your decision in this respect."

26. Although in evidence at the trial of these proceedings, this letter of 26 February 2014 was not referred to in Justice Southwood's judgment, even though his Honour noted (at [80]) the Commissioner's earlier chasing letter and offer of audio recordings of 24 February 2014.

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



27. On 28 February 2014, I transferred the documents I received on CD from the Commissioner on to my hard drive. There were over 2,000 pages of documents in a number of pdf files. None of these documents carried the referencing system which the Commissioner used when asking witnesses questions. This was the first occasion on which I had access to the documents which related to Mr McCarthy's and Ms Lawrie's periods as the relevant Minister and the Cabinet decision of 10 July 2012.

28. There were also about 430 separate audio files. Dates and times were apparent on these files which meant that it was possible to know that information, but nothing more, about what was recorded, at least as far as I was able to tell. I also did not have a way of identifying the documents to which the witnesses referred or were referred during their testimony.

29. In their submissions of 10 March 2014 (AW2/7), which I settled, Mr McCarthy and Ms Lawrie said:

"the conduct of the inquiry to date by the Commissioner causes us great concern that we may not be fairly treated by him in this inquiry or in his report. Examples of what we believe is unfair treatment to date include deciding how he would conduct the inquiry without giving us an opportunity to comment, hearing evidence which he knew or should have known was evidence which we may want to challenge but without giving us any warning and refusing to provide us with a transcript of the evidence received by him to date."

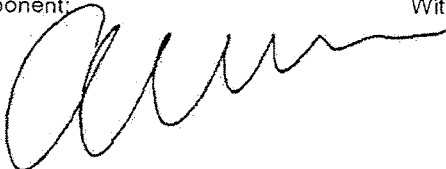
30. I settled these submissions in these terms because I considered that it was important to protect my clients' position by putting on record these matters at that stage. I believed and still believe that I had reasonable grounds for settling these submissions in those terms and that it was both appropriate and necessary to make those points.

31. The examples in these submissions were not the only matters which were concerning me at the time. I recall about this time listening to a passage of audio testimony and being concerned about the Commissioner's use of leading questions. In preparing this affidavit I have tried to locate that passage but have not been able to identify it. I was aware however that, without a transcript of the precise questions used and the testimony extracted, these points could not be taken credibly.

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:

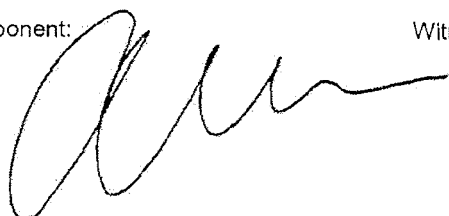


32. At 3.07 pm on 10 March 2014, I emailed to the Commissioner:
- (a) Those submissions of 10 March 2014; and
 - (b) My note on public interest immunity (AW2/9).
33. In relation to the submissions on public interest immunity I prepared those because I was extremely concerned that public interest immunity in cabinet documents was not being properly protected and preserved and that, as counsel, it was my duty to put that concern on the record.
34. On 10 March 2014, I attended with Ms Lawrie the informal meeting proposed by the Commissioner where he put the documents to us about which he wished to asked questions. He gave me a folder of documents which had on them the references he used. This meeting was recorded. Transcript is at AD1/25/38-52.
35. Also, on or about 10 March 2014, I attended the same sort of meeting with Mr McCarthy and the Commissioner. Part of the transcript is at AD1/26/53. This refers to the Unions NT Proposal (at AD3/47/616) and particularly the first two sentences, which were as follows:
- "The Stella Maris site has a long history of being a community place assisting travellers and seamen for more than 100 years.*
- The Seafarers Union together with the Stella Maris organisation took over the use of the historic "Railway" building on the site for the benefit and welfare of seamen in the port of Darwin"*
36. These two statements went to the Union connection with Stella Maris, which was a critical issue for the Inquiry and about which we had not yet been heard. The Commissioner said *"I think we've established sufficiently... some of those [which he went on to clarify as "the first two sentences"] ... to be clearly inaccurate"*. At the meeting on 10 March 2014, I asked him to confirm that he has *"formed that view already"* and he said "Yes" (see transcript at AD1/26/53).
37. I was trying to take notes at the same time as asking these questions. I wrote down *"formed a final view that first two statements are not true"* (AW2/14).
38. I immediately took objection to this (see the transcript at AD1/26/54).

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



39. I followed up that oral objection by drafting a letter which Halfpennys sent on 11 March 2014 asking the Commissioner to disqualify himself and reserving our clients' rights if he did not (AD1/27/55). Regrettably, I mistakenly thought that what I had written down in my notes was verbatim rather than a summary. But the note represented an accurate summary of the conversation as a whole, and I still consider the point was fairly and properly taken.

40. The Commissioner communicated his refusal to recuse himself by a letter of 11 March 2014 (AD1/28/57). On 13 March 2015, he also determined to cease discussing cabinet documents in camera and to hold all parts of the hearings in public. However, he adopted the position that "*conversations within the cabinet room*" were likely to be subject to public interest immunity and that he did not intend "*to traverse any of those discussions at all*" (AD1/29/61-62).

41. Halfpennys' letter of 11 March 2014 (at 39 above) also stated:

"We also note that, whilst you have provided copies of documents to our clients about which you wish to ask questions, you are continuing to refuse to indicate for what purpose. You make vague suggestions about conflict of interest or failures to observe normal process without explaining in a precise what (sic) (a) what you mean and (b) on what basis that conduct may fairly be criticised. Again, our clients rights are fully reserved.

Finally, we should note that the 430 individual audio files you have provided by disc in relation to 7 hearing days of evidence are of no help in assisting our clients understand the evidence which has been given at the inquiry. Our clients simply do not have the resources to listen to let alone transcribe this evidence. The inquiry's failure to provide a transcript continues to deprive our clients of the opportunity to properly understanding [sic] the evidence which has been given to the inquiry."

42. In settling that letter:

- (a) The first paragraph refers to a concern I had about the Commissioner unfairly asking questions of the plaintiff and Mr McCarthy by reference to contemporaneous documents to obtain (it appeared to me) admissions of fault but without articulating the basis on which that conduct may fairly be criticised so the witness had a fair opportunity to put his or her answer in

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Deponent:

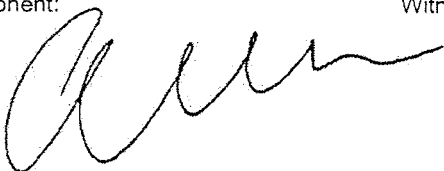
Witness:



response. As far as I can recall, at no stage was a comprehensible basis for any particular complaint about Mr McCarthy's or Ms Lawrie's conduct ever put to me by the Commissioner (save that Mr McCarthy had given untruthful evidence about his attendance at the cabinet meeting on 10 July 2012).

- (b) The second paragraph conveys my further concern noted at 28 above. It had become clear to me by early March 2014 that the Inquiry was not going to make a transcript of the evidence available and that the audio files provided by the Commissioner did not provide a practical means of accessing the evidence which had been given. The only way to access this evidence was to listen to the audio files - which went for many hours - and to make detailed notes of what was said by reference to the time and the particular file. Neither I nor my instructing solicitors had the time or resources to do this. In these circumstances, the Commissioner's reassurance in his letter of 17 February 2014 that he would provide "*all relevant materials*" in relation to any possible adverse finding was particularly important for me to be able to adequately prepare a response on behalf of the plaintiff or Mr McCarthy.

43. On 13 and 14 March 2014, Ms Lawrie attended the Inquiry and provided sworn testimony to the Commissioner. I was given leave to represent her at the Inquiry on these days. This hearing, I assumed, was still part of the "*information gathering phase*" referred to in the Commissioner's letter of 17 February 2014 letter. I listened carefully to the questioning from the Commissioner and the answers from Ms Lawrie. I considered that Ms Lawrie had provided a satisfactory explanation for her conduct in relation to the proposed grant of a lease of Stella Maris to Unions NT. Nothing the Commissioner said during those two days left me thinking that he was contemplating making any particular adverse finding or findings against Ms Lawrie at that stage. The matters I put to him from time to time during the course of that hearing as to the subject events were intended to persuade him generally that Ms Lawrie's evidence should be accepted and that there was no basis for concluding that Ms Lawrie had any case to answer such as to necessitate giving notice of a possible adverse finding. Further, my submissions were made on short notice in response to the content of questions I had only just heard. It was not possible to take my comments further than that as I did not know:



- (a) The particular respects in which the Commissioner believed or contemplated that Ms Lawrie's conduct could be open to adverse comment by him;
- (b) Why he may hold such a view; or
- (c) With reference to what material.

44. If, following my comments on 13 and 14 March 2014, the Commissioner nevertheless believed that Ms Lawrie's conduct could be open to adverse comment by him, I expected to have that belief, the grounds for it and the material which he considered supported it, drawn to my attention so that I could be given a reasonable opportunity to obtain instructions and then to prepare and put Ms Lawrie's case in response as fully and as persuasively as possible. I had this expectation:

- (a) Because of the Commissioner's statement in his letter of 17 February 2014 (see 15 above and AD1/15/23); and
- (b) Because I considered the giving of such notice to be a requirement of the applicable rules of natural justice in any event.

45. My recognition of the fact that the Inquiry was only at stage 2 as described in the Commissioner's letter of 17 February 2014 can be seen from my statement at the end of the plaintiff's testimony on 14 March 2014 where I said (AD1/31/153-4):

I've got just four matters which I thought might be appropriate to raise with you at this point of the inquiry, noting of course that this is still very much a work in progress.

46. I expressly qualified the general submissions I was about to make in these terms to remind the Commissioner that we were only at the information gathering phase and to ensure that he would not take the submissions I was about to make as being a complete statement of the plaintiff's position for the purposes of the Inquiry. I took the Commissioner's response ("*Indeed*": AD1/31/154) as an acceptance of this.

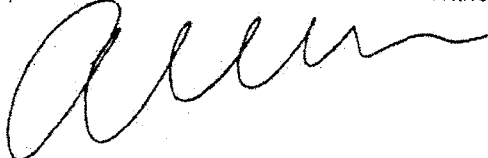
47. After Ms Lawrie and Mr McCarthy gave evidence I sent an email to Cathy Spurr on 16 March 2014 (AW2/15) in which I said *inter alia*:

We had a successful Thursday and Friday at the inquiry. Both Gerry and Delia were brilliant. We have really pushed the burden not a benefit point and it seems to be

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



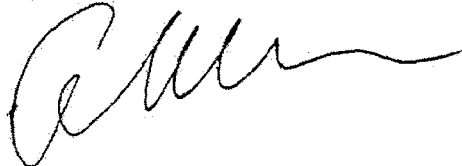
gaining traction even with Lawler. He's going to let me cross-examine the NTG valuer next week.

