TRIBUNAL: THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL (NORTHERN TERRITORY)

PARTIES: LAW SOCIETY NORTHERN TERRITORY

and

ALISTAIR WYVILL SC

FILES NO: No. 1 and 2 of 2019

DELIVERED ON: 11 December 2020

HEARING DATE/S: 7 to 11 September and 3 and 4 November 2020

ORDERS: Applications No 1 and 2 of 2019 are dismissed.

REPRESENTATION:

Counsel:

Applicant: Arthur Moses SC and Lisa-Claire Hutchinson

Respondent: Jeremy Kirk SC, Scott Robertson and Faye Ashworth

Solicitors:

Applicant: Hicksons Lawyers

Respondent: Squire Patton Boggs (AU)

REASONS FOR JUDGMENT

1. The Law Society Northern Territory, the Applicant, makes allegations against Alistair Wyvill SC, the Respondent, of professional misconduct or misconduct of a lesser significance as detailed in two Disciplinary Applications.

2. Disciplinary Application No 1 of 2019 alleges that the Respondent engaged in professional misconduct by making allegations against Southwood J in an email to the Bar Council (Northern Territory) on 2 June 2015 that were inappropriate and unsubstantiated, with no basis, and improper.

3. Disciplinary Application No 2 of 2019 now contains seven allegations numbered 2, 4 – 9. We dismissed Allegations 1 and 3 because of the application of parliamentary privilege. In very broad but brief summary, Allegations 2, 4 - 7 and 9 in Application No 2 assert that on specified dates between June 2014 and January 2015 the Respondent engaged in professional misconduct by advising the making of statements and affidavits and himself swearing affidavits containing assertions that were unjustified or untrue or that he knew or ought to have known were false or misleading.

4. Allegation 8 asserts that in November 2014 the Respondent engaged in professional misconduct or unsatisfactory professional conduct by affecting the integrity of the evidence in proceedings when he drafted and/or settled affidavits of two deponents in proceedings when he knew that he was likely to be a witness in the proceeding.

5. The background to the allegations, as detailed in Application No 2 is:

> 1. At all material times, the Respondent was an Australian legal practitioner pursuant to s6 of the Legal Profession Act 2008 (NT) ("LPA") and held a barrister practising certificate.
>
> The Stella Maris Inquiry
>
> 2. In a meeting on 10th July 2012, the Cabinet of the then Northern Territory Government approved the offer of a Crown Lease over land in Darwin known as the Stella Maris site to Unions NT. On 3rd August 2012 the documents offering and setting out the conditions for the lease were stamped by the then Minister for Lands and Planning, Mr Gerald McCarthy (Mr McCarthy).
>
> 3. At the time of the decision to offer the lease, Ms Delia Lawrie (Ms Lawrie) was a member of the Legislative Assembly, the Deputy Chief Minister and Treasurer of the Labour Party. Ms Lawrie had involvement in the Stella Maris site and had, in the years previous, worked towards the goal of the lease being offered to Unions NT.
>
> 4. A general election for the Northern Territory Parliament was to take place on 25th August 2012 (the election). The government was to enter caretaker mode on 6th August 2012.
>
> 5. The election resulted in a change of government. The new government (the Country Liberal Party) opposed the lease and, in December 2013, commissioned an inquiry into

the circumstances of the purported decision to offer the lease and associated matters (the Inquiry). Mr John Lawler (the Commissioner or Mr Lawler) was Commissioner of the Inquiry.

6. Ms Lawrie and Mr McCarthy were summonsed to appear at the Inquiry to give evidence and to produce documents. At the time of the Inquiry, Ms Lawrie was the leader of the opposition and Mr McCarthy was deputy leader of the opposition.

7. The Respondent, instructed by Cathy Spurr (Ms Spurr) of Halfpennys Lawyers, acted as counsel for Ms Lawrie and Mr McCarthy at the Inquiry

8. Hearings pursuant to the Inquiry took place over a number of days, namely 12, 14, 17, 19, 20, 21, 26 and 28 February, 11, 12, 13, 14, 17, 18, 19 and 21 March, and 1 April 2014. On 26th May 2014 the Commissioner presented his report ("the Commissioner's Report"). On 19th June 2014 the report was tabled in the Legislative Assembly of the Northern Territory.

9. The report contained a number of adverse findings concerning Ms Lawrie's conduct.

The Supreme Court Proceeding

10. On 30th July 2014, Ms Lawrie instituted a proceeding in the Supreme Court of the Northern Territory against the Commissioner, being proceeding number 68 of 2014 of the Supreme Court of the Northern Territory (the Supreme Court Proceeding).

11. Justice Southwood presided over the Supreme Court Proceeding.

12. By the Supreme Court Proceeding Ms Lawrie sought declaratory relief and an order quashing the Commissioner's Report, complaining that the Commissioner had denied her procedural fairness. The Respondent, who initially was acting for Mr Lawrie, filed two affidavits and also drafted a pleading. The Respondent subsequently ceased to act in the Supreme Court Proceeding.

13. On 1st April, Southwood J delivered his decision dismissing Ms Lawrie's action in *Lawrie v Lawler* [2015] NTSC 19 (the Decision). In the Decision, Southwood J found that Ms Lawrie:

1) Was accorded procedural fairness by the Commissioner; and

2) Had waived the right to claim procedural fairness beyond what Ms Lawrie was in fact accorded by the Commissioner.

14. In the course of explaining his conclusions on the finding outlined above, Southwood J made findings which were critical of the Respondent's conduct at the Inquiry and to an extent, in the Supreme Court Proceedings.

6. Before going to the Allegations, we record that this Tribunal is a body established pursuant to the *Legal Profession Act* 2006, s669. It is required to hear each allegation against an Australian legal practitioner in a disciplinary application, s 517. The Tribunal is bound by the rules of evidence in conducting a hearing, s 521. This includes any applicable provisions of the *Evidence (National Uniform Legislation) Act* 2011 (NT). That Act, s4, provides that it applies to all proceedings in a "Territory court". The term "Territory court" is given an expanded meaning by S3, and the Dictionary and includes "a body (other than a court) that, in exercising a function under the law of the Territory, is required to apply the laws of evidence". This Tribunal comes within the expanded meaning.

7. In our approach to the evidence and the applicable standard of proof we have kept in mind, that Act, s140; the effect of which is that the standard of proof is on the balance of probabilities and that without limiting the matters that we may take into account in deciding whether that standard has been satisfied, we may take into account the nature of the subject-matter of the proceeding and the gravity of the matters alleged. In this regard we are of the view that the proceedings before us involve a number of serious allegations with potentially grave consequences.

8. We have also kept in mind the following passage from the joint judgment of Mason CJ, Brennan, Deane and Gaudron JJ in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66, (1992) 67ALJR170 at 170 – 171 (citations omitted):

“ The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J. commented in Briginshaw v. Briginshaw:

> “The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ....
> There are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading.” ”

9. In most, if not all of these reasons, we will, in part, address the particular allegation on the basis of our assessment of the Respondent’s belief and the integrity of that belief. In doing so, we have not lost sight of the reality that the burden of proof is on the Applicant.

10. A matter we must emphasise is that any findings that we make are solely as between the parties to these proceedings. In the course of the evidence, a number of persons have been referred to who are not a party, have not given evidence and have not been heard. As to some of them, derogatory and offensive things have been said and asserted and our findings will reflect this. It is most important to keep in mind that while we will express views and conclusions based on the evidence put before us, they are not findings against non-parties or anyone who has not given evidence. Our findings are solely as between the parties to these proceedings. One of the reasons for this caution is that:

> “to act only on the version advanced by one adversary is to risk reaching unsound conclusions, and thus to risk both injustice and inefficiency. Experience teaches that commonly one story is good only until another is told. Where a judge hears one side but not the other before deciding, even if the side heard acts in the utmost good faith and makes full disclosure of all that that side sees as relevant, there may be considerations which that side had not entertained and facts which that side did not know which, if

> brought to the attention of the judge, would cause a difference in the outcome". *International Finance Trust Company Limited v New South Wales* (209) 240 CLR 319, Heydon J at [143].

11. The Respondent filed three affidavits in these proceedings. He was crossed-examined for about twelve hours over two and a half days. The hearing was somewhat unusual because of Covid19 travel restrictions. It was conducted from the Supreme Court building in Darwin. Counsel for both parties were in Sydney. One member of the Tribunal was in Cairns and the presiding member was in Hobart. Counsel and these Tribunal members participated in the hearing via Webex. The third member of the Tribunal was in the hearing room in Darwin as was the Respondent when cross-examined. The two members of the Tribunal who were not present in the hearing room are confident that they were able to properly assess the Respondent as a witness, even though they observed his cross-examination on a screen. Of necessity, each member's initial assessment of the Respondent as a witness was not influenced by another member. When we later conferred, we had each made the same assessment. We consider the Respondent to be a forthcoming, careful, reliable and honest witness.

12. We go to Allegation 2 which follows together with its particulars.

Allegation 2

On 12 June 2014, the Respondent engaged in professional misconduct, as defined at common law, by advising the Chief of Staff to Ms Delia Lawrie, who at the time was the Leader of the Opposition in the Northern Territory, that a public statement should be made asserting (i) that the Stella Maris Inquiry was conducted unfairly from the beginning reflecting the Commissioner's lack of qualifications, experience or skills to run the Inquiry, and (ii) that the unfair conduct of the Inquiry was evidenced by the Commissioner having prejudged one of the critical issues for the Inquiry by describing the connection between Stella Maris and the union movement as an "urban myth", when the Respondent knew or ought to have known that these were allegations of serious misconduct or incompetence, for which there was no or insufficient evidence for their justification.