I'm working with our valuer to get his report up to speed. His comment on the Unions NT budget which shows how much fund raising was needed to get Stella Maris up and running is:

Analysis of the budget tends to prove conclusively this is not a profit generating, high performing business enterprise seeking to take advantage of what might seem to be highly attractive lease terms and conditions for the subject property.

48. The plaintiff sought to rely upon this email at the trial but was excluded following the defendant's objection: transcript 28 January 2015 at pages 56-57.
49. On 21 March 2014 I attended the Inquiry to tender the report from Mr Scarborough (the valuer we had retained) (AD/32/158-199) and to cross-examine the valuer Mr Harris whom the Commissioner had retained. I had received Mr Harris' report (AD1/32/184) in about early March. He had assessed the market rent of the proposed lease at \$60,000 per annum being 2% of the value of the freehold of \$3,000,000. I understood that this was being put forward as the value of the proposed lease to Unions NT, i.e., \$60,000 for each year of the lease term (10 + 10 years) For the reasons set out in Scarborough's report I thought this approach was wrong.
50. Mr Scarborough's report as included in the Agreed Documents (AD1/32/158) and tendered at trial is missing two important pages in the attachments, that is, document no.7, the Proposed Budget Stella Maris Redevelopment 2009/2010 Prepared by Unions NT (AW2/16). This document is important as it was, to the best of my recollection, the only evidence before the Inquiry as to the likely cost of putting Stella Maris into a condition where it could be conducted in accordance with the terms of the proposed lease and the likely net income from conducting business on the premises in accordance with the terms of the proposed lease. It suggested that Unions NT would need to raise \$128,000 in cash donations and \$46,000 in in-kind support in the first year in order to conduct business on the premises in accordance with the terms of the proposed lease. It projected a surplus of only \$4,058 at the end of the first year in return for this investment. Assuming that this budget was accurate,

Deponent:



Witness:



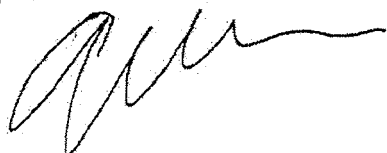
Mr Scarborough assessed the capitalised value of the benefit to the Northern Territory of Unions NT taking on this responsibility at \$1,005,000 (AD1/32/169). I considered that Mr Scarborough's report provided support for the plaintiffs and Mr McCarthy's position that the proposed lease was more of a burden than a benefit to Unions NT and that Cabinet's decision was the best decision in the public interest.

51. The hearing on 21 March 2014 finished after Mr Harris indicated that as he had only just seen Scarborough's report, he needed some further time to consider it and prepare a response.
52. On 27 March 2014, I saw the Commissioner's letter to Halfpennys of 26 March 2014 (AD2/34/205), which recalled Mr McCarthy, but not Ms Lawrie, to give further evidence.
53. Whilst I was concerned about the recall for Mr McCarthy, I remember noting that no point had been taken in relation to Ms Lawrie's evidence. Given this and my views at the time as to the strength of Ms Lawrie's evidence and of Mr Scarborough's report:
 - (a) I had some confidence that, in spite of the earlier suggestions that the Commissioner was unsympathetic, he might nevertheless accept our case that the decision to grant a lease in the terms as proposed was in the public interest;
 - (b) In any event, I thought it was unlikely that he would contemplate making any adverse finding against the plaintiff and, as a result, I thought it was unlikely that he would give her notice in this respect as set out in his letter of 17 February 2014.
54. I then saw two further letters from the Commissioner, the first dated 28 March 2014 (AD2/36/206) (with the enclosed letter from Paul Maher of 26 March 2014 (AD2/34/201)) and the second dated 3 April 2014 (AD2/39/249) (with the enclosed report from Mark Harris dated 2 April 2014 (AD2/38/244)). Whilst I did not read either of these to suggest that the Commissioner was contemplating making any particular adverse finding or findings against Ms Lawrie, they did undermine considerably the optimism I had been feeling since the plaintiff and Mr McCarthy had given evidence

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



about the prospect of persuading the Commissioner that cabinet's decision to grant a lease in the terms as proposed to Unions NT was the right decision.

55. Further, I could not see what point the Commissioner was seeking to make from Mr Maher's letter given:

(a) Its qualifications at [16]:

"I note that my instructions do not extend to the provision of a detailed advice on the likelihood of a success of a judicial review application brought by an aggrieved party. Indeed, I do not have sufficient information available to be able to provide such a detailed advice. I have only been asked to advise generally on the possibility of a court setting aside the Minister's determination."

(b) Mr Maher's instructions or assumptions (set out in the opening two paragraphs of the letter, and also at [15]) did not seem to accord with the facts, for example, no mention was made of the decision having been made by cabinet;

(c) There was no consideration of standing;

(d) Any consideration of unreasonableness should have addressed the question of the benefit/burden of the lease.

56. I recall considering the utility of preparing a detailed response to Mr Maher's letter.

57. Mr Harris' report rejected Mr Scarborough's approach and maintained the assessment made in his earlier report that the market rental for the proposed lease could be validly assessed by applying a percentage to the underlying freehold value of the land. He rejected Mr Scarborough's approach (which required an examination of the costs involved in complying with the proposed lease and the likely income from conducting business in accordance with the terms of the proposed lease) on the basis that "every prospective tenant's needs and requirements are different" (AD2/38/248). I believed from this report and from my cross-examination of Mr Harris on 21 March 2014 that, if I resumed my cross-examination of him, I was unlikely to persuade Mr Harris to change his mind or that any further cross-examination of him was likely to alter the Commissioner's approach to valuation. I



was particularly concerned about the latter given comments I recall the Commissioner making during Mr Harris' evidence on 21 March 2014 which suggested that the Commissioner was not following the valuation evidence.

58. However, whilst I saw that the prospects of persuading the Commissioner to accept that Cabinet's decision was the right decision had diminished, I knew that no notice of possible adverse findings had been given in relation to the plaintiff or Mr McCarthy.

Consideration of strategic options: late March to early April 2014

59. Consequently, on 31 March 2014, I sent an email to Mr McCarthy, Ms Lawrie, Mandy Taylor and Cathy Spurr (AD4/49/654).

60. The tone of this email reflected my frustration about the apparent failure of the plaintiff's, Mr McCarthy's and Mr Scarborough's evidence and my submissions that cabinet's decision was in the public interest to have any impact on the Commissioner. I was also frustrated with the Commissioner's persistence in pressing for a withdrawal of the "final view" assertion when, although those precise words were not used, they captured the substance of what he said. The email said:

"Just to confirm that Gerry is back on tomorrow at 9 am for what hopefully should be a short stint.

Can I also confirm...

- Given what is happening elsewhere, no news from the inquiry is definitely good news?

- That said:

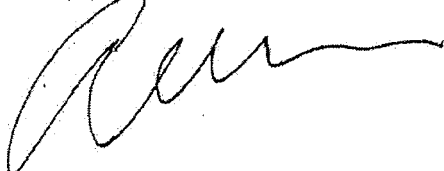
o we need to respond quite firmly to Lawler's bold suggestion that we withdraw the allegation that he has expressed a "final view" - prejudged the connection between Stella and Unions NT - by giving him both barrels including about the "urban myth" comment etc. I think it is important to put a few quotes on the record which you can use later to discredit his report without risking contempt/defamation.

o is it also time to say to him that we have no confidence in the inquiry or him because of the unfairness of his conduct of the inquiry to date, Delia and Gerry have important public duties from which this is a serious distraction and, given the fact

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



that no lease was actually granted, we consider the inquiry to be a pointless waste of time and will not be co-operating with it any further?? And then ignore him from now on? By staying engaged we may actually be giving him the opportunity to try to fix up the messes we say he has created and also more chance to verbal us."

61. Ms Lawrie responded in an email dated 31 March 2014 (AD4/50/655) as follows:

"I fully concur with your advice.

This has been a political stunt premised on lies.

I caught up with Hendo today. He did not ask for no White.

I still suspect Rod Applegate.

Hendo also agreed it should have been pre Cabinet not BSC.

The person creating that ruse is Rod Applegate.

Give it to them both barrels. "

62. In relation to the first "o" point in my email, this arises by necessity from the need to respond to the matter raised on page 2 of the Commissioner's letter of 26 March 2014 (AD2/35/205a). This was not a proposal for a change in strategy. Further, I believed then and still believe that the approach proposed in response to the Commissioner's position was legitimate, lawful and proper. In the face of what I considered to be unfairness on the Commissioner's part (including pre-judgment of the link between Stella Maris and the unions which was a key part of our case), we had to respond or risk waiver. I believe that the submissions I made in this respect at the hearing on 1 April 2014 (AD2/37/240-243) further to this part of my email and in response to the matter being raised by the Commissioner at that hearing were both proper and appropriate in the circumstances.

63. In relation to the second "o" point in my email, whilst it is a proposal for a change of strategy:

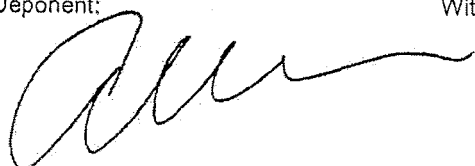
(a) It is in terms a proposal for an open strategy as can be seen from my use of the words "to say to him", referring to the Commissioner. There was no intention whatsoever on my part to suggest that the plaintiff and Mr McCarthy engage in any deception;

(b) It was never implemented. Whilst Ms Lawrie agreed with it at the time, there was no similar response from Mike Gleeson, Mr McCarthy or Cathy Spurr. Further, it was never said to the Commissioner that "we have no

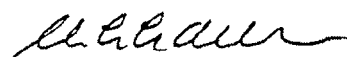
AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



confidence in the Inquiry or [you/him] because of the unfairness of his conduct of the inquiry to date, Ms Lawrence and Mr McCarthy have important public duties from which this is a serious distraction and, given the fact that no lease was actually granted, we consider the inquiry to be a pointless waste of time and will not be co-operating with it any further" or anything of the kind.

- (c) Further, subsequent emails do not refer back to the proposal; rather, they proceed on the assumption that no such strategy had been or would be agreed or embarked upon: see for example my email to Cathy Spurr of 8 April 2014 and her email in reply of the same date (AD4/51/657), in which we were still discussing strategy.

64. On 1 April 2014, I attended with Mr McCarthy to deal with the issue of his non-attendance at the cabinet meeting on 10 July 2012 and the Commissioner's request in relation to the "final view" statement (see the transcript at AD2/37/228ff).
65. As stated above, I don't believe that anything I said there was inappropriate in any way.
66. Following this hearing, I asked the plaintiff's staff to try to find the Commissioner's "urban myth" statement. Following information I received from Mr Gleeson at 4.17pm on 2 April 2014 and after about 30 to 45 minutes of listening to the audio files on my computer, I located the statement at the beginning of the audio file "Stella Maris Inquiry-Lawler_20140219-1632_01cf2d903c0477a0.trm" which is a recording of part of the testimony of David Money given on the afternoon of 19 February 2014.
67. Following the exchange of emails at AD4/51/657, on 11 April 2014, I had a telephone discussion with Cathy Spurr.
68. By this stage, my professional and personal resources to continue with the Inquiry on a pro bono basis were running very low. Over the 40 working days between 10 February 2014 and 4 April 2014, I had sent or received a total of about 270 emails in relation to this matter, had attended at the Inquiry's rooms at Casuarina on 5 different occasions for a total of about 3 days, had done all of the work to secure Mr Scarborough's report, drafted written submissions, drafted a number of important items of correspondence, as well as having read thousands of pages of documents.

AFFIRMED this 26th day of May 2015.

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Deponent:

Witness:



I was particularly concerned because the Northern Territory Bar Association's conference in Dili was due to take place between 9 and 12 July 2014 and a large amount of organisation was still required to make this conference a success. I was also concerned about my own practice. I wanted to speak to Ms Spurr before making a final decision I was aware also that I may be needed to prepare a response to the report particularly if it was critical of Cabinet's decision.

69. Ms Spurr's file note at AD4/52/659 records some of what I said to her. I recall:

- (a) Explaining my thinking as set out in paragraphs [54] to [58] above;
- (b) For those reasons I said words to the effect there was little point in us putting in this extra work and our efforts would be better spent on assisting Ms Lawrie and Mr McCarthy preparing their own report justifying Cabinet's decision;
- (c) As we were both ceasing to act I wanted to make sure that the Commissioner was advised of this (and I recall conveying this to Ms Spurr with words to the effect that "*we can't say nothing*") and to ensure that the Commissioner did not receive the false impression that the plaintiff and Mr McCarthy had made the decision to terminate our retainer;
- (d) I said we should advise the Commissioner "*our clients had exhausted their ability to draw on pro bono legal support for the inquiry*" as this was the true position. The word "*exhausted*" reflected what I was feeling at the time. I told her that I was not prepared to do the work required to respond to Mr Maher's letter and deal with Mr Harris' supplementary report on a pro bono basis. She said that if I was not prepared to continue on a pro bono basis she was not prepared to either;
- (e) I told her to include the words "*Our clients remained vitally interested in the outcome of the Inquiry*" as I wanted to make sure that our withdrawal did not give rise to any risk of waiver on the part of the plaintiff and Mr McCarthy. I did have in mind at that time that it remained possible that notice of proposed adverse findings may still be given by the Commissioner in relation to the plaintiff and/or Mr McCarthy. I included those words for the purpose of

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



ensuring that the plaintiffs and Mr McCarthy's right to receive any such notice was preserved.

70. On 14 April 2014, I received Cathy's draft by email at 4.20 pm (AD4/53/660-662) which I settled by adding "*Accordingly we will no longer be representing Ms Lawrie and Mr McCarthy in this matter*" to the second paragraph and "*Please note that*" to the fourth, and returned by email at 4.31 pm (AD4/55/664-665). I made these amendments to be clear about the two important points I wanted the letter to make – that Ms Spurr and I were terminating our retainer and that this should not be taken in any way which would diminish the rights Ms Lawrie and Mr McCarthy otherwise had.
71. Looking at that letter now, it would have been better expressed if "*assistance*" in line 3 [which as sent said "*Our clients have exhausted their ability to access pro bono legal assistance*"] was replaced with "*representation*". I was prepared to continue to assist Ms Lawrie and Mr McCarthy in the Inquiry by providing advice from time to time and assisting in the drafting of a report on their behalf. However I was not prepared to continue to take on what I considered to be the much more significant and time-consuming professional responsibility of responding on behalf of Ms Lawrie and Mr McCarthy to these two further letters from the Commissioner and dealing with the matters which might flow from that.
72. In including the words "*our clients had exhausted their ability to draw on pro bono legal support for the inquiry*", I had no intention of disguising the fact that I would be providing further assistance at some stage to Ms Lawrie and Mr McCarthy in relation to the Inquiry by assisting them with the drafting of their report in response to the Commissioner's report. It was not my intention to deceive the Commissioner in any way. It did not occur to me that whether or not I might provide such further assistance to Ms Lawrie and Mr McCarthy might be of any legitimate concern to the Commissioner or could affect his actions in any way.
73. I then ceased representing Ms Lawrie and Mr McCarthy in the Inquiry.

Post-retainer: late April to May 2014

74. After this, I went back to my practice and to organising the Dili conference. Occasionally, Mr Gleeson would ask me a question pertaining to the Inquiry, but otherwise I moved on to other things.

AFFIRMED this 26th day of May 2015.

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Deponent:

Witness:



75. When I ceased to represent the plaintiff and Mr McCarthy in the Inquiry on 15 April 2015, I was not confident that the Commissioner would accept our case that cabinet's decision was in the public interest. I thought it was likely that he would be critical of the decision and the processes leading up to it. However, precisely what form that criticism would take I could not predict, hence my statement in my email of 10 June 2014 to Mr Gleeson that *"It is very hard to draft a response to something the precise detail of which we don't yet know"* (AD4/65/693).
76. In relation to the plaintiff and Mr McCarthy individually, I did not expect adverse findings to be made against them most particularly because notice that an adverse finding was being considered had not been given (although I could see a risk that the Commissioner may consider that he had given that notice in relation to Mr McCarthy's evidence about being present at the cabinet meeting on 10 July 2012). I expected the Commissioner to comply with his letter of 17 February 2014. That remained my expectation until I saw the adverse findings in the Report.

The commencement of these proceedings: June to August 2014

77. Between June 2014 and August 2014 I communicated with Ms Spurr in relation to the application which was filed by Ms Lawrie. However such communications are privileged and that privilege has not been waived as far as I am aware.
78. On 24 June 2014, Halfpennys sent a letter to the Commissioner asking him to confirm that no notice had been given.
79. A response to the 24 June 2014 letter was received by Halfpennys on 22 July 2014 (AW2/18). That response expressed the view that:
- "your clients [in context, Ms Lawrie and Mr McCarthy] were clearly on notice of the possibility of an adverse finding."*
80. A decision was ultimately made to commence proceedings in Ms Lawrie's name only. I do not recall precisely when this decision was made but it was after receipt of the response of 22 July 2014.
81. I agreed to act in the proceeding to be filed on Ms Lawrie's behalf on a conditional fee basis.

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



82. The proceedings were commenced on 30 July 2014. At the time the proceeding was commenced I believed that Ms Lawrie had a genuine claim with good prospects of success as set out in the statement of facts issues and contentions.

Commencement to trial – September 2014 to January 2015

83. Once it was clear in early November 2014 that I would have to provide an affidavit, I knew that I could not be counsel. In November of 2014 Tony Young of my chambers was instructed to act as counsel for the plaintiff in the matter which he agreed to do. My last action in the matter in 2014 was on 9 December 2014 when I provided copies of documents I had on my computer to Mr Young
84. I was out of Darwin from just after New Year until Sunday 25 January 2015.
85. When I returned in Darwin on Sunday 25 January 2015, in accordance with arrangements I had made by email with Mr Young I went to chambers and started reviewing the documents on my computer in order to assist the plaintiff to comply with the discovery order which had been made on 15 January 2015. This took several hours on the Sunday and the following Monday. I provided the documents which I thought may fall within the order for discovery to Mr Young and perhaps also his junior Mr George. I went through the documents I had located with Mr Young in his chambers for the purpose of ensuring that the documents in my possession which fell within the discovery order were disclosed.
86. As a result of that review, I located documents which I did not have before me when I deposed to my affidavit of 12 November 2014. As a result I prepared and deposed to my affidavit of 27 January 2015.
87. My involvement in the matter in January 2015 up to the start of the trial was as set out above, apart from a telephone conversation I had with Mr Young on 21 January 2015 when I called him from Melbourne at his request. I was not involved in the drafting or settling of written submissions, in any conferences with the plaintiff or, save as set out above, in the preparation for trial.
88. I was aware that the defendant was likely to challenge my evidence particularly in relation to my reliance on the Commissioner's letter of 17 February 2014 and the statement in Halfpennys' letter of 15 April 2014 that the plaintiff and Mr McCarthy "had exhausted their ability to access pro bono legal assistance" in support of a case

AFFIRMED this 26th day of May 2015.

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Deponent:

Witness:



of waiver the precise logic of which I did not follow. I do not recall how I became aware of these matters. Otherwise I was not aware of what if any allegations of improper conduct might be made against me.

89. The trial started on 27 January 2015. I was in my chambers that day. I was not in the court where the trial was being conducted on the morning of the trial (or at any other stage). At about 11am I received a telephone call from Cathy Spurr advising me that the plaintiff had decided not to rely on her own affidavit, Cathy's and mine. As a result I was told that I was not needed for cross-examination.
90. I then packed up the materials I had been reading in preparation for giving evidence and put them in a condition to be returned to Halfpennys. I thought that I would have no further involvement in the matter.
91. I heard from Tony Young and perhaps Mr George on Wednesday evening or Thursday that nevertheless the defendant was still making serious allegations against me. Mr Young and Mr George were both very busy working on the case and I did not get any detail from them as to the precise nature of the allegations which we being made.
92. The first time I received anything in writing about what was being said against me was when I received an email from Fiona McLeod SC the president of the Australian Bar Association at 10.11pm on Thursday 29 January 2015 drawing my attention to an article on the NT News website about what had been said in court that day. That was the first and only detail I received in writing of what was being said against me until I received the judgment. I did not see a copy for the defendant's second amended Statement of Facts, Issues and Contentions dated 28 January 2015 (which at paragraphs 27A to 27C gave particulars of the alleged "*deliberate and deceptive strategy*") until after the judgement was handed down. I have never been contacted by the defendant or anyone on their behalf about this matter until I received a copy of Mr Maher's letter of 10 April 2015.
93. The only contact I have had from Justice Southwood is a letter from his associate on 2 April 2015 (AW2/23).

AFFIRMED this 26th day of May 2015.

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Deponent:

Witness:



Judgment in these proceedings: April 2015

94. Justice Southwood delivered judgment in favour of the defendant on 1 April 2015. It contained a number of references to me, as to which I say as follows.

Judgment at [144]

95. Justice Southwood says in his judgment 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."

96. With respect, this is incorrect:

- (a) Ms Lawrie and Mr McCarthy continued to be represented by Ms Spurr and me in the Inquiry until around 15 April 2014 and by that means remained engaged in the Inquiry;
- (b) This included my representation of Mr McCarthy at the hearing on 1 April 2014 (see 64ff above), and by our receipt and consideration of correspondence from the Commissioner including his letters of 26 March 2014, 28 March 2104 (and enclosed advice from Maher) and 3 April 2014 (enclosing the valuation report from Harris) (see for example 52 and 54 above);
- (c) Ms Lawrie was not recalled to give further evidence, and so there was a limit to how much further involvement or active engagement she could have had in the Inquiry after 31 March 2014;

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Deponent:

Witness:



- (d) As explained at 62 to 63(c) above, the second "o" point in the email of 31 March 2014 did not represent any change in strategy, but rather a proposal which was not adopted. Further, it certainly did not propose a deceptive strategy;
- (e) There was no strategy that Ms Lawrie would withdraw from participation in the Inquiry. Instead a decision was made by her legal representatives not to respond to the outstanding correspondence from the Commissioner but to cease representing her in the Inquiry. I judged that the poor prospects of these submissions having any persuasive effect did not justify the further imposition on my and Ms Spurr's time. As previously stated, at this point I stated that I was not prepared to continue to act pro bono in those circumstances (see 69ff above).