Particulars to Allegation 2

.1. On various dates in April, May and June 2014, there were discussions (in person and over email) between the Respondent, Ms Spurr, Ms Lawrie, and Ms Lawrie's Chief of Staff, Michael Gleeson, respectively, as to a potential response by Ms Lawrie to what was anticipated to be a report by the Commissioner containing adverse findings.

.2. On 8 April 2014, the Respondent emailed Ms Spurr. In that email he asked Ms Spurr for her views on *"preparing our own account to be released at the same time as* [the Commissioner's Report]" **("the dissenting report").**

.3. On 8 April 2014, Ms Spurr replied to the Respondent by email indicating that she

"liked the idea of putting [their] *own account of the story out at the same time."*

.4. The dissenting report was discussed further in conference between the Respondent and Ms Spurr on 11 April 2014 and in various emails between the Respondent and Mr Gleeson on 23 April, 19 and 25 May and 10 June 2014.

.5. On 26 May 2014 at 2.24 pm, Cathryn Tilmouth, Ms Lawrie's Media Adviser, sent an email to the Respondent. At 3:49 pm the Respondent replied to Ms Tilmouth and Mr Gleeson with an email in which he had made amendments to the original text of Ms Tilmouth's email (the portions in bold text reflect the Respondent's amendments to the original email sent to him by Ms Tilmouth.

To: *Cathryn Tilmouth*

Subject: *RE: draft statement to media*

Date: , *Monday 26 May 2014 3:49:00*

Hi

Please see below

Alistair

From: Cathryn Tilmouth

Sent: *Monday, 26 May 2014 2:24 pm To:* *Alistair Wyvill*

Cc: *Michael Gleeson*

Subject: draft statement to the media

The Stella Maris Inquiry political stunts continue with the report being delivered to the Administrator but kept under wraps until mid June.

Did the CLP Government - the executive or its delegates - see a *draft of this report?*

Has the CLP Government - the executive or its delegates - seen the report? Has the Government been briefed by Mr Lawler?

Labor does not expect any adverse findings in the 21 recommendations because Commissioner Lawler provided an undertaking that, ***before considering whether to make any adverse finding*** *against any person or organisation, he would "provide any such person or organisation with notice, all relevant materials, and opportunity to make submissions in relation to this matter". It is normal,* a *matter of basic fairness, and established in the law, for any potential adverse findings to be advised to the affected parties and submissions to be made.*

No ***such notice and subsequent opportunity to make submissions was provided to any*** *former Labour Minister.*

The Stella Maris Inquiry continues to be a *political stunt purely designed to distract Territorians from how incompetent the Giles Government truly is.*

Cathryn Tilmouth

.6. At 9:09 am on 10 June 2014, the Respondent sent an email to Mr Gleeson. In the email the Respondent advised that, rather than circulating the full dissenting report on the day that the Commissioner's Report was to be made public:

> *. . . it may be better just to hand out* a *one pager anticipating the attack on Gerry and making our other big points and perhaps giving them Chris' history of SM.*

.7. Mr Gleeson replied to the Respondent's email at 5:29 pm to the effect that Ms Lawrie *"has taken your advice,* a *one pager is fine".*

.8. On 12 June 2014 at 5:29 pm, Mr Gleeson asked the Respondent to send the one pager to him so that it could be considered by Ms Lawrie.

.9. On 12 June 2014 at 8.51 am, the Respondent sent an email to Mr Gleeson in the following terms:

> *Mike*
>
> *Draft attached* - *probably* a *few typos sorry. Any queries please call. I also attach Chris' essay which I was proposing to hand out.*

.10. A document was attached to the Respondent's email. That document read as follows [with emphasis added]:

Stella Maris Inquiry- Key Points

1. *There is no question that there is* a *strong connection between Stella Maris and the Union movement which goes back decades. It is not an "urban myth".*

2. *It was because of this connection that Unions NT was prepared to put substantial resources into renovating Stella Maris so it could be used* as a *community centre for the benefit of the whole community whilst preserving its heritage values. It (sic) the first year alone, the budget it prepared projected* a *loss of circa $170,000. Unions NT was aiming to cover this loss from its own funds, the work of volunteers and funding (sic) raising.*

3. *As the proposed lease expressly stated that no NT Government*

funding would be provided for Stella Maris, it imposed a *substantial financial burden on Unions NT. No other organisation (including the National Trust or Music NT) had this commitment to Stella Maris or access to such resources to cover these costs.*

4. *Delia and Gerry, as experienced Ministers, knew this. This is why they and all other members of the Henderson Cabinet did not consider t necessary to go through an application process. Nor were they advised by any public servant at any stage that it would be unlawful or improper not to hold an application process. In fact, Parliament has given the Minister for Lands the express power to determine, should he wish, that an application process need not be undertaken prior to the grant of a Crown lease: see section 12 (3) of the Crown Lands Act.*

5. *The offer from Unions NT represented in 2012 and still represents today the best proposal for preserving Stella Maris for the whole community* as a *heritage site. Based on the Unions NT's budget, an independent, (sic) expert valuer has assessed the savings to the Taxpayer over the life of the proposed lease at over $1,000,000. We call upon the Government to proceed with it.*

6. ***The inquiry was conducted unfairly from the beginning, reflecting we believe Lawler's lack* of *qualifications, experience or skills to run an inquiry such as this.***

- ***By describing the connection between Stella Maris and the union movement as an "urban myth" before he had heard from any cabinet minister, Lawler appears to have prejudged one* of *the critical issues for the inquiry.***
- *No funding for legal representation was made available to those against whom the Inquiry was clearly targeted.*
- *No transcript of evidence was provided which has the practical effect of keeping the evidence secret.*
- *No notice of possible adverse findings has been given to Delia or Gerry, yet it appears from recent statements by the Chief Minister that Lawler has made serious and quite unjustified adverse findings against Gerry.*

7. *Finally,* as *the power to grant* a *lease under the Crown Lands Act was never exercised, and Unions NT never actually got* a *lease, never got the keys and never moved in to Stella Maris, why have the Giles Government and Lawler wasted* so *much time and money on something that never happened?*

.11. By his email of 8.51 am on 12 June 2014, the Respondent recommended that Ms Lawrie should make a public statement about the Stella Maris Inquiry containing the [above highlighted representations in paragraph 6 and its first dot point].

.12. The Respondent knew or ought to have known that the representations which he recommended Ms Lawrie make in her public statement, either taken separately or together, amounted to an allegation or allegations of incompetence or misconduct by the Commissioner, of which there was no or insufficient evidence for their justification.

13. The issue which goes to the core of Allegation 2 is whether there was sufficient evidence to justify the Respondent's belief in the assertions that he advised should be made. This question is to be determined on the basis of the information available to the Respondent when his draft was to be published, that is, following the release of the Commissioner's Report. This would not exclude evidence of subsequent matters that throw light on the genuineness of his belief. For example, a statement made by the Respondent, subsequent to the release of the Report on 19th June, that he had not believed in the truth of the assertions he advised Ms Lawrie to make, would clearly be relevant. However, the proposition that courts and tribunals favour actuality over prophecies when determining some matters, has no application in these proceedings. This is not a valuation or compensation case where evidence of a subsequent fact can confirm foresight. We have evidence that a transcription of the recording of the evidence before the Commissioner prepared well after 19th June establishes that on 26 and 28th February 2014 the Commissioner referred to the suggested link between the Stella Maris site and the unions as "an urban myth". This evidence has no impact on our assessment of the soundness of the Respondent's belief that the Commissioner had made statements to this effect when the Respondent drafted the statement. We do rely on evidence that prior to 1 April the Respondent had been told of the Commissioner's 'urban myth" comments and that on 2 April he heard the Commissioner make an "urban myth" comment when he listened to an audio file of David Money giving evidence to the Commissioner on 19 February 2014.

14. The Respondent deals specifically with Allegation 2 in paragraph 135 – 146 of his lengthy affidavit of 30th June 2020. We will not repeat them. He stands by his belief in the assertions made in paragraph 6 of the draft statement. In what follows we endeavour to deal with the evidence that provides the background to, and the basis for Allegation 2 in chronological order.

15. As explained in Mr Wyvill's lengthy affidavit, paragraph 29, when he found out about the Inquiry, in December 2013 he was concerned that the Country Liberal Party may have created the Inquiry to cause political damage to its political opponents, the Labor Party. At the time he provided occasional informal advice to Ms Lawrie and her staff on legal or political matters. He offered to assist Ms Lawrie and Mr McCarthy in connection with the enquiry. Ultimately, he and Cathy Spurr, a solicitor with the firm Halfpennys, agreed to be their counsel and solicitor before the Inquiry at no fee, if necessary.

16. Mr Wyvill drafted a letter dated 2nd December 2013, A2, sent to the Chief Minister by Mr McCarthy on behalf of what we infer was the Parliamentary Labor Party. It detailed their position in relation to the proposed inquiry into the agreement between the former Labor Government and Unions NT as to the Stella Maris site. The first of the matters said in the letter to be important to put very clearly on the record includes an assertion that the Stella Maris site had been closely associated with the proud history of the Trade Union movement in the Northern Territory over several decades.