Judgment at [151]

97. Justice Southwood makes two assertions at [151] of his judgment.

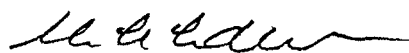
98. The first is as follows:

"The email (of 31/3/2014) signals the commencement of the strategy to ignore, disengage and discredit the Inquiry. 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 about why it was necessary to make the decision to grant a Crown lease of Stella Maris to Unions NT in the manner the decision was made. This is made clear by Mr Wyvill's 8 April 2014 email to Ms Spurr set out below and by other comments he makes in other emails set out below."

99. I do not agree that the email of 31 March 2014 can be construed in that way, for the reasons at 96 above.

100. The second assertion in the judgment at [151] is as follows:

"It must have also been obvious to Mr Wyvill that the Inquiry was not going well for Ms Lawrie and Mr McCarthy. Mr McCarthy had just been caught out misinforming the Inquiry about a key part of his evidence. Much of Ms Lawrie's evidence was



dissembling and it was apparent that she was not conscientiously endeavouring to assist the Inquiry."

101. With respect, this is incorrect:

- (a) I thought their evidence went well: see 47 above;
- (b) I was comfortable that Mr McCarthy had made an honest mistake about his attendance at the cabinet meeting on 10 July 2012; and
- (c) I did not think that Ms Lawrie was dissembling or conscientiously endeavouring to not assist the Inquiry in her evidence at all. I note that this also does not appear to have been the view of the Commissioner – Finding 10 of the Report suggests the Commissioner accepted her evidence, insofar as it said (emphasis added):

"I find that, notwithstanding 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".

Judgment at [161]

102. After referring to the exchange between the Commissioner and myself on 1 April 2014 when I objected to the Commissioner inquiring into what had been said at other cabinet meetings (see 64 above), Justice Southwood says at [161]:

"The above exchange is consistent with Mr Wyvill's suggested strategy that they give Mr Lawler "both barrels" by ceasing to cooperate with the Inquiry and by indicating to him that they had lost all confidence in his ability to fairly conduct the Inquiry. It is apparent that Mr Wyvill was engaging in a tactic of attempting to divert Mr Lawler from exploring precisely what involvement, if any, Mr McCarthy had with the Stella Maris Cabinet submission and the waiver of the six day time limit."

103. With respect, this is incorrect:

- (a) I responded to the Commissioner's questions on their merits;

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



- (b) There was no lack of appropriate cooperation by me at that hearing or on any other occasion;
- (c) As soon as I had seen the extent of disclosure of cabinet documents, I was concerned about public interest immunity. Although he did not accept my concerns about Cabinet documents, the Commissioner had accepted that public interest immunity probably applied to prevent any examination by him of what was said in cabinet and that as a result he did not intend "to traverse any of those discussions at all" (see 40 above). However, when Mr McCarthy was recalled on 1 April 2014, the Commissioner tried to ask him questions about discussions at Cabinet meetings other than 10 July 2012. It seemed clear to me that a question directed at what was discussed at other Cabinet meetings breached the immunity in the same way that any questions directed to what was discussed at the Cabinet meeting on 10 July 2012 would have breached that immunity. I objected accordingly (see the transcript at AD2/228-230);
- (d) Further, whether or not that view was correct, it was my genuine belief at the time and the basis of my objection; and
- (e) The "exchange" that occurred at the Inquiry on 1 April 2014 primarily concerned breach of immunity, not "exploring precisely what involvement, if any, Mr McCarthy had with the Stella Maris Cabinet submission and the waiver of the six day time limit" (as set out at [161] of the judgment). It was never my intention to attempt to divert Mr Lawler from exploring any matter he was legitimately entitled to explore, including "what involvement, if any, Mr McCarthy had with the Stella Maris Cabinet submission and the waiver of the six day time limit".

Judgment at [163-164]

104. Justice Southwood says in his judgment at [163-164]:

"[163] What Mr Wyvill is doing during the course of this exchange with Mr Lawler [concerning the "final view" and "urban myth" issues raised during Mr McCarthy's evidence on 1 April 2014] is consistent with the first dot point of his email dated 31 March 2014. First, Mr Wyvill is endeavouring to respond to Mr Lawler's concern that

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



Mr McCarthy had wrongly suggested that Mr Lawler had stated that he had reached a 'final view'. He is also asserting that Mr Lawler had wrongly described the attachment between Unions NT and the Stella Maris site as an 'urban myth' and thereby prejudged the issue. Second, Mr Wyvill is putting 'quotes on the record' for the purpose of using them to discredit Mr Lawler at a later date. In substance, Mr Wyvill was endeavouring to disparage Mr Lawler publicly on the record so that political use could be made of his comments in other places.

[164] Mr Wyvill fails on both counts. Both barrels were empty. Mr Wyvill acknowledges that it was he who used the expression 'final view', not Mr Lawler; and Mr McCarthy withdrew his comments to the effect that Mr Lawler had reached a final view. Further, Mr Wyvill could not provide any particulars to support his assertion that Mr Lawler had described Union NT's attachment to the site as an 'urban myth'. Mr Lawler also answered the disparaging comments."

105. With respect, this is incorrect:

(a) It was the Commissioner who raised each of those two matters (the "urban myth" and the "final view" issues) on that day of the hearing, not me. I was responding to his attempts to get us to resile from our "urban myth"/"final view" complaints. I did not think it was appropriate to do so:

(i) As to the "urban myth" issue, see 65 and 66 above; and

(ii) As to both the "urban myth" and the "final view" issues, see the transcript of Mr McCarthy's evidence on 1 April 2014 at AD2/37/240-243;

(b) I consider that my conduct during this aspect the hearing was legitimate and proper.

Judgment at [181]

106. Justice Southwood says in his judgment at [181]:

"This letter to Mr Lawler [of 15 April 2014 – see 70 to 71 above] is part of the strategy of Ms Lawrie ignoring and disengaging with the Inquiry. The whole of the second paragraph in Ms Spurr's letter to Mr Lawler is deliberately and knowingly

AFFIRMED this 26th day of May 2015.

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Deponent:



Witness:



false. The making of the false statements was counselled by Mr Wyvill; and Ms Spurr sent the letter after obtaining instructions from Ms Lawrie. Ms Lawrie knew the statements were false. Ms Lawrie had not exhausted her ability to access pro bono advice from Mr Wyvill and Ms Spurr. That was not the reason why she did not respond to the advice of Mr Maher or the further report of Mr Harris. After this letter was sent to Mr Lawler, Mr Wyvill, and to a lesser degree Ms Spurr, continued to provide ongoing pro bono legal assistance, advice and representation to Ms Lawrie."

107. With respect, this is incorrect:

- (a) The second paragraph of the letter contains three statements:
 - (i) That our clients had "exhausted their ability to access pro bono legal assistance";
 - (ii) That "accordingly, we will no longer be representing [them] in this matter"; and
 - (iii) That "in those circumstances, we do not propose to respond to [Maher's letter and Harris's report]";
- (b) As to the first, I have explained at 71 above my regret in hindsight at my choice of wording, but maintain for the reasons at 72 that the statement involved no intention to mislead;
- (c) As to the second, the statement correctly reflects the decision which Ms Spurr and I reached (see 69 above), and which was accepted by Ms Lawrie and Mr McCarthy;
- (d) As to the third, that statement is also true, "we" being a reference to Halfpennys.

Judgment at [182]

108. Justice Southwood says in his judgment at [182]:

"The statement, "Please note that our clients remain vitally interested in the outcome of the enquiry", is also disingenuous and misleading. As I have said, it does not represent the true position of Ms Lawrie. It is a device which has been used to

AFFIRMED this 26th day of May 2015.

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Deponent:

Witness:



deflect any suggestion that Ms Lawrie has abandoned the Inquiry. It is a device which was capable of being used to suggest that Mr Lawler failed to accord Ms Lawrie procedural fairness."

109. With respect, this is incorrect:

- (a) The plaintiff and Mr McCarthy were *"vitally interested in the outcome of the Inquiry"*. To my knowledge they were both extremely concerned throughout the Inquiry as to what the Commissioner might say in his report, particularly about them. The fact that Ms Spurr and I were not prepared to continue to provide pro bono representation did not change that fact;
- (b) The purpose I had clearly in mind was to ensure that our ceasing to act was not misinterpreted as an abandonment of our clients' right to receive natural justice in the Inquiry's processes, particularly in relation to notice of any possible adverse finding;
- (c) At that stage it had not occurred to me that the Commissioner might not comply with his duty to accord natural justice to Ms Lawrie and Mr McCarthy including by providing notice of any possible adverse finding. I do not understand how it could be concluded that I would attempt to set up a "device" to exploit an opportunity which hadn't occurred to me

Judgment at [192]

110. With reference to my email exchange with Mike Gleeson on 19 May 2014 (see AD4/60/672-673), Justice Southwood says in his judgment at [192]:

"Once again, consistent with his strategy, Mr Wyvill is counselling Ms Lawrie and her advisers against corresponding with Mr Lawler. He is, of course, also continuing to give pro bono advice. Mr Wyvill's email establishes that he still believes that Mr Lawler was unable to be persuaded about Ms Lawrie's position. He continues to believe that the best approach is a political strategy, which now includes asserting that the process never had any independence from the beginning. I accept Mr McLure's submission that what is being counselled by Mr Wyvill is a strategy to make the incredibly serious and completely baseless allegation that the Country

AFFIRMED this 26th day of May 2015.

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Deponent:

Witness:



Liberal Party Government picked Mr Lawler on the basis that he would find what they wanted him to find."

111. With respect, this is incorrect:

- (a) As Mike Gleeson's email stated, what we were discussing in the email exchange was something that had occurred in the Parliament and I was counselling a response "in parliament";
- (b) In any event, I did not believe that there was anything wrong with not corresponding with the Commissioner. The position was clear on the record – he would provide notice of any possible adverse finding (see 15 above). In the circumstances I did not believe that the plaintiff's and Mr McCarthy's position would be improved by writing to the Commissioner – it was his duty to provide natural justice, not our duty to seek it from him;
- (c) My email of 19 May 2014 to Mike Gleeson was informal personal advice – no-one else was copied in;
- (d) My comments regarding lack of independence were made in the context of the matters set out in Mike Gleeson's email which had been raised in the Parliament. It appeared to me from these comments that the Commissioner had given the Chief Minister a copy of the draft report before it had been given to the Administrator and I was concerned as to whether the Commissioner was acting independently; and
- (e) I do not agree that I counselled the making of (or any strategy to make) any allegation which was baseless.