17. A note prepared by Mr Wyvill for, and taken to, a meeting with Ms Lawrie, Mr McCarthy and Ms Spurr on 19 December 2013 includes the prediction that "common law rules – natural justice, etc – are likely to have a

significant role to play". It also records the need to investigate a number of matters including "History of SM and association with Union Movement. Witnesses?"

18. Mr Wyvill had a number of concerns regarding the Inquiry as at early February 2014. He was concerned that the Commissioner was not a retired or serving judge or a senior barrister, or other lawyer with experience in, or knowledge of, conducting inquiries or the like. When cross-examined before the Tribunal Mr Wyvill said he was not suggesting that this was an appointment that only a lawyer could fulfil and that a former Cabinet secretary may have been qualified because of experience in the workings of Cabinet, T196. *(Our references to transcript pages are to the daily transcript, a total of 384 pages. The consolidated transcript page numbers differ by a page less per day, a total of 379 pages)*. When Mr Wyvill became aware the Commissioner was going to conduct the Inquiry he did as much research as he could about him. This was in December 2013 or February 2014. He knew that the Commissioner had been a Deputy Commissioner of the Australian Federal Police and a member of the Australian Crime Commission. He assumed that the Commissioner would have conducted inquiries under the legislation governing the Australian Crime Commission. He was concerned that as a former police officer and even as a former member of the Australian Crime Commission, the Commissioner would not have had experience discharging a function where he had a duty of fairness which may have required him to make findings that were damaging to the person who had appointed him and to the person who was paying his bill. That, in Mr Wyvill's experience, was quite a skill. He said that anybody who has had any experience with expert evidence knows how difficult it is to get experts who are unaffected by the fact that they are appointed by somebody who is paying their bill. He was also concerned that the Commissioner had no apparent experience at leasing, which was critical in this case. He said the Commissioner had to understand how an interest in a lease was valued, how its worth was assessed, T197. Another concern Mr Wyvill had was that no counsel assisting had been appointed to the Inquiry, despite this being almost universal in commissions of inquiry in Mr Wyvill's experience. He was also concerned that no attempt had been made to articulate to his clients the precise allegations of wrongdoing (if any) which were being made against them.

19. Mr Wyvill drafted a long letter sent to the Commissioner by Halfpennys dated 14th February 2014. It includes the proposition that the decision to offer a lease of the Stella Maris site was a decision of Cabinet and what Mr McCarthy did was pursuant to his duty as a Minister to carry out a Cabinet decision so if the decision to make the offer set out in Mr McCarthy's letter was to be criticised, that criticism should be directed at Cabinet not Mr McCarthy.

20. This proposition is consistent with the law as enunciated by Blackburn CJ in *Whitlam v Consolidated Press Limited* (1983) 73 FLR 414 at 421 – 422:

> "Cabinet is a group of persons who have in common certain political aims. It has to make decisions which must command support in Parliament and, it is hoped, will command substantial support in the electorate. The common political aims are necessarily broad; in their particular applications they may be the subject of disagreement among members of Cabinet. Each member of Cabinet has a personal responsibility to his conscience and also a responsibility to the Government. Discussion and persuasion may abolish the disagreement, or they may merely reduce it, or leave it unaltered. If any disagreement remains there must nevertheless be a decision, but it will be one which some members like less than others. Both practical politics, and good Government, require that those who like it less must still publicly support it. If such support is too great a strain on a

> Minister's conscience, he can resign. So the price of the acceptance of Cabinet office is the assumption of the liability to support Cabinet decision. The burden of that liability is shared by all, and supported by the convention that every member is entitled to insist that whatever his own contribution was to the making of the decision, whether favourable or unfavourable, every other member will keep it secret. The maintenance of the rule of the secrecy of individual contributions to discussion, and votes, in Cabinet, provides a guarantee of the most favourable conditions possible for the utmost frankness in the expression of views. To reveal the view, or vote, of a member of Cabinet, expressed or given in Cabinet, is not only to disappoint an expectation on which that member was entitled to rely, but also to reduce the security of the continuing guarantee, and above all, to undermine the principle of joint responsibility. Joint responsibility supersedes individual responsibility; in accepting responsibility for the joint decision, each member is entitled to the assurance that he will be held responsible only for that, and only as one member of the whole Cabinet which made it; and that he will not be held responsible for any different view which he may have expressed."

21. More significantly, the letter of 14th February noted that no warning had been given that the Commissioner was considering making any particular finding of wrong-doing against Mr McCarthy or Ms Lawrie and went on to say that, by proceeding as the Commissioner had:

> ".. you appear to share the view that it is not open for you to reach any view on the evidence to the effect that either or both our clients had been guilty of any misconduct. Given that the inquiry must be conducted in accordance with the rules of natural justice, was it otherwise, the matter would have needed to have been approached by you very differently."

22. As to the latter, the relevant portion of the letter is:

> <u>The conduct of the inquiry</u>
>
> We note that:
>
> *1.* apart from the summons referred to below, no formal contact has been made by you with either of our clients. Particularly we note that no warning has been given that you are considering making any particular finding of wrong-doing against either of our clients. Further, no invitation has been received by them from you inviting our clients to comment on the procedure you propose to adopt for the inquiry or to attend the hearings and listen to the evidence and if appropriate ask questions themselves of the witnesses;
>
> *2.* you have announced how you intend to conduct the inquiry, started hearing evidence, have completed several witnesses and appear to be intent on proceeding to a prompt conclusion.
>
> Our clients support any approach which will lead to the prompt conclusion of this inquiry which, with respect, they see as
> (a) pointless
> (b) politically motivated and
> (c) a waste of tax payers' money.

23. On 17th February the Commissioner replied. Of significance to the Respondent was the Commissioner's advice that the Inquiry was to be conducted in phases and was still in the information-gathering phase following which:

> "Then, and only then will I be in a position to determine whether there may be grounds to make any adverse finding against any person or organisation. Should that eventuate, I will provide you or any such person or organisation with notice, all relevant materials, and an opportunity to make submissions in relation to the matter."

24. In his affidavits and when cross examined, Mr Wyvill referred to this letter as the Ainsworth letter as the Commissioner's advise reflects the procedural fairness obligations on the Commissioner enunciated in *Ainsworth v Criminal Justice Commission* [1992] HCA 10. The relevant portion of the letter in this regard is headed "The conduct of the Inquiry". As this letter is central to these proceedings we reproduce it in full.

Dear Ms Spurr

I refer and thank you for your emailed letter of 14 February 2014, re the Stella Maris Inquiry. I note you act for Ms Delia Phoebe Lawrie MLA and Mr Gerry McCarthy MLA. The references to the enclosed copies in your letter have not been received by the Inquiry.
I will deal with each of the matters raised in your correspondence in turn.

Request for submissions

I note in your letter identifies the material on pages one and two, numbered paragraphs 1 - 5 (inclusive) as your clients' public, and obviously preliminary, submission. I intend to excise that text from your letter and post it on the Inquiry's website, together with the other public submissions.
Should you have any objection to this course, I request you advise the Inquiry of the reason why, by no later than 5 pm Tuesday 18 February 2014. I will consider any response you make.

Public interest immunity

My opening statement from the Inquiry outlines how I intend to deal with documents and testimony concerning Cabinet dealings. I also note recent legal precedents in relation to public interest immunity (PII) claims.
I presume your reference to the waiver of Cabinet confidentiality by the Northern Territory in numbered paragraph 1 on the first page of your letter is intended to be a reference to Pl1 considerations. In my understanding, Pl/ is not vested in the Crown, any person or organisation may claim it, and it may not be waived by the Crown. Moreover, to the extent that there may be any PII attaching to the dealings in and around Cabinet during the time your clients were members, it would fall to your clients to assert any claim for privilege should they choose to do so.

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 still are 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 findings 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.

I note in this context that you and your clients are well aware of the Inquiry, its Terms of Reference, public website and hearings schedule. Indeed, there has been a person who claims to be from Ms Lawrie's office present during all the public hearings. If you or your clients were so inclined, you could have chosen - and could still make application - to have me consider whether your clients could be legally represented during these public hearings. You have chosen not to do so.

As I have stated in the media, I intend to conduct a thorough, fair, transparent and efficient Inquiry. This inquiry is not an adversarial process, it is inquisitorial in nature, and I intend to proceed on that basis. Although it is not governed by the rules of evidence, it will not be conducted in a fashion which disadvantages any party on that account. As the Act expressly provides, the Inquiry is entitled to inform itself in such manner as it thinks fit and without regard to legal forms and solemnities, subject of course to the requirements of procedural fairness.

I am pleased to note that your clients share my desire to have the Inquiry completed promptly and I look forward to their assistance in that regard.
I have publicly announced that I intend to submit my report to the Administrator of the Northern Territory in accordance with the Act on Monday 26 May 2014.

Attendance of your clients.

You will have now received summonses for Ms Lawrie and Mr McCarthy to attend the Inquiry to give evidence. We have attempted to meet your request concerning your clients' availability by adjusting our witness schedule accordingly. I note the summons served on Ms Lawrie requires her attendance on Friday, 28 March 2014, which is at the end of the sittings period you referred to and on a non-sitting day. I should advise that I think it is likely that Ms Lawrie may well carry over until Monday, 31 March 2014 given that her involvement with Stella Maris spans the period 2007 - 2012.
Consistent with the practice involving other witnesses, I am willing to discuss your clients' testimony with them before the hearings. These discussions will be tape recorded. This provides an opportunity for witnesses not to be surprised by matters ultimately put to them.