Judgment at [203]

112. Justice Southwood says in his judgment at [203]:

"Despite being reminded of the contents of Mr Lawler's letter of 17 February 2014 and knowing Mr Lawler's report would not be made public until 19 June 2014, neither Ms Lawrie nor Mr Wyvill nor Ms Spurr contacted Mr Lawler to ask to be notified of any adverse findings against Ms Lawrie and given an opportunity to make further submissions about any adverse findings. Instead, Ms Lawrie and Mr Wyvill

AFFIRMED this 26th day of May 2015.

31

Deponent:



Witness:



maintained their strategy of deliberately ignoring and disengaging from the Inquiry and further developed it by deciding to commence legal proceedings based in part on an alleged reliance by Ms Lawrie on Mr Lawler's letter of 17 February 2014 and an alleged failure by Mr Lawler to give Ms Lawrie notice of his adverse findings prior to finalising his report."

113. With respect, this is incorrect:

- (a) For the reasons set out at 96 above, I disagree with his Honour's construction of my email of 31 March 2014;
- (b) For the reasons set out at 111(b) above, I did not believe that there was anything wrong with not corresponding with the Commissioner, given the duty to provide natural justice lay with him;
- (c) His Honour's comments here refer (at least in part) to my email of 26 May 2014 (AD4/63/682), which was sent on the date on which the Commissioner had said he would give (AD1/15/25) and did in fact give his report to the administrator (AD2/42/255); and
- (d) Whilst legal proceedings by Ms Lawrie were an option in the event that adverse findings were made no decision was made at this stage to commence legal proceedings.

Judgment at [221]

114. With reference to an email from Mr Gleeson to Ms Lawrie of 19 June 2014 (which gave an account of a conversation I had had with Mr Gleeson following public release of the Report), Justice Southwood says in his judgment at [221]:

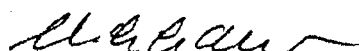
"Mr Wyvill's advice included a recommendation that Ms Lawrie make a false statement. In his letter dated 17 February 2014 Mr Lawler had clearly stated that he may well be making adverse findings about Ms Lawrie's conduct; and any adverse findings clearly would not come as a surprise, let alone a complete surprise. Ms Lawrie and her advisers had developed a sophisticated strategy to deal with the "ugly" report findings they had for some time anticipated Mr Lawler would make. Further, the purpose of Mr Wyvill's advice to Mr Gleeson was to try and bolster their assertions that they had been denied procedural fairness."

AFFIRMED this 26th day of May 2015.

32

Deponent:

Witness:



115. With respect, this is incorrect:

- (a) The Commissioner had stated in his letter of 17 February 2014 that he would not make any adverse finding without giving notice, which as noted above I considered was consistent with his duty to accord natural justice;
- (b) Because no notice had been provided, any specific adverse finding would necessarily be and did in fact come as a surprise;
- (c) I have noted above my views held at various times as to the likelihood of adverse findings;
- (d) The particular findings were a complete surprise to me;
- (e) I did not counsel the making of any false statement;
- (f) As to an "ugly" report, which was a reference by his Honour to Ms Lawrie's email to a group of her staff and colleagues of 26 May 2014 (AD4/61/676), I did expect to report to be unfavourable in relation to the actual decision about the Stella Maris site but did not expect adverse findings against Ms Lawrie: see paragraph 76 above; and
- (g) The purpose of the advice was not to "bolster", but to ensure that the plaintiff and Mr McCarthy's position was protected by having their complaint on the record as soon as a breach of the obligation to give notice was apparent. I considered that it would have been unwise not to do this.

Judgment at [223]

116. With reference to paragraphs 6 to 12 of the Statement of Facts, Issues and Contentions filed on 24 September 2014 (see 83 above), Justice Southwood says in his judgment at [223]:

"Apart from the partial admission pleaded in par 11 of the Plaintiff's Statement of Facts Issues and Contentions, the allegations pleaded in the document are untrue, as Ms Lawrie must know. It is a fair inference that Ms Lawrie would have seen the document before it was filed in Court because it was Ms Spurr's invariable practice to obtain instructions from Ms Lawrie before taking a step on her behalf. The filing of

AFFIRMED this 26th day of May 2015.

33

Deponent:

Witness:



the Plaintiff's Statement of Facts Issues and Contentions appears to be the culmination of the Mr Wyvill's strategy to discredit Mr Lawler which has been approved and adopted by Ms Lawrie."

117. The relevant paragraphs from that Statement are as follows:

7. The plaintiff and her legal representatives relied on the defendant's statements in this letter in determining how the plaintiff ought to participate in and contribute to the Inquiry.

8. As part of Phase 2 of the Inquiry and in response to a summons from the defendant dated 15 February 2014, the plaintiff attended the Inquiry and provided sworn testimony to the defendant.

9. After completing phase 2 of the Inquiry, on 27 March 2014, the plaintiff's solicitors received a letter from the defendant dated 26 March 2014 advising that he did not wish to recall the plaintiff to give further testimony.

10. At no stage did the plaintiff receive any notice from the defendant that he considered that there may be grounds to make any adverse findings against the plaintiff whether as foreshadowed in the letter referred to in paragraph 6 above or otherwise.

11. From on or about 26 March 2014, the plaintiff did not seek to make any further contribution to the Inquiry, whether by responding to inquiries from the defendant, by seeking to put in further evidence, by making further submissions herself or via her solicitors or counsel, or otherwise. On 14 April, the plaintiff's solicitors ceased representing the plaintiff in the Inquiry.

12. The plaintiff and legal representatives acted as set out in paragraph 11 above in the belief that, by reason of the defendant's conduct (most particularly as set out in paragraphs 6 and 9 above), he was not considering making any findings which were adverse to the plaintiff. In the circumstances, this belief was reasonable.

118. I did draft this statement but, with respect, his Honour's remarks at [223] of the judgment are incorrect:

(a) I believed then and still believe that all of those statements are true;

(b) I gave the advice I gave and made the decisions I made up to and including my decision to cease acting as counsel in the knowledge that:

AFFIRMED this 26th day of May 2015.

34

Deponent:



Witness:



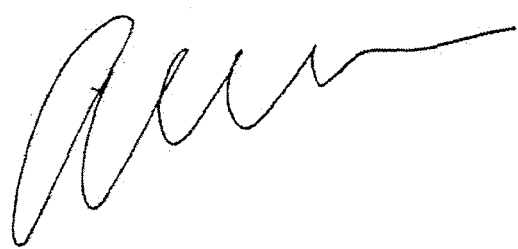
- (i) The Commissioner had undertaken to give notice of any possible adverse finding (and was under a duty to do so in any event); and
- (ii) No such notice had been given;
- (c) I have noted above (see 52 and 53 above) that, unlike with Mr McCarthy and consistent with my view of the strength of the case we had put, Ms Lawrie had not been called back and that that was a factor which suggested that the Commissioner was not considering making any adverse finding against her;
- (d) The purpose of commencing the proceedings was to set aside the findings against the plaintiff in the Report which I considered had been arrived at unfairly. A necessary and obvious consequence of success in the proceedings was that it would discredit the Commissioner and his Report; and
- (e) Consequently, I consider that his Honour's comments at [223] of the judgment are untrue.

119. I know the facts in this affidavit of my own knowledge except where otherwise appears.

AFFIRMED by the abovenamed)
 deponent at Darwin)
 this 26TH day of May 2015)
 Before me:)


 Commissioner for Oaths / Legal Practitioner

Kirby Larissa Lawler
 Commissioner of Oaths (NT)
 Minter Ellison
 Level 1, 60 Smith Street
 Telephone No DARWIN NT 0800



AFFIRMED this 26th day of May 2015.

35

Deponent:

Witness:

IN THE SUPREME COURT OF THE
NORTHERN TERRITORY OF
AUSTRALIA AT DARWIN

No. 68 of 2014

BETWEEN:

DELIA PHOEBE LAWRIE

Plaintiff

and

JOHN LAWLER

Defendant

ANNEXURE AW2

This is the annexure marked AW2 referred to in the affidavit of ALISTAIR WYVILL affirmed the 26th day of May 2015.



Witness

Name

Address or Ph.

Qualification

Kirby Larissa Lawler
Commissioner of Oaths (NT)
Minter Ellison
Level 1, 60 Smith Street
DARWIN NT 0800



LEADER OF THE OPPOSITION

Parliament House
State Square
Darwin NT 0800
Opposition.Leader@nt.gov.au

GPO Box 3700
DARWIN NT 0801
Telephone: 08 8928 6668
Facsimile: 08 8928 6666

Mr John Elferink
Attorney-General
Darwin NT 0800

18 February 2014

Dear Mr Elferink

STELLA MARIS INQUIRY

We are writing regarding the oaths we took under s.38(1) and s.38(2) of the Northern Territory (Self-Government) Act 1978 when we were appointed ministers and members of the executive council. We seek to be released from those oaths in relation to matters concerning Stella Maris.

As you know, the decision to offer a lease of Stella Maris to Unions NT was a decision made by Cabinet. Both of us were involved in that decision not just as members of cabinet but also as ministers in the events leading up to the decision. Mr McCarthy was also involved as a minister in implementing the decision for a brief period after it was made.

It seems to us that any disclosure of or discussion by us of the events within Government leading up to the cabinet decision, of the cabinet decision itself and of how it was implemented risks placing us in breach of these oaths.

Please therefore confirm on behalf of the Northern Territory that we are released from these oaths in relation to matters concerning Stella Maris so that we may fully co-operate with the inquiry.

We look forward to hearing from you.

Yours sincerely

DELIA LAWRIE

GERRY MCCARTHY



LEADER OF THE OPPOSITION

Parliament House
State Square
Darwin NT 0800
Opposition.Leader@nt.gov.au

GPO Box 3700
DARWIN NT 0801
Telephone: 08 8928 6668
Facsimile: 08 8928 6666

Mr John Elferink
Attorney-General
DARWIN NT 0800

18 February 2014

Dear Mr Elferink,

STELLA MARIS INQUIRY

We are writing to you regarding legal representation in relation to the inquiry.

As you know, the inquiry has commenced. Although it is not entirely clear, it seems that evidence will be taken over several weeks from a large number of individuals. Further, it seems that a large number of documents will be produced to and considered by the inquiry.

The decision to offer a lease of Stella Maris to Unions NT was a decision made by the then Northern Territory Cabinet. Individual Cabinet members were carrying out their duties in good faith as Ministers of the Crown. Nevertheless, members of the current government have made serious allegations of wrong-doing under parliamentary privilege and used their majority in Parliament to establish this inquiry. We categorically deny any wrong-doing and wish to ensure that our position is properly presented to the inquiry.