Documents

Concerning your request to access documents that have come into the possession of the Inquiry, I will to the fullest extent possible make any document that we intend to have your clients comment upon, provided to them in advance of their testimony. Cabinet documents will be made available to your clients to view in our offices. Your clients will be permitted to take copies of any Cabinet documents they consider necessary for their preparations upon provision of a written undertaking that access to those copies will be restricted to your clients and their legal representatives, and they will not be more widely disseminated.

So far as other categories of document are concerned, I will endeavour to have copied those documents identified by your clients during the course of inspection as relevant necessary to their preparations.

Please contact the Inquiry on 89996011 to make the necessary arrangements for inspection.

Summons to produce

I reject your assessment of the summonses to produce documents. The summonses are narrow in their focus and provide a clear description of what material is required to be produced. I respectfully suggest that you give some further and careful consideration to the description in the Schedules. If you are still uncertain as to the requirements, I will receive a call from you to explain it further. That area of disagreement notwithstanding, I note your clients' indication that they will cooperate with the Inquiry concerning the production of documents, and the proposal that you provide the documents on their behalf is acceptable.

The involvement of Harold Nelson Holdings

Finally, although the matter does not arise directly from the content of your correspondence, I advise that the Inquiry intends to call you (sic) as a witness.

Information received by the Inquiry to date suggests the purpose of obtaining a lease over the Stella Maris site was for Unions NT and other related entities to move their operations to the Stella Maris location thereby creating the opportunity to redevelop 38 Woods Street, Darwin into a multi-story, multi-use complex. We understand planning and negotiations were underway to achieve this outcome.

Harold Nelson Holdings is a part owner of the 38 Woods Street property. Australian Electoral Commission records also reveal that Harold Nelson Holdings receives significant rental payments as the part owner from the tenants of 38 Woods Street, Darwin,

Harold Nelson Holdings, of which you (sic) have been a long-standing director over the time in question, may have been involved in negotiations with Unions NT concerning the relocation and redevelopment of 38 Woods Street, Darwin.

If that is correct, Harold Nelson Holdings and Unions NT may have stood to gain a significant pecuniary benefit from the associated redevelopments.

Subject to a without prejudice discussion with you (sic), I would consider taking testimony from another suitable office bearer of Harold Nelson Holdings who could provide testimony on the above matters.

I look forward to your response.

Yours sincerely

John A Lawler AM APM
Inquiry into Stella Maris

17 February 2014

25. Mr Wyvill's email of 20th February 2014 to Ms Lawrie with Mr McCarthy and others copied in, recognises that the Inquiry seems to be targeting Ms Lawrie and Mr McCarthy as he said,

> "Given the statements in parliament and conduct of commissioner to date, Inquiry seems to be targeted at least in part at her and Gerry".

26. A letter drafted by Mr Wyvill and sent to the Commissioner by Halfpennys on 26th February 2014 includes the following:

> "Transcripts
>
> 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."

27. Mr Wyvill settled his clients' submissions to the Inquiry dated 10th March 2014.

They include:

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.

This inquiry was established in highly controversial circumstances and, we believe, motivated purely by a desire on the part of the CLP to try and cause political damage to ourselves as the leader and deputy leader of the opposition.

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.

…

28. On 10th March 2014 Mr Wyvill attended the Inquiry with Mr McCarthy. In the course of this hearing, V2/191, the Commissioner showed Mr McCarthy a document and said as to statements in it "*I think we have established sufficiently ... some of those to be clearly inaccurate"* and he confirmed to Mr Wyvill that he had formed the view already "*that those statements are inaccurate*". Mr Wyvill put to the Commissioner that before hearing all the evidence he had formed a "final view" about one of the most critical elements of the case and should disqualify himself from the hearing. The Commissioner declined.

29. A letter drafted by Mr Wyvill and sent to the Commissioner by Halfpennys dated 11 March 2014 reads, V10/105 :

Dear Mr Lawler,

STELLA MARIS INQUIRY

We refer to yesterday's meetings at your offices.

During the course of the meeting with Mr McCarthy you stated that you had formed a 'final view" that each of the following statements made in Unions NT Proposal of May 2009 was "not true."

"The Stella Marris (sic) site has a long history of being a community place assisting travellers and seaman for more than 100 years. The Seafarers Union together with the Stella Maris organization took over the use of the historic Railway building on the site for the benefit and welfare of seaman in the port of Darwin".

You have stated that you have formed that final view even though

1. As you well know, our clients have not been told about or given an opportunity to test any of the evidence which has been already led to the Inquiry on this topic upon

which you rely to support this view. Our clients do not even know what that evidence is.

2. Our clients and other critical witnesses in relation to this issue have yet to give evidence.

With respect, we believe that your statement plainly evidences pre-judgment on your part of one of the important issues for the inquiry to consider. This gives rise to a reasonable apprehension of bias. In these circumstances, our clients call upon you to disqualify yourself from proceeding further with the inquiry.

Should you elect to proceed with the inquiry, our clients' further participation shall be with a full reservation of rights.

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 criticized. 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 the evidence which has been given to the inquiry.

30. The Commissioner's reply of the same date reads:

Dear Ms Spurr,

I refer to your letter dated 11 March 2014. I take that correspondence to be an application that I disqualify myself from proceeding with the Inquiry. You may consider this response to be a refusal of that application.

As you will appreciate, this is a non-determinative inquiry that has been charged with making a thorough investigation without regard to legal forms and solemnities. The general scope and purpose of the hearing was made public at the outset. It is obviously not possible to specify at the outset what information will come to light during the course of the evidence. One purpose of the preliminary meeting with your client was to discuss with him certain material information that has come to light during the course of the investigation so that he knows what he is going to be asked about and has opportunity to deal with it. That information includes testimony from the author of the Unions NT proposal to the effect that statements contained in the two sentences to which I was attempting to direct your client's attention yesterday evening were variously exaggerated and untrue.

As you will also appreciate, there is nothing objectionable in indicating a provisional view on a particular question, based on information which has come before the inquiry. Provisional views of that nature are subject to further evidence or argument, including evidence from your client. As stated, one purpose of the preliminary meeting was to apprise your client of material matters and to give him notice and opportunity to address those matters during the course of his evidence. Such a procedure is routinely considered to be both of assistance to witnesses yet to give evidence and of assistance to the inquirer in the formulation of a final view.

In summary, forming and expressing (for the assistance of subsequent witnesses) provisional views based on evidence heard to date does not amount to pre-judgment; your client has opportunity to address the accuracy or otherwise of any statement made in the Union NT proposal should he consider that it somehow bears on his interests; and it is not incumbent on the Inquiry to transcribe evidence where recordings have been provided to interested persons. That your client and/or his legal representatives may have chosen not to examine that evidence does not amount to a denial of natural justice.

Yours sincerely,

John A Lawler AM APM

Commissioner

Inquiry into Stella Maris

11 March 2014

31. By letter dated 26th March 2014, V10/107, the Commissioner wrote to Halfpennys. In the context of these proceedings, this letter is as significant as the Commissioner's letter of 17th February. At the outset, the Commissioner explains that his Inquiry is now in the third of four phases. This harks back to his letter of 17th February in which he explained that following the completion of phase 2 he would be in a position to determine whether there were grounds to make any adverse findings against any person or organisation and what would then follow. The significance of this letter to the Respondent and his clients is that, in paragraphs we have emphasised below, it clearly indicates that the Commissioner was likely to reject Mr McCarthy's evidence that he had been physically present at the Cabinet meeting in question, provides the material relied upon by the Commissioner referable to this and gives a date for Mr McCarthy's recall as a witness to explain the discrepancy between his evidence and the material provided. This was what the Commissioner said he would do in his letter of 17th February if he thought there may be grounds to make an adverse finding against any person. That he did not do so in relation to any other matter referable to Mr McCarthy or any matter referable to Ms Lawrie strongly suggested that consistent with his statement of 17th February, he was not contemplating making any other adverse findings against Mr McCarthy and was not contemplating making any adverse findings at all against Ms Lawrie. This letter provided the Respondent and his clients with good reason to believe that the Commissioner had not forgotten about his 17th February commitment and would stand by it.

32. The letter of 26th March 2014 is:

Dear Ms Spurr,

The Inquiry into Stella Maris is now in its third of four phases, which involves analysis and consolidation of the testimony and information, the Inquiry has received to date. I wish to raise a number of matters with you and I would be grateful if you would bring these to the attention of Mr Alistair Wyvill of Counsel, and Ms Delia Lawrie MLA and Mr Gerald McCarthy MLA.

Firstly, I have sought a further report from Mr Mark Harris of the Australian Valuation Office in relation to the analysis of Mr Brian Scarborough of the Stella Maris Crown Lease. The report of Mr Harris is due to be provided by Wednesday 2 April 2014 and when that report is available I will provide you a copy.

On the same issue of the cost or value of the Crown Lease for Stella Maris, I have requested further information from the Department of Lands, Planning and Environment. The information sought endeavours to quantify any (1) capital expenditure, and or (2) ongoing expenditure on maintenance, required to bring the Stella Maris site up to a standard so as to be effectively utilised by the lease. In this regard you should note paragraphs 6 – 9 inclusive of Cabinet Submission 4033.

Secondly, your letter of 11 March 2014, states that the audio files relating to the evidence given to the Inquiry are of no help in assisting your clients. Notwithstanding, I have included the remaining audio files from the hearing process. You now have all the audio files, of all witnesses, who have provided testimony to the Inquiry.