Given the scale of the inquiry, it is not possible for us to do this without legal representation.

Rightly, we understand that the Government has offered to pay for the costs of legal representation to public servants who may appear before the inquiry. We ask that this same offer be extended to us. Without this assistance, we will be unable to put our position properly to the inquiry and as a result the outcome of the inquiry, if unfavourable to us, will necessarily be unfair and unreliable.

We look forward to hearing from you.

Yours sincerely

Delia Lawrie

Gerry McCarthy



HALFPENNYS

L A W Y E R S

Your Ref: John Lawler
Our Ref: CLS:sml:20130805

Telephone: (08) 8942 8888
Facsimile: (08) 8942 8842

Private & Confidential

18 February 2014

Mr John Adrian Lawler
Commissioner - Stella Maris Inquiry
2/5, Cascom Centre
13-17 Scaturchio Street
DARWIN NT 0801

Attention: John Lawler

Dear Mr Lawler

STELLA MARIS INQUIRY

We refer to the above and confirm that the writer seeks leave to represent Delia Lawrie & Gerry McCarthy at the enquiry in this matter. We have engaged Alistair Wyvill as Counsel.

We note that transcript of the proceedings has been taken and we would request a copy of that transcript.

Finally, we note your offer of a without prejudice discussions. Please advise a suitable time for the same.

We look forward to hearing from you further in that regard.

Yours faithfully

Halfpennys

CATHY SPURR

cathyspurr@halfpennys.com.au
sarah.little@halfpennys.com.au

Richard Henschke LL.B • Cathy Spurr LL.B • Crystal Triggs LL.B (Hons)

Level 2 Beagle House 38 Mitchell Street Darwin NT 0800 GPO Box 3344 Darwin NT 0801
A legal practice conducted by Halfpennys Lawyers Pty Ltd ACN 009 623 894

INQUIRY IN CONFIDENCE

Our Ref: 2014/74-1~1
Your Ref: CLS:sml:2013085

Inquiry Into Stella Maris
Stage 5, Cascom Centre
13-17 Scaturchio Street Darwin NT 0800
Tel: 08 8999 6005
John.Lawler@nt.gov.au
Stellamaris.Inquiry@nt.gov.au

Ms Cathy Spurr
Halfpennys Lawyers
Beagle House
38 Mitchell Street
Darwin NT 0800

(Via email) cathy.spurr@halfpennys.com.au

Dear Ms Spurr,

I acknowledge receipt of your letter of 17 February 2014 and the annexures referred to in your earlier letter of 14 February 2014.

I also acknowledge receipt of your letter of 18 February 2014 and your confirmation that you represent Ms Delia Lawrie MLA and Mr Gerald McCarthy MLA. I note you have retained Mr Wyvill as Counsel.

The Inquiry has been audio recording all testimony, but for reasons of cost efficiency has not and does not intend to make any transcripts. To do so, would involve significant expenditure that is not justified at this time. I am prepared to make available to you these audio files, at your earliest convenience, subject to the same written undertakings as outlined in my earlier letter as it relates to In Camera proceedings.

I wish to advise that 10am Monday 24 February 2014, would be a suitable time to meet with you and/or Counsel at our office. I am unfortunately unable to do that sooner, owing to other Inquiry commitments.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. Lawler', with a large, loopy flourish above it.

John A Lawler AM APM
Commissioner
Inquiry into Stella Maris

18 February 2014

INQUIRY IN CONFIDENCE



OFFICE OF THE HON JOHN ELFERINK MLA
MINISTER FOR JUSTICE

Parliament House
State Square
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minister.elferink@nt.gov.au

GPO Box 3146
Darwin NT 0801
Telephone: 08 8928 6615
Facsimile: 08 8928 6590

Ms Delia Lawrie & Mr Gerry McCarthy
Office of the Leader of the Opposition
DARWIN NT 0800

Dear Ms Lawrie & Mr McCarthy

Thank you for your two letters of 18 February 2014.

To ensure that your position is properly presented to the inquiry, I have authorised you access to Mr Michael Grant QC, the Solicitor General for the Northern Territory. The Solicitor General will provide you with legal and practical advice on presenting evidence to the inquiry as well as its scale and terms of reference.

Contrary to your assertion, Government has not offered to pay the costs of legal representation to public servants who appear before the inquiry. Actually, they have been offered access to legal advice regarding the inquiry from the Solicitor for the Northern Territory on matters of practice and procedure. I **attach** the email to public servants from the CEO of the Department of the Chief Minister confirming this. To date, no witness has sought legal advice.

I trust that the Solicitor General's assistance will ensure any evidence you may give to the inquiry will be properly presented, fair and reliable.

Your letter also raises concerns about your capacity to discuss or disclose matters to the inquiry of which you became aware by reason of you holding Ministerial office. If you believe that the terms of the Oath taken by Ministers under the *Northern Territory (Self Government) Act 1978* impedes upon your capacity to give evidence to the inquiry, I suggest you clarify this with the Solicitor General.

Regards

JOHN ELFERINK

21:46

19/2/14



Northern Territory
Government

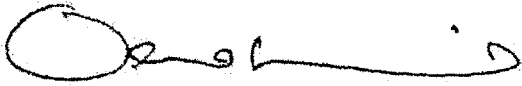
**IN THE MATTER OF THE INQUIRIES ACT
AND IN THE MATTER OF AN INQUIRY
INTO THE DECISION OF THE THEN
MINISTER FOR LANDS AND PLANNING TO
GRANT A LEASE OVER LOT 5260 TOWN
OF DARWIN KNOWN AS STELLA MARIS
TO UNIONS NT ON OR ABOUT 3 AUGUST
2012 PURSUANT TO AN APPOINTMENT
DATED 18 DECEMBER 2013**

**SUBMISSIONS FROM DELIA LAWRIE AND GERRY MCCARTHY IN RELATION TO
THE PUBLICATION OF THE EVIDENCE AND DOCUMENTS RECEIVED BY THE
INQUIRY**

1. We believe that this inquiry cannot be conducted properly or fairly if the public is excluded from any of the hearings and not allowed to see and review all of the documents and other evidence which is given to the Commissioner.
2. This inquiry was established in highly controversial circumstances and, we believe, motivated purely by a desire on the part of the CLP to try to cause political damage to ourselves as the leader and deputy leader of the opposition.
3. Further, the conduct of the inquiry to date by the Commissioner causes us great concern that we may not be fairly treated by him in this inquiry or in his report. Examples of what we believe is unfair treatment to date include deciding how he would conduct the inquiry without giving us an opportunity to comment, hearing evidence which he knew or should have known was evidence which we may want to challenge but without giving us any warning and refusing to provide us with a transcript of the evidence received by him to date.
4. In these circumstances, it is critical for us to be able to put our own case to the public as to why this decision was the right decision and for members of the public to be able to form their own view about the evidence and other material which has been put before the Commissioner. That is why we believe that all evidence and documents should be made public.
5. However, that should only be done if it can be done lawfully. We note from Mr Wyvill's note to the Commissioner that it seems that there has been a serious breach of the public interest immunity which applies to the large number of Cabinet Documents which have been released by the Territory to the Commissioner. That too is a matter of grave concern and appears to be another regrettable

consequence of the Commissioner proceeding without first consulting properly those affected by this inquiry.

Dated this 10th day of March 2014

A handwritten signature in black ink, appearing to be 'Delia Lawrie', with a large initial 'D' and a long horizontal stroke.

Delia Lawrie

A handwritten signature in black ink, appearing to be 'Gerry McCarthy', with a large initial 'G' and a circular flourish.

Gerry McCarthy

IN THE MATTER OF THE INQUIRIES ACT
AND IN THE MATTER OF AN INQUIRY
INTO THE DECISION OF THE THEN
MINISTER FOR LANDS AND PLANNING
TO GRANT A LEASE OVER LOT 5260
TOWN OF DARWIN KNOWN AS STELLA
MARIS TO UNIONS NT ON OR ABOUT 3
AUGUST 2012 PURSUANT TO AN
APPOINTMENT DATED 18 DECEMBER
2013

NOTE FROM COUNSEL

1. This note is provided by counsel representing Ms Lawrie and Mr McCarthy for the assistance of the Commissioner. It concerns matters to do with the administration of justice and does not reflect instructions he has received from Ms Lawrie or Mr McCarthy. It is provided because counsel considers it his duty to bring the matters set out below to the attention of the Commissioner.
2. Attached is a letter from Ms Lawrie to the Solicitor General which was sent on 4 March 2013 and the Solicitor-General's response of 6 March 2014. With respect, it appears that there are errors of law in that response.

PUBLIC INTEREST IMMUNITY IS NOT CONFINED TO CABINET DELIBERATIONS

3. Contrary to what is set out in paragraph 15 of the letter, documents which attract public interest immunity ("PII") by their class alone are not confined to those which record cabinet's actual deliberations. In *Spencer v Commonwealth* (2012) 206 FCR 309 at [31]-[32], after considering the three relevant High Court decisions (*Lanyon Pty Ltd v Commonwealth* (1974) 129 CLR 650, *Sankey v Whitlam* (1978) 142 CLR 1 and *Commonwealth v Northern Land Council* (1993) 176 CLR 604, the latter relied upon by the Solicitor-General as supporting his opinion), the Full Federal Court stated:

31 In *New South Wales v Ryan* the Full Court allowed an appeal on the basis that the judge at first instance had erred in not following the principle explained in *Northern Land Council* that (at 252):

it is not enough to weigh (and find wanting) the importance to the government of disclosure of the particular facts which would be revealed by production of the cabinet material in question. Only a sufficient demand of justice can outweigh the protection to which Cabinet documents are entitled in virtue of their nature, irrespective of those facts. Furthermore, the authorities also require weight to be given to the government's claim that disclosure of the document would be harmful, and it is simply not correct that disclosure of recommendations couched in broad terms, or which are implicit rather than express, could not justify this claim.