Thirdly, I have attached the following documents to this letter:

Telstra Call Charge record spreadsheet for mobile phone number 0418782572 on issue to Mr McCarthy as of 10 July 2012, and associated covering report from Mr Gary Barnes.

A letter from the Speaker of the Northern Territory Legislative Assembly regarding access to Parliament House and fuel card purchases for Mr McCarthy's allocated motor vehicle.

Travel acquittal details for Mr McCarthy from the Department of Chief Minister and covering report from Ms Teresa Hart.

The above documents seem to establish that Mr McCarthy was in Elliot on 10 July 2012. This supports the Cabinet attendance record for Cabinet Meeting No 479 which considered the Future of Stella Maris. The information obtained to date does not support the definitive sworn testimony of Mr McCarthy when he gave evidence on Thursday 13 March 2014, that he was physically present at the Cabinet Meeting No 479. I have included a copy of a transcript that the Inquiry has prepared in relation to the evidence Mr McCarthy gave on this point.

Given Mr McCarthy was not excused at his last appearance, I intend to recall him before the Inquiry to have him explain this discrepancy and other issues that flow from him not being in attendance at the Cabinet meeting. I was intending to do that at 9am on Thursday3 April 2014. If you can confirm or otherwise if this time and date is suitable by Friday 28 March 2014.

I have also attached the transcript of Ms Delia Lawrie on this issue and given she was more equivocal (with the assistance of Mr Wyvill), I do not intend to recall her.

I have also attached the audio files of the conversations between Ms Lawrie and Mr McCarthy and myself on 10 March 2014. I have also included a transcript of taped conversation between Mr McCarthy and I where the issue of me forming a 'final view' was canvassed. You will see from the transcript that Mr Wyvill is the only person to utter the words 'final view'.

Given Mr McCarthy subsequently raised this issue in his sworn testimony, I will be asking Mr McCarthy to withdraw that statement as being untrue.

I would also ask you to draw to Mr MCarthy's attention the relevant provisions of s14 of the Inquiries Act (NT) before he returns to provide testimony to the Inquiry. I look forward to hearing from you on the above matters"

33. On 28 March 2014, the Commissioner emailed a letter to Ms Spurr enclosing written advice from Paul Maher, the solicitor assisting the Inquiry, inviting any submissions in response by 14 April 2014. V10/183.

34. An email dated 31 March 2014 from Mr Wyvill to Mr McCarthy, Ms Lawrie and a staffer in Ms Lawrie's office reads, V2/123-115:

Hi all

Just to confirm that Gerry is back on tomorrow at 9am 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 thinki [sic] 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 that no lease was actually granted, we consider the inquiry to be a pointless waste of time and will not be co-operating any further?? and then ignore him from now on? By staying engaged we may actually be giving him the opportunity to try and fix up the messes we say he has created and also more chance to verbal us.

Gerry, do you want to pick me up from chambers at 8.30 so we can discuss how to deal with tomorrow on the way out there?

Cheers,

Alistair

35. Ms Lawrie replied within 10 minutes 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 has agreed it should have been pre Cabinet not BSC. The person creating that ruse is Rod Applegate. Give it to them both barrels."

36. On 1st April 2014 Mr McCarthy appeared before the Commissioner with Mr Wyvill. After questioning Mr McCarthy about his presence at the relevant cabinet meeting and other matters, the Commissioner referred to Mr McCarthy having said that he was not a Territorian and had formed a final view. The following is extracted from what then ensued.

MR WYVILL: Mr Lawler, this really isn't a new line of questioning, but Mr McCarthy has asked me to respond on his behalf to this, if I may.

THE COMMISSIONER: Please.

MR WYVILL…. It is correct, it seems, assuming that accuracy of the transcript that the words final view' were actually words that came from me.

THE COMMISSIONER: Indeed.

MR WYVILL: But we stand well and truly beside the substance of what we said, which is that that is and we repeat that we believe that that is a fair characterisation of the words that you used on that day. We agree that it is not a quote, so we agree or we maintain the position that there's an absolutely … fair characterisation of the position you took in that … prehearing meeting. Just to make it absolutely clear, Commissioner, you made it clear there that you had formed a view. You said …'we think we've — I've think we've established sufficiently some of those to be clearly inaccurate' and that's where we said to you — I said to you 'you've formed that view already, have you?'

And you said that those statements are inaccurate and I said yes and you said yes. And that's clearly your final view. So the characterisation of that being the final view is absolutely accurate in our respectful submission and we've already made that point to you in correspondence.

There are additional concerns we have, which is the fact that you have not at all sought to reject or deny what Ms Lawrie put to you about the use of the term … urban myth to describe the connection between Unions NT and Stella Maris. And we say that is a plain indication of a prejudgment and appearance of bias. Based on that basis alone, you ought to disqualify yourself from going any further in this matter.

….

THE COMMISSIONER: Thank you, Mr Wyvill. Just in relation to your second point, you've asserted that twice now that I said 'urban myth'. Can you point me to when and where [I] said that?

MR WYVILL: Well, Mr Lawler, this is another aspect of the unfairness of this Inquiry. That was reported to us by a person … helping us with this Inquiry, but as we made clear on the record, throughout, you have refused to produce a transcript, so we don't have any convenient access. You know that we don't have the resources to type up a transcript …of a large number of days of evidence. We don't have the ability to produce that. You do, you do, you produce it when it suits you, you won't produce it for us.

THE COMMISSIONER: But you've raised it twice now, Mr Wyvill, that you've asserted that I've said that. Surely it's fair and proper and decent for you to detail when it was *said and who was said to and what the basis of where the proof is that it was in fact said…"*

37. The "urban myth" assertion had first been raised on 14th March 2014 when Mr Wyvill appeared before the Commissioner with Ms Lawrie. In the course of her evidence, she expressed concern that the Commissioner had been quoted as describing the Union Movement's relationship with the Stella Maris site as an urban myth. The Commissioner did not respond. A little later Mrv Wyville complained that that the Commissioner had not denied describing the connection between the Union movement and the site as an urban myth. The Commissioner responded, V8/2027:

> *Well, the reason I made no comment about that, Mr Wyvill is that I can't recall saying that. If the transcript has it that I've said that, then that's what the transcript says. But I don't have a recollection of that now. I'm not saying I didn't, I'm not saying I did, I just have got no recollection of it."*

38. Following the hearing on the 1st April 2014 Mr Wyvill asked Ms Lawrie's staff to locate the Commissioner's use of the term "urban myth". On 2nd April 2014 he was directed to an audio file of the testimony of David Money, given on the afternoon of 19th February 2014 in the course of which the Commissioner said*, "That's fine, you're following the urban myth like everybody else."* [As transcribed in Simon Cureton's affidavit, page 50]. The concluding words *"like everybody else"* suggests that the Commissioner had formed this view in relation to the evidence of more than one previous witness.

39. When cross examined before the Tribunal, Mr Wyvill agreed that when he appeared before the Commissioner on 1 April 2014 he did what was proposed in the first dot point of his email of 31 March 2014, that is, as approved by Ms Lawrie, he gave the Commissioner both barrels and put a few quotes on the record that she could use later to discredit his report**,** T216. As to what was proposed in the second dot point in that email he said it was never acted on. His evidence as to this is addressed in paragraphs 123 to 128 below.

40. By email dated 8th April 2014 to Ms Spurr, Mr Wyvill wrote, V10/137

> Hi Cathy
>
> I know we have some outstanding correspondence from Lawler.
>
> I have a strong feeling that nothing we will say is going to change his mind – he will just use what we say to try to get around the points we make.
>
> Do you think it might be better simply to hold our fire and put our efforts into preparing out own account to be released at the same time as his?
>
> I'm in Dili for 3 days back Thursday. Still happy to do a response to him but I will need until early week.
>
> What do you think?.
>
> Regards
>
> Alistair

41. Ms Spurr's reply of the same date was:

> Dear Alistair
>
> I am thinking we still need to respond to him so he can't say we had an opportunity but ignored it.
>
> I like the idea of putting our own account of the story out at the same time though.
>
> Are you in chambers today?
>
> Regards
>
> Cathy Spurr

42. On 11th April 2014 Mr Wyvill had a telephone conversation with Ms Spurr, V10/188, in which he explained his view that there was little point in them continuing to represent Ms Lawrie and Mr McCarthy in the Inquiry and that their efforts would be better spent in assisting them preparing their own report justifying Cabinet's decision. Ms Spurr said that if he was not prepared to continue on a pro bono basis, nor was she. Following this exchange, a letter drafted by Ms Spurr, settled by Mr Wyvill and approved by Ms Lawrie and Mr McCarthy, was forwarded to the Commissioner on 15 April 2014. It is as follows, V10/189:

> Dear Mr Lawler,
>
> STELLA MARIS INQUIRY
>
> We refer to the above and to previous communication in relation to this matter, in particular to your letter of 28 March 2014.
>
> Our Clients have exhausted their ability to access pro bono legal assistance. Accordingly, we will no longer be representing Ms Lawrie and Mr McCarthy in this matter. In those circumstances, we do not proper to respond to the advice of Mr Maher or the subsequent valuation report of Mr Harris.
>
> It would be our view that the enquiry should seek Mr Scarborough's opinion on the advice of Mr Harris and at the enquiry's cost.
>
> Please note that our clients remains (sic) vitally interested in the outcome of the enquiry.
>
> Please ensure that further correspondence is provided direct to our Clients via post at the following address:
>
> Ms Delia Lawrie
> Leader of the Opposition
> 4th Floor, Parliament House
> Mitchell Street
> DARWIN 0800
>
> Mr Gerry McCarthy
> PO Box 769
> Tennent Creek NT 0861