32 This summary, which accurately reflects the reasoning in *Lanyon*, *Sankey v Whitlam* and *Northern Land Council*, discloses that the approach advocated by the applicant is fundamentally inconsistent with authority. True it is that documents recording deliberations of Cabinet have "a pre-eminent claim to confidentiality". But

other documents including "papers brought into existence for the purpose of preparing a submission to Cabinet" and "documents and communications passing between a Minister and the head of his department relating to Cabinet proceedings and material prepared for Cabinet" are recognised classes prima facie entitled to protection on the grounds of public interest immunity. And as *New South Wales v Ryan* makes clear, the question in respect of both classes is "whether the relevance of the material to the proceedings in which disclosure is sought is sufficient ... to justify disclosure". (emphasis added, footnotes omitted)

4. Similar views were expressed in *State of New South Wales v PTTC* [2011] NSWCA 60 at [50] where Allsop P (with whom Hodgson JA and Sackville AJA agreed) said (emphasis added) "Cabinet documents in the form of documents recording the matters put to Cabinet for discussion (such as minutes for the consideration of Cabinet) have been held to be in the same position as records of the deliberations or decisions of Cabinet". Allsop J then referred to the decision *Egan v Chadwick* (1999) 176 CLR 604 (also relied upon by the Solicitor-General as supporting the contrary position) without any suggestion that that case in fact supports the exact opposite of what Allsop J was stating. A careful examination of *Egan v Chadwick* (1999) 176 CLR 604 shows that it does not stand as authority for the proposition for which the Solicitor-General contends.
5. This area of the law was helpfully summarised by Derham As J in the recent decision of *Matthews v SPI Electricity Pty Ltd* [2014] VSC 65 where his Honour said at [24] (footnotes and irrelevant sections omitted, emphasis added):

(b) The common law recognises a "rough, but acceptable" division of public interest immunity claims into "class" and "contents" claims;

(c) Documents can be immune from disclosure on the basis of their class because their disclosure would injure the public interest, irrespective of the actual contents of the documents;

...

(e) A claim in respect of a class of documents is, by its nature, general and that claim will normally be upheld if the class is one that is recognised as being, prima facie, subject to public interest immunity;

(f) It is well recognised that the proper working of government relies on ministers and other senior servants of the Crown being able to engage in policy development and decision-making on the basis that their deliberations are kept confidential and that the convention of collective responsibility for government decisions is maintained. Documents that could disclose such deliberations fall within a class that attracts the public interest immunity;

(g) governmental processes directed to obtaining a Cabinet decision upon a matter of policy and Cabinet's decision upon that matter should not, in the public interest, be disclosed by the production of Cabinet papers, including papers which have been brought into existence within the governmental organisation for the purpose of preparing a submission to Cabinet. Such papers belong to a class of documents that are of a nature

that ought not to be examined by the Court, except in very special circumstances;

(h) Cabinet documents extends to –

(i) Cabinet minutes or other records of Cabinet discussions and records of discussions between heads of departments;

(ii) papers prepared as submissions to Cabinet;

(iii) any documents which relate to the framing of government policy at a high level;

(i) immunity from disclosure is not automatically accorded to documents falling within such a class claim. There is no absolute immunity from production and inspection of Cabinet documents. The court must still weigh the public interest in the proper functioning of government with the public interest in the proper administration of justice whereby all relevant documents are available to a party seeking to litigate a claim;

(k) In order for the public interest in the administration of justice to arise in the balancing process, the documents must contain 'material evidence'. Relevance to the proceedings is of itself insufficient. The documents must have an important bearing upon the ultimate decision on the relevant questions;

(l) In civil cases it will only be where exceptional circumstances give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of documents recording Cabinet deliberations that it would be necessary or appropriate to order production of the documents to the Court;

(m) Where such exceptional circumstances exist, the appropriate course to be followed will ordinarily be for the judge personally to inspect the documents for the purpose of deciding whether the relevance of the material to the proceedings in which disclosure is sought is sufficient, even in those exceptional circumstances, to justify disclosure;

(n) The judge ought not to order the disclosure of the contents of documents recording Cabinet deliberations unless the judge is satisfied that the material is crucial to the proper determination of the relevant proceeding;

(o) Even though years may have passed since a relevant document was brought into existence, and government may have changed, it does not follow that the matters that are the subject of such documents have ceased to be current or controversial;

(p) Documents recording the actual deliberations of Cabinet are more likely to attract immunity than documents prepared outside Cabinet such as reports or submissions for the assistance of Cabinet. They have 'a pre-eminent claim to confidentiality';

(q) Other documents including 'papers brought into existence for the purpose of preparing a submission to Cabinet' and 'documents and communications passing between a Minister and the head of his department relating to Cabinet

proceedings and material prepared for Cabinet' are recognised classes prima facie entitled to protection on the grounds of public interest immunity; and

(r) Documents relating to a topic that is current or controversial will attract a high level of confidentiality.

6. It can be seen therefore that, with great respect to the Solicitor-General, the major premise for his opinion – that cabinet documents of the kind released to the Commissioner are not within a class which is subject to PII - is wrong.
7. The impact of this error is significant as it means that cabinet documents should have been treated in this inquiry in the same way that the Solicitor-General has advised that cabinet deliberations must be treated.

THIS IMMUNITY MUST BE RESPECTED EVEN IF A WITNESS DOES NOT MAKE A CLAIM

8. In *Victoria v Seal Rocks Victoria Pty Ltd* [2001] VSCA 94, Ormiston JA stated at [16]-[17]:

The right of the Crown or government to assert that cabinet documents and the like are immune from production is a matter of high public policy. It is not the subject of waiver or acquiescence: it cannot, for example, be resolved by decision of the government of the day. It is public policy in the strictest sense which requires that documents of this kind be immune from public disclosure generally or even disclosure for the limited purposes of litigation or arbitration...

In my opinion, therefore, public interest immunity in a document or other communication is a right by way of an immunity or a privilege which enures in the body politic and indeed in the nation (or relevant polity) as a whole, and not merely in the executive, being designed to protect the operation of the instruments of government at the highest level and for the benefit of the public in general, subject only to a court's reaching a conclusion to the contrary on sound grounds that no other public interest, especially in the administration of justice, should prevail in the particular circumstances. It follows, as has been held on numerous occasions, that the making of a claim for this immunity by the Crown, or by any other party to the proceeding for that matter, is not necessary, for it is the Court's duty to consider the possible application of the immunity, whenever it may appear to arise, subject only to satisfying itself, after appropriate argument, that it does apply and that any relevant countervailing factors ought not to deny the immunity.

COMMISSIONER HAS NO POWER TO DECIDE ISSUES OF PUBLIC INTEREST IMMUNITY

9. Further, it appears clear that the *Inquiries Act* does not abrogate public interest immunity. Clear words would be required before such a construction would be adopted: *Baker v Campbell* (1983) 153 CLR 52 at 96-97, 116-117, 132; *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543 at [43], [88], [93]-[94] [132]-[135].
10. It necessarily follows that the Commissioner does not have the power to summons any documents which are subject to PII or to examine any witnesses in

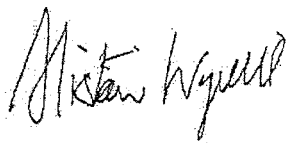
relation to such matters. Nor does he have power to look at a document (certainly documents within a "class" which enjoys PII like cabinet documents) to undertake the task referred to in paragraph (m) of the passage from *Matthews v SPI Electricity Pty Ltd* set out above. The Commissioner has no "implied authority" to undertake the task performed by Allsop P at [60]-[115] in *State of New South Wales v PTTC* [2011] NSWCA 60: see *AWB Ltd v Cole* (2006) 152 FCR 382 at [59].

CONCLUSION

11. It is the Commissioner's duty to conduct this inquiry according to law. For the reasons set out above:

- 11.1. the release of a substantial volume of cabinet documents to the Commissioner is a serious breach by the Territory of the PII these documents enjoy;
- 11.2. the on-going use by the Commissioner of these cabinet documents in this inquiry is also a serious breach of the PII these documents enjoy. This is particularly so as the Commissioner's use of these documents, even *in camera*, directly undermines "the proper working of government (which) relies on ministers and other senior servants of the Crown being able to engage in policy development and decision-making on the basis that their deliberations are kept confidential and that the convention of collective responsibility for government decisions is maintained": *Matthews v SPI Electricity Pty Ltd* [2014] VSC 65 at [24] para.f;
- 11.3. the Commissioner has no power to lift this immunity;
- 11.4. there is an urgent need for the Commissioner and/or the Attorney to bring these matters to the attention of the Supreme Court.

Dated this 10th day of March 2014



Alistair Wyvill SC

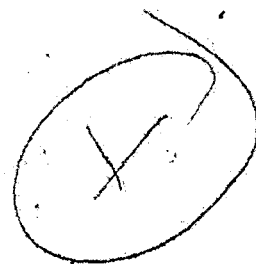
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→ Prager's joined down a 10
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case.

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not true



Didn't get sent to 2012.

3/8/12

- Strategic plan

20/7/2009 - File Note / Unchurned

Joseph Brighthouse

From: Alistair Wyvill
Sent: Sunday, 16 March 2014 7:50 PM
To: Cathy Spurr
Cc: DeliaP Lawrie; Gerry.McCarthy@nt.gov.au; Mandy Taylor; Michael Gleeson (Michael.Gleeson@nt.gov.au)
Subject: Stella Maris

Dear Cathy

We had a successful Thursday and Friday at the inquiry. Both Gerry and Delia were brilliant. We have really pushed the burden not a benefit point and it seems to be gaining traction even with Lawler. He's going to let me cross-examine the NTG valuer next week.

I'm working with our valuer to get his report up to speed. His comment on the Unions NT budget which shows how much fund raising was needed to get Stella Maris up and running is:

Analysis of the budget tends to prove conclusively this is not a profit generating, high performing business enterprise seeking to take advantage of what might seem to be highly attractive lease terms and conditions for the subject property.

The sense I get is that Lawler may have decided that we are too much like hard work and may be moving his sights away from Delia and Gerry to the Unions, including Alan Patton. He has his undies in a tangle over the "workers club" subcommittee as being some massive conspiracy to hide the Unions true intentions from the Government.

You may wish to warn them that about this. Perhaps it's now at the point where no one cares, but it may still be worth putting them on notice

Regards

Alistair

Alistair Wyvill SC

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Proposed Budget Stella Maris re-development 2009/10

	Total \$	InKind	Total \$ & Inkind	%
Income				
Grants				
NTG	100,000	-	100,000	49%
Port Welfare Committee	10,000	23,000	33,000	16%
Unions NT / Other	10,000	23,000	33,000	16%
Fundraising	8,000	-	8,000	4%
Total Grants / Project	128,000	46,000	174,000	86%
Income Earned	-			
Meetings	6,720	-	6,720	3%
Number	56	-	56	
Avg \$				
Functions	9,000	-	9,000	4%
Number	60	-	60	
Avg \$				
Rental / office	10,800	-	10,800	5%
Total income earned	29,066	-	29,066	14%
Total income	157,066	46,000	203,066	0%
Capital Exp				
Building Improvements	40,000	900	40,900	25%
Kitchen / Toilets	48,000	5,000	53,000	31%
Grounds	5,900	6,900	12,800	4%
Office	7,000	2,000	9,000	4%
Admin	-	-	-	
Accounting / bkp	900	900	1,800	1%
Advertis / promote	3,200	-	3,200	2%
Insurance	2,400	-	2,400	2%
Print and Stationar / post	600	-	600	0%
Occupancy	-	-	-	
Rent	-	-	-	0%
Power and Water	7,400	-	7,400	5%
Phones / internet	2,200	-	2,200	1%
Reparis and Maint	1,200	5,800	7,000	1%
Equipment / Motor Vehicle	-	-	-	
Repair and maint	6,058	3,400	9,458	4%
Motor Vehicle Exp	800	18,000	18,800	1%
Employment	-	-	-	
Contract Project officer	30,000	-	30,000	19%
Total Expenses	155,658	42,900	198,558	0%
Surplus / Loss	1,408	3,100	4,508	0%

2014/10 12 - (2)

Draft Estimated Total \$ and Inkind Budget		
	\$	%
NTG	100,000	49%
Port Welfare Committee	33,000	16%
Unions NT	33,000	16%
Other Grants	8,000	4%
Income Earned	29,066	14%
Total Income	203,066	100%
Expenditure		
Capital	115,700	57%
Administration	8,000	4%
Services	16,600	8%
Equipment	28,258	14%
Project Manager	30,000	15%
Total Expenditure	198,558	98%

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Inquiry into Stella Maris
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Halfpennys
Lawyers
GPO Box 3344
DARWIN NT 0801

Attention: Ms Cathy Spurr

(via email: cathyspurr@halfpennys.com.au; sarah.little@halfpennys.com.au)

Dear Madam

I refer to your private and confidential letter to the Commissioner dated 24 June 2014. As you note in that correspondence, the Commissioner delivered his report to the Administrator on 26 May 2014, and the report has been laid before the Northern Territory Parliament. The Commissioner's function has been discharged, and it would not be appropriate for him to enter into any dialogue concerning the matter.

As I understand your correspondence, you assert that the Inquiry:

- found that Minister McCarthy's conduct was not accountable, responsible or in the public interest in relation to the decision to offer a Crown lease to Unions NT;
- found that the manner in which Minister Lawrie involved herself in the process of granting the site to Unions NT was not proper and was unfair to the public and other community groups; and
- recommended that the Legislative Assembly consider whether there has been an alleged breach of the Code of Conduct contained in the *Legislative Assembly (Members' Code Of Conduct And Ethical Standards) Act 2008* (NT),

in circumstances where your clients were not given notice that adverse findings were a possibility or an opportunity to make submissions in relation to the matter.

I draw your attention to the following matters concerning the conduct of the Inquiry.

- The Inquiry's Terms of Reference required it to inquire into and make findings concerning the circumstances of the decision of Minister McCarthy to offer a

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lease to Unions NT; the public policy and public accountability considerations involved in making that decision without putting the matter out to expressions of interest or public tender; and the performance of relevant persons, including Minister McCarthy, in terms of compliance with the regulatory regime and proper accountability processes. Your clients were aware of those matters from the outset, as they were Members of the Legislative Assembly when the resolution containing those Terms of Reference was passed.

- On 12 and 14 February 2014, the Inquiry heard background evidence from representatives of the Friends of the North Australia Railway, the National Trust, the Heritage Branch, the Apostleship of the Sea, Music NT, the Planning Action Network and the Darwin City Council.
- On 14 February 2014, you made a public submission on behalf of your clients noting the conduct of the Inquiry and the Terms of Reference; asserting that your clients were limited in what they could say by reason of Cabinet confidentiality and stating that you would be asking government to waive the requirement of confidentiality; stating that in making the offer Minister McCarthy was carrying out a decision of Cabinet; stating that in their participation in the Cabinet determination your clients acted both in good faith and consistently with government policy on community land grants; asserting your clients' continuing belief that the decision was in the best interests of the Territory; denying any belief on the part of your clients that they were offering Unions NT any substantial net financial benefit; asserting that Unions NT did not in fact receive an asset which would generate any substantial net financial benefit; and asserting that the offer of a lease was nothing more than a non-binding indication of an intention to exercise a statutory power for a public purpose on terms which were insufficiently precise to create enforceable contractual rights.
- On 7 and 15 February 2014 your clients were served with separate summonses to produce relevant documents and appear before the Inquiry to give evidence.
- On 18 February 2014, you wrote formally to the Inquiry seeking leave to represent your clients at the Inquiry, and advising that you had engaged Mr Wyvill as their Counsel.
- On 26 February 2014, you wrote to the Inquiry confirming that Mr McCarthy would attend to give evidence before the Inquiry on 14 March 2014; stating that your clients did not wish to assert any public interest immunity in relation to Cabinet dealings and that it was essential that the public see all aspects of the relevant Cabinet dealing; and seeking electronic copies of all documents (which were subsequently provided in advance of your clients giving evidence). You also advised that the date for which Ms Lawrie had been summoned to give evidence fell in a sitting week, and sought alternative dates. The Inquiry accommodated Ms Lawrie in that respect.

- On 10 March 2014, your clients attended preparatory conferences with the Commissioner in company with Mr Wyvill during which the Commissioner advised the documents on which your clients would be questioned, the line of questioning that would be taken with each of your clients, and those areas in respect of which the Commissioner considered there were public interest and accountability issues arising.
- Immediately prior to the preparatory conferences two written submissions to the Inquiry were made, one under the hand of your clients personally and one by the counsel. The first submission was to the effect that it was critical for your clients to be able to put the case to the public as to why the decision to offer the lease to Unions NT was the right decision, and that all evidence and documents had to be made public for that purpose. The second submission was to the effect that the relevant Cabinet documents were subject to public interest immunity and could not lawfully be disclosed. All relevant evidence and documents were made public.
- Your clients were given sufficient time and information to prepare and present their case effectively, your clients were given the opportunity to give evidence and address material adverse to them, and your clients were clearly on notice of the possibility of an adverse finding. That risk was also obvious from and inherent in the parliamentary debate and the subsequent resolution containing the Terms of Reference.
- On 13 March and 1 April 2014, Mr McCarthy gave evidence over the course of approximately 7 ½ hours. At the commencement of that evidence his counsel made application for approval to represent Mr McCarthy during that process. That approval was granted. During the course of that evidence Mr McCarthy was taken exhaustively through all material relevant to the accountability, responsibility and public interest considerations concerning his decision to offer a Crown lease to Unions NT. He was asked directly about those matters, and in fact took the opportunity on many occasions to make submissions and assertions that his decision was correct in those respects. At no stage during the course of his evidence did Mr McCarthy or his counsel suggest that he had not been given sufficient information to be able to be heard in a meaningful sense and not be taken by surprise during the course of the evidence in relation to the matters traversed by the Inquiry. There was no suggestion that Mr McCarthy had not been given opportunity to address or deal with any issue he considered important.
- On 13 and 14 March 2014, Ms Lawrie gave evidence over the course of approximately 5 ½ hours. Counsel was given approval to represent Ms Lawrie during that process. During the course of that evidence Ms Lawrie was taken exhaustively through all material relevant to the accountability, responsibility and public interest considerations concerning the Cabinet determination to offer

a Crown lease to Unions NT. She was asked directly about those matters, and also took the opportunity to make submissions and assertions that her involvement in the Cabinet process was appropriate in those respects. At no stage during the course of her evidence did Ms Lawrie or her counsel suggest that she had not been given sufficient information to be able to be heard in a meaningful sense and not be taken by surprise during the course of the evidence in relation to the matters traversed by the Inquiry. There was no suggestion that Ms Lawrie had not been given opportunity to address or deal with any issue she considered important.

- During the course of the preparatory conferences and their evidence the Inquiry identified critical issues and materials on which any findings concerning your clients were likely to turn, and your clients were given opportunity to deal with those matters and did in fact deal with them. That included apprising your clients of the nature and content of potentially adverse material.
- On 21 March 2014, approval was given for your clients' counsel to cross examine Mr Mark Harris from the Australian Valuation Office.
- On 28 March 2014, you were provided with a copy of legal advice the Inquiry had received from a solicitor, Mr Paul Maher, and given an opportunity to make a submission by 14 April 2014. Contained within this legal advice was the following statement: 'my advice is that there is a respectable argument that the Minister's determination was unreasonable and that it would be set aside by the court.' In a letter dated 15 April 2014, you indicated that you did not intend to respond to this advice and that your clients had exhausted their ability to access pro bono legal assistance.
- On 3 April 2014, you were provided a report from the Australian Valuation Office that provided comment on a submission made by the independent valuer, Mr Brian Scarborough, that you engaged. In a letter dated 15 April 2014, you indicated that you did not intend to respond to this report and requested that the Inquiry seek Mr Scarborough's opinion on the AVO report. This request was met.
- Details of the witnesses called by the Inquiry to give evidence, and the times at which that evidence was being taken, were available on the Inquiry's website. Audio recordings of evidence taken by the Inquiry were available on the Inquiry's website. Documents produced to the Inquiry on summons were posted on the Inquiry's website. The Inquiry was run on an "open file" basis. In addition to this, it is my understanding that a representative from your clients' office was present during all of the hearings, with the exception of the some of the earlier in-camera proceedings. Every effort was made to accommodate this representative, including the Inquiry contacting her directly via phone when a hearing time changed due to a power outage.

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- Except for a number of closed sessions, the Inquiry was conducted in public. The audio recordings of even those closed sessions were provided to your clients and subsequently placed on the Inquiry website. Their content was not adverse to your clients' interests.
- Thereafter, the rules of natural justice did not require the Commissioner to disclose what he was minded to find so that the parties could have a further opportunity of addressing his mental processes before he reached a final finding. The findings of which you complain were clearly contemplated by your clients, and all the evidence directed to those findings were put to your clients.

The recommendation concerning the Code of Conduct is entirely non-determinative and makes no finding in relation to your clients.

Yours sincerely



Christopher Stewart
Research Officer
Inquiry into Stella Maris

22 July 2014



Telephone: (08) 8999 6533

JUDGES' CHAMBERS
SUPREME COURT
DARWIN

2 April 2015

Mr Alistair Wyvill SC
William Forster Chambers
GPO Box 4369
DARWIN NT 0801

Dear Mr Wyvill

Following upon his Honour's decision in *Lawrie v Lawler*, his Honour has determined that your conduct during the Stella Maris Inquiry and your representation of Ms Lawrie, including whether you may have sworn a false affidavit, should be referred to the Law Society for investigation. The Law Society will also be asked to consider whether there are any matters which should be referred to the Director of Public Prosecutions.

His Honour has asked me to inquire into whether you would like an opportunity to be heard before the matter is referred to the Law Society. Please advise me accordingly.

His Honour also asks that, by return email, you provide an undertaking to the Court to maintain your complete records, including computer records, relating to the Inquiry and your representation of Ms Lawrie.

Yours sincerely

Lachlan Peattie
Associate to the Hon Justice Stephen Southwood

The Hon. Justice Stephen Southwood

Supreme Court Building, State Square,
DARWIN NT 0800

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IN THE SUPRMEE COURT
OF THE NORTHEN TERRIOTRY
OF AUSTRALIA

No. 68 of 2014
(21443873)

BETWEEN:

DELIA PHOEBE LAWRIE

Plaintiff

AND:

JOHN LAWLER

Defendant

AFFIDAVIT

DEPONENT: ALISTAIR WYVILL
AFFIRMED: 26 MAY 2015

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