43. In the course of Mr Wyvill's cross examination about the letter of 15th April 2014 the following exchange occurred, T218:

> *And just in relation to the answer that you gave earlier that that advice of 31 March 2014 was not acted upon but a different strategy was acted upon, do you recall giving that evidence?...Yes.*
>
> *The different strategy that was embarked upon and the one that you had advised, was to write a letter to the Commissioner saying that you had exhausted as set out in the letter dated 15 April 2014, that was the different strategy wasn't it?......Well the – to be careful about answering your question ..., that strategy that we decided was reflected in that letter. As I've indicated there were errors in the drafting in the letter, but the strategy was implemented by that letter, yes.*
>
> *And what was that strategy sir?---That strategy was to save our resources, that was the point. The strategy was to – my decision to stop spending a lot of time in an inquiry where I had no confidence of the work I was going to do was going to advance my client's interests and the strategy was to stop doing that work, to take it on the chin that there was going to be a damaging narrative, political damage from the report probably, not for sure, but probably, and to put our resources into a dissenting report to deal with that damaging narrative. Relying on and noting at the same time and that's why this is the actual point or one of the critical points about that letter, is that we were taking instructions not to waive Delia and Jerry's entitlement to getting notice in terms of Ainsworth and that was expressly part of that letter and expressly part of what we had in mind in that strategy. We knew we had that protection.*

44. The following earlier exchange relates to the deficiencies Mr Wyvill acknowledged in the drafting of the letter: T205

> *I think you have accepted, have you not, that on reflection the use of those words, "Our clients have exhausted their ability to access pro bono legal assistance", could have been expressed better?---Yes, I have.*
>
> *Yes. And sitting here today, what do you say it should have read?---It would have been better if those first two sentences simply have said, "This firm and counsel have decided that they're no longer prepared to provide pro bono legal assistance in the present circumstances in this matter. And accordingly we will no longer be representing Ms Lawrie and Mr McCarthy in this inquiry." That would have been a more accurate statement, a better statement.*
>
> *And in relation to that, that you just stated to the Tribunal, can you explain why that wasn't drafted in that way in this letter?---It's just poor drafting. I didn't give it enough thought.*

45. When he was brought back to this paragraph at a later time he said: T212

> *The logic of the paragraph is quite straightforward. It explains ... that they no longer have access to pro bono legal assistance which was true. My concern is about the use of the word "exhausted" which suggests that that was a permanent position which would be wrong. It wasn't permanent. They had no further access to pro bono legal assistance…the result of that was that we would no longer be representing them. And it was important then to deal with the outstanding*

correspondence from the Commissioner. And we said we won't be proposing to [respond to] it and then we put alternatives as to what the Commissioner should do.

Yes. That's your evidence in terms of this letter, correct?---Yes.

The real reason for the position taken in the letter of 15 April 2014 was, was it not, that the position was that your advice was that Ms Lawrie and Mr McCarthy should no longer stay engaged with the inquiry because it may give Mr Lawler the opportunity to try to fix up the messes, you say, he had created, and also more chance to verbal. Wasn't that the position?---No. That's a gross oversimplification. It was a very complex decision, that decision to cease to act at that point. There were elements that you have described in the decision but there are other elements as well. So, the answer is no to your question.

Well, you said it was a gross oversimplification I think was your phrase. What were the other matters apart from what I just put to you that played into the consideration?---I have covered this in my affidavit at length and if I remember correctly, thinking about it now, most importantly was the fact that I had formed a view that the Commissioner was unlikely to be persuaded by our view about the merits of the Cabinet decision. It - that was particularly critical because there was, I thought, a significant amount of work involved in responding to Mr Maher's and Mr Harris' material and I just didn't think it was worth it. I had a lot of other things on at the time, a lot of other commitments that I needed to attend to and making a balancing decision, I decided that that just simply wasn't worth the effort. And one of the factors that played on that was that the risk of that additional effort proving counterproductive because it would give him something to feed off and that's the essence of what that statement that you put to me before. And as a good example of that, if you look at his report you will see that the report goes at length through what Mr Scarborough said and the report that we produced and that gives it a credibility because it looks like a careful and genuine analysis. Whereas if you look at what use is made of Mr Maher's report, it's a one or two lines just put there which have very, very little weight and that was precisely the risk that I saw of staying engaged in this process, that the work we were going to do was not just not going to help us, it was actually going to give, you might say, a false degree of credibility to the report.

…

You advised your clients to cease any assistance in respect of that inquiry or any appearance in that inquiry in order that that inquiry would not be given an opportunity to fix up, what you say, were the messes that had been created by the Commissioner and more chance for the Commissioner to verbal your clients. Do you accept that?---No, I don't.

46. On 23 April 2014 Mr Gleeson emailed Mr Wyvill about PWC Legislation that is of no relevance to this matter, made an enquiry about the publication of the Commissioner's Report and offered assistance referable to the dissenting report MrWyvill was preparing. The email is as follows:

Subject: PWC Legislation

Hi Alistair,

A couple of things,

1. I know Commissioner Lawler has told us that May 26 is the date when the report will be made public. Do you think there is any likelihood of it being finalised earlier and us being ambushed in this sitting of Parliament?
2. Assuming the May 26 date is adhered to, when do you need something from Chris Burns to help compile your dissenting report? What form would you like Chris' information to take?
3. The journalists are taking some convincing that the PWC legislation actually paves the way for privatisation. As a result, I'd like to arrange a briefing for them to be taken through the legislation. I know it's short notice, but us there any chance you could come in here tomorrow for half an hour or so if we can corral the influential journos to be here so they can have the legislation explained to them? If you are available, I think a morning briefing at about 10am would work best as late in the day the TV journalists will be busy filing their stories. The idea is to have them briefed ahead of the PAC hearing on 28th which is next Monday.

Once again apologies for asking you for your valuable time.

Your assistance on these matters has been greatly appreciated.

Yours, Mike

47. Mr Wyvill responded a short time later as follows:

> **Subject**: PWC Legislation
>
> Hi Mike,
>
> If he was smart, Lawler would show us a draft to give us a chance to comment before going public. But we obviously can't assume that.
>
> We cannot rule anything out as such but having some idea as to the amount of work involved I would think that the chances are less than 5% of it being much earlier than 26 May.
>
> It would be great if Chris could produce a narrative history of the Labor movement at the wharf area generally, at Stella Maris site specifically and how that site has come to symbolise the history of the Labor movement in Darwin.
>
> I can incorporate it quite quickly if I had it say, the week before?
>
> I'm stuck tomorrow sorry. If you have any doubters left after your briefing, I would be happy to have an 'off the record' chat about it with them early next week if that would assist
>
> Cheers
>
> Alistair.

48. On 25th May 2014 Mr Wyvill provided a draft of a suggested lengthy dissenting report to Mr Gleeson. His email described the draft as a work in progress. It is titled Stella Maris – The True Position. The draft reiterates the case put by Territory Labor to the Inquiry and does not anticipate adverse findings in the Report against Ms Lawrie or Mr McCarthy personally. It does anticipate that the Report would include findings critical of the former Territory Labor Cabinet. Paragraphs 5, 10, 12 and 28 of the draft follow.

"5. Lawler is a southerner without, we believe, the qualifications or skills to run an inquiry like this. We believe that he conducted it unfairly from the beginning. We are disappointed but not surprised that he reached the conclusions he did, which we believe are misguided, wrong and unfair to the hard-working cabinet members, union officials and others involved in getting this proposal through cabinet to the stage of an accepted letter of offer. Worse, but not acknowledging the real benefits of the unions NT offer, we believe he has done all Territorians a disservice.

10. There shouldn't be a need to state the bleeding obvious, but, unfortunately, our experience of Lawler suggests that we should not take anything for granted. The Australian Labor Party has a long and proud association with the labour movement, reflecting its origins as the workers' party. This is not a secret. And it is hardly a surprise that a Territory Labor Government should adopt many policies which align with those of the Territory Union movement, e.g., a commitment to safe work places (reflected in the Henderson's Government's support for the national OHS scheme which became law in the Territory in 2001) and a commitment to one of the most forward-looking and equitable workers' compensation schemes in the country.

12. Many people who have lived in the Territory for many years will be a little surprised that Lawler described the connection between Stella Maris and the Unions as an "urban myth" and statements which Labor cabinet ministers in correspondence had made about that connection as being "clearly inaccurate". They might be even more surprised that he expressed those views before having heard from any of the members of Labor cabinet who made the decision to approve the offer of a lease to Unions NT, including Dr Chris Burns, a committed Labor Party member, Labor MLA, Labor Minister and long-term unionist and union supported.

28. Lawler is an under-qualified southerner who should never have been appointed to run any Territory inquiry. He is not a lawyer. It appears he has not knowledge or experience of leasing. He has never conducted an inquiry of this kind. We understand that his only exposure to… [This incomplete sentence concludes the last paragraph in the draft]

49. In the course of his cross-examination Mr Wyvill said, when referred to paragraph 5, that he certainly would have reached the view expressed in that paragraph by the time he and Ms Spurr ceased to act, T249. His cross examination included the following: T 250

"I knew [in early February] that he wasn't a lawyer. I knew that he'd worked as a police officer. He may have had other ways that he was qualified in these matters. My concern, for example, about Cabinet procedures and his knowledge of that, was from the points he was making during the course of the inquiry, which seemed to me to be quite off the wall.

Okay, and just in relation to just the answer you've just given now, you formed the view, did you, about his qualifications, you say, in part because of some matters that he was expressing at the inquiry?---Absolutely. The way he conducted the inquiry, the questions he asked, the things he did, was probably the best source of information as to - or one of the best sources of information as to his capacities to deal with the inquiry.

…

Now, just in relation to the skills in par 5 where you say, "Lawler is without, we believe … skills to run an inquiry like this". …

The reference to skills is a reference to what, in that passage there?

---It's a reference to what I talked about yesterday. It's a reference to the capacity to act impartially from your appointment. It's a reference to knowing to exercise a discipline on your thinking so that you keep an open mind throughout the course of the inquiry, no matter how attractive one particular view might be. Skills like that.

And that was because he hadn't previously held a role which was not a matter you understood and which he was not undertaking work for an employer, correct?---Not just that, but the way he behaved in the inquiry. For example, saying very early on that he, in effect, pre-judged the connection issue.

And when you say, "very early on" at which point in time very early on had he pre-judged that?---The fireside chat session. [10 March 2014]

Right. If you go to ... par 10. You say this ...

"There shouldn't be a need to state the bleeding obvious, but unfortunately our experience of Lawler suggests that we should not take anything for granted." ...---Yes.

What are you referring to there?---Well, the fact that our experience - our direct experience was that we put up this - what I thought was a very persuasive case about the benefits of this lease to the Commissioner and he - in substance - in my view, ignored it. And you can see that from the Maher - the Maher communication. Here we have, we put up this strong case and then he releases the Maher advice and the Maher advice is effectively based upon the assumption that there was no rational basis for the decision to grant the lease.

Okay. And go to par 28 ... are these your words; "Lawler is an underqualified southerner who should never have been appointed to run any Territory inquiry. He is not a lawyer. It appears ...he has no knowledge"?---Yes.

"Or experience of policing. He has never conducted an inquiry of this kind. We understand that his only exposure to". Are they your words?---Yes they are.

Again, that is a focus on the assertion by you that the Commissioner did not have the skills or qualifications to conduct the inquiry, correct?---Yes, it is."

50. At 9.30 am on 26 May 2014, Ms Lawrie sent the following email to Gerry McCarthy and other Labor members, copying in Mr Gleeson (but not then Mr Wyvill):

> Hi team
>
> We understand that the Stella Maris Inquiry report is being handed to the Administrator today. This is a process to make it public.
> We are unsure as to when we will receive a copy of the report but have plans in place to get it ASAP it is public. It would be good for Caucus to receive a briefing on the report tomorrow. Today we will be busy co- ordinating a response.
> You will receive our response from Michael Gleeson ASAP.
> Please let Michael Gleeson know of your availability times (perhaps 11.30 am?) so we can co-ordinate a Caucus briefing.
> We expect an ugly report because Lawler has shown his true colours throughout the Inquiry. As I said to my children last night, desperate despotic regimes in other countries go straight to locking people up, torture et al.
> This local desperate, despotic regime doesn't have that option at least. Feel free to contact me anytime.

51. At 12:15 pm on 26 May 2014, Mr Wyvill sent an email to Ms Lawrie, and Mr Gleeson with Ms Spurr copied in. It attached an electronic copy of the Commissioner's letter of 17 February 2014 and drew a particular passage to Ms Lawrie and Mr Gleeson's attention:

> Delia/Mike
>
> Check out the highlighted passage on page 2!
>
> I attach a draft of the letter which we sent which prompted that response. I don't appear to have the final in the form as sent.
> Cathy, would you be able to locate it and circulate?
> Cheers
> Alistair

52. The passage he intended to highlight was the Commissioner's commitment of 17 February:

> 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 an opportunity to make submissions in relation to the matter.

53. A paragraph containing a statement to the effect that this email demonstrated that Ms Lawrie and her advisors had forgotten about the Commissioner's 17th February statement that if there where grounds to make an adverse finding against a person he would provide the person with notice, all relevant materials and an opportunity to make submissions, was put to Mr Wyvill in the course of his cross-examination. He responded:

> T 90 "*… on the basis of what I know, of my own knowledge, it's just simply a false statement that we had forgotten about the letter of 17 February up and until 26 May 2014. That's wrong on a whole range of levels. I had not forgotten about Ainsworth at all at any stage. It was in my mind. When we terminated the retainer there's a sentence in that letter ... which owes its existence to the combination of Ainsworth and the 17 February 2014 letter. So the premise on which this paragraph is founded is quite wrong*."

54. In his lengthy affidavit of 30 June 2020, the substance of Mr Wyvill's explanation for the sentence "Check out the highlighted passage on page 2!" in his email on 26 May is that in late May 2014 when preparing a draft dissenting report, he revisited the correspondence exchanged during the Inquiry including the Ainsworth letter. He had not forgotten about the reassurance given in that letter. He remembered it and was re-reading the primary documents to remind himself of the detail of the reassurance. He could not recall precisely why he put an explanation mark at the end of the sentence but thought it likely that, having been away from the matter for about six weeks, he had forgotten how clear and specific the terms of the reassurance were. He had not forgotten that the Commissioner had given the reassurance.

55. We accept this evidence. The documents and some comments of Mr Wyvill when before the Commissioner demonstrate that procedural fairness was at the front of Mr Wyvill's mind from the outset. We refer to his meeting notes of 19th December 2013 and the letter to the Commissioner of 14th February 2014 that elicited the commitment contained in the Commissioner's letter of 17th February. The letter to

the Commissioner of 26 February said that transcripts were essential for procedural fairness. Two statements in Mr Wyvill's letter to the Commissioner of 11th March to the effect that his clients' rights are fully reserved are consistent with a reference to their right to procedural fairness. The comment in Mr Wyvill's email of 31st March 2014 that "no news from the inquiry is definitely good news?" appears to assume procedural fairness. We accept the evidence that the sentence in the letter to the Commissioner of 15th April 2014: "Please note that our clients remains (sic) vitally interested in the outcome of the Inquiry" together with the provision of their addresses for correspondence were specifically inserted to protect their ongoing entitlement to procedural fairness. That entitlement is also relevant to the comment in Mr Wyvill's email to Mr Gleeson of 23rd April to the effect that if the Commissioner was smart he would show a draft of his Report to them and give them a chance to comment before going public.

56. After Ms Lawrie had given evidence to the Commissioner on 14th March 2014 the Commissioner invited her and Mr Wyvill to make "a closing statement". V8/2091. His response kept open the possibility of saying more in the event of notice of an adverse finding. He began by saying:

> *"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."*

He concluded his response by saying, V8/2095 *"there is nothing further that we would say at this stage, Mr Commissioner."*

57. At 3:49 pm on 26 May 2014 Mr Wyvill amended a draft statement for the media emailed to him by Cathryn Tilmouth, Ms Lawrie's Media Adviser. The amendments added a reference to the Commissioner's undertaking as to adverse finding and recorded that no notice of an adverse finding and offer of an opportunity to make submissions was provided to any former Labor Minister. The amended draft statement is set out in particular 2.5

58. At 9.09 am on 10 June 2014 Mr Wyvill sent the following email to Mr Gleeson:

> Hi Mike
>
> I've been doing a bit more work on this. In terms of handing out our report on Thursday, my concerns are (not just finishing it in time, but also):
>
> - I think we have to assume that a copy of our report will end up with the Gov and Lawler not long after we hand it out
> - It is very hard to draft a response to something precise detail of which we don't yet know. There is a real risk that we will look silly by attacking points that aren't made or that we will add force to the criticism in the report by not responding to those we don't anticipate
> - We will also give them a chance to amend/explain the report to kill off our complaints
> - They will also have much more time to prepare a response to our points generally/poke holes in what we say.

I think it may be better just to hand out a one pager anticipating the attack on Gerry and making our other big points and perhaps giving them Chris' history of SM.

What do you think?"

59. What then ensued is detailed in particulars 2.7 – 2.10 culminating in the one-page draft dissenting statement, the initial part of paragraph 6 of which is the basis for Allegation 2. That paragraph is:

> 6. The inquiry was conducted unfairly from the beginning, reflecting we believe Lawler's lack of qualifications, experience or skills to run an inquiry such as this.
>
> - By describing the connection between Stella Maris and the union movement as an "urban myth" before he had heard from any cabinet minister, Lawler appears to have prejudged one of the critical issues for the inquiry.
> - No funding for legal representation was made available to those against whom the Inquiry was clearly targeted.
> - No transcript of evidence was provided which has the practical effect of keeping the evidence secret.
> - No notice of possible adverse findings has been given to Delia or Gerry, yet it appears from recent statements by the Chief Minister that Lawler has made serious and quite unjustified adverse findings against Gerry.

60. With regard to paragraph 6 above, the following exchange occurred in the course of Mr Wyvill's cross-examination, T203, after it was put to him that as a lawyer, he was advising his client to make a public statement to call into question public confidence in the Inquiry because of the experience of the person conducting the Inquiry:

> *"I knew I was recommending ... Ms Lawrie to make a public statement. I knew the content of the public statement called into question the Commissioner's competence. I knew that that was likely to undermine confidence of the public in the outcome of the inquiry.*
>
> *And that's what you were seeking to achieve by advising your client to issue a public statement in the form of a one-pager?---That's precisely what I was seeking to achieve - precisely what I was seeking to achieve because for the reasons explained, I thought that the inquiry lacked fairness.*
>
> *[I]f you form the view that an inquiry is not being conducted fairly, as a lawyer do you, ... advise your client to seek a judicial review in relation to any matters of pre-judgment by the inquiry ... rather than advising your client to make a public statement which seeks to ... to undermine confidence of the public in an inquiry?---I see both of those options legitimate and indeed, part of my responsibilities when I am representing a politician in this context."*

61. It is to be remembered that the use of the draft dissenting statement was both conditional and its content was anticipatory. It was only to be used when the Report was issued and if the Report contained

damaging findings as anticipated in the draft. Obviously enough it would not be used if the Report was favourable to Mr Wyvill's clients. It was also unlikely to be used if the Report did not make findings as anticipated in the draft. As explained in Mr Wyvill's email of 10th June, there was a real risk that they would look silly if the draft attacked points that were not made in the Report, or failed to respond to criticisms that were not anticipated.

62. Around the 18th June 2014 Ms Lawrie or Mr Gleeson advised Mr Wyvill of rumours that the Commissioner's Report contained adverse findings against both Ms Lawrie and Mr McCarthy personally and that the Country Liberal Party would use its majority in the Legislative Assembly to refer Ms Lawrie and Mr McCarthy to the Legislative Assembly Privileges Committee for breaching the *Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act* 2008 (NT). Mr Wyvill had not previously been aware of the existence of that Act. He was asked to advise on the strategy to be followed if there were adverse findings against Ms Lawrie or Mr McCarthy. That evening he drafted an originating motion which sought a declaration that the Commissioner had failed to observe the requirements of procedural fairness, and sent a draft to his clients and Ms Spurr. In the course of his cross-examination, T259, Mr Wyvill said that he had prepared the draft to *"in effect to calm the horses….just to show Delia that there was a Plan B.*"

63. The Commissioner's Report was made public on 19th June 2014. As had been anticipated, it contained findings critical of the former Territory Labor Cabinet's decision to grant the lease to Unions NT as well as Mr McCarthy. However, it also made a number of serious findings against Ms Lawrie. V10 /193. The correctness, or otherwise, of the findings is of no significance to these proceedings. What is significant is that in making them the Commissioner failed to do what he said he would, in his letter of 17 February, before making adverse findings. The findings include the following:

- "Minister Lawrie acted with bias over many years, forming a view in 2009 that Unions NT should be exclusively granted a lease over the site without an expression of interest process" (page 12);

- "... the fact remains that Minister Lawrie acted with bias in favouring Unions NT over other community groups"(page 37);

- "From her time as Minister for Planning and Lands in 2007 up until the Cabinet meeting of 10 July 2012, Minister Laurie acted in a bias[ed] way by favouring Unions NT in its attempts to be granted a lease for the site" (page58);

- " If Minister Lawrie was so biased as to be unable to allow other interested community groups to advance their proposals to be compared and properly assessed against Unions NT's application, then she should have excluded herself from participating in the Cabinet decision-making process" (page 60);

- "Finding 10: 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 proves was not proper and was unfair to the public and other community groups" (page 60);

- "Recommendation 6. I recommend that the Legislative Assembly consider whether there has been an alleged breach of the Northern Territory of Australia Legislative Assembly (Members Code of Conduct and Ethical Standards) Act 2008, by Ms Delia Lawrie …, and whether under the provisions of s.5 (1) it wishes to refer any alleged breach of the code to the Privileges Committee" (page 60).

64. Mr Wyvill's understanding is that ultimately his draft dissenting statement was not used. The Applicant does not contend otherwise and there is no evidence to the contrary. It may be that it was decided not to use the dissenting statement as it failed to anticipate that adverse findings would be made against Ms Lawrie and deal with that eventuality. In his email of 10 June Mr Wyvill had forecast that this sort of difficulty could make them (and the dissenting statement) look silly.

65. With the evidence we have referred to in mind we focus on Allegation 2. Plainly Mr Wyvill and his clients believed in the gist of what he recommended should be said in paragraph 6 of the draft dissenting statement.

66. The Applicant does not assert that there was no or insufficient evidence to justify the last 3 dot points in paragraph 6 that:

> - No funding for legal representation was made available to those against whom the Inquiry was clearly targeted.
> - No transcript of evidence was provided which has the practical effect of keeping the evidence secret.
> - No notice of possible adverse findings has been given to Delia or Gerry, yet it appears from recent statements by the Chief Minister that Lawler has made serious and quite unjustified adverse findings against Gerry.

67. The Applicant contends that there was no or insufficient evidence for the statements that:

> 6. The inquiry was conducted unfairly from the beginning, reflecting we believe Lawler's lack of qualifications, experience or skills to run an inquiry such as this.
>
> - By describing the connection between Stella Maris and the union movement as an "urban myth" before he had heard from any cabinet minister, Lawler appears to have prejudged one of the critical issues for the inquiry.

68. On 19 February the Commissioner described the connection between the Stella Maris site and the Union movement as an "urban myth" before he had heard all the evidence including evidence from any cabinet minister. That being so, there was sufficient evidence to justify the statement in the first dot point

that the Commissioner appeared to have pre-judged the question of this connection. From the stand point of the Territory Labor Cabinet, Unions NT and Mr Wyvill's clients this was a critical issue. The connection between the prior history of the Trade Union movement and the Stella Maris site is the first point raised in Mr McCarthy's letter of 2nd December 2013 to the Chief Minister with respect to the contemplated inquiry. The need to identify witnesses referable to the association of the Stella Maris site with the union movement is one of the nine matters identified for investigation in Mr Wyvill's note for the meeting of 19th December 2013. In the course of the hearing on 10th March, the Commissioner agreed that he had formed the view already that some statements in a document were clearly inaccurate. This resulted in Mr Wyvill complaining that he had formed a view about one of the most critical elements of the case and requesting the Commissioner to disqualify himself. The next day, Halfpennys wrote to the Commissioner. That letter identified the link between the Stella Maris site, seamen and the Seafarers' Union as the subject of the Commissioner's comments on 10th March, asserted that his pre-judgement gave rise to a reasonable apprehension of bias and called on him to disqualify himself. The strong link between Unions NT and the Stella Maris site was central to the evidence Ms Lawrie gave to the commissioner on 14th March when explaining what she had done. In the course of that hearing and the hearing on 1st April Mr Wyvill expressed concern to the Commissioner about his failure to deny that he had used the term "*urban myth*" to describe the connection between Unions NT and the Stella Maris site. On the latter occasion Mr Wyvill complained that it was a plain indication of pre-judgement and bias and said the Commissioner should disqualify himself. The first paragraph in the draft dissenting statement that provides the basis for Allegation 2 includes the assertion that there is no question that there is a strong connection between Stella Maris and the Union movement which goes back decades and it is not an "*urban myth*". This evidence is sufficient to justify the description of the connection between the Stella Maris site and the Union movement as one of the critical issues for the Inquiry.

69. The draft dissenting statement was for Ms Lawrie, as the Leader of the Opposition to use, if appropriate, when the Commissioner's Report was published. In assessing the sufficiency of evidence that justifies the statements in the draft, it must be borne in mind that the draft was not, and did not purport to be, a balanced legal assessment. It was a political response to the anticipated findings of an Inquiry established by Ms Lawrie's political opponents. It is in this context that we assess the remaining elements of the statement that are in issue.

70. We turn to the assertion that "the Inquiry was conducted unfairly from the beginning." As noted in the Report, V10/274, the Commissioner completed "Phase 1: Planning and administration" on 9th February 2014 and "Phase 2: Information gathering" ran from 10th February 2014 to 21st March 2014. Recognising, as explained by the Commissioner, that the Phases should not be viewed in isolation, it seems that the Information Gathering Phase started around 10th February. On 7th February 2014, summonses that appeared to have been issued by the Commissioner were emailed to the electoral offices of Ms Lawrie and Mr McCarthy seeking the production of the documents identified in schedules thereto. Halfpennys' letter to the Commissioner of 14th February 2014, said:

> "With respect, we find the schedules incomprehensible. The scope of the documents you seek is entirely unclear… that said, our clients wish to cooperate with the Inquiry."

This evidence suggests unfairness.

71. In the same letter, Halfpennys complained that the Commissioner had announced how he intended to conduct the Inquiry without inviting their comment on the procedure to be adopted. A similar complaint was made in the submission of Ms Lawrie and Mr McCarthy to the Commissioner on 10th March 2014. Of itself, the making of a complaint of unfairness is not evidence of unfairness. However, the basis of a complaint may provide that evidence. We do not accept that the Commissioner's determination of how he would conduct the Inquiry without first inviting the comments of Ms Lawrie and Mr McCarthy is evidence of unfairness.

72. Halfpennys' letter of 14 February complains that the Commissioner had started hearing evidence and completed several witnesses without inviting their clients to attend the hearing and listen to evidence and if appropriate, ask questions of the witnesses. The submission of Ms Lawrie and Mr McCarthy to the Commissioner on 10th March 2014 complains that the Commissioner had heard evidence which he knew or ought to have known was evidence which they may have wanted to challenge, but without giving them any warning. This evidence is a basis for asserting unfairness.

73. The Commissioner decided to conduct the Inquiry without Counsel Assisting. This was a matter that concerned Mr Wyvill. The Commissioner in his Report at page 275 acknowledged that the use of Counsel Assisting "would normally be the case in an Inquiry such as this." His decision was a legitimate cause for concern as it required the Commissioner to take on the role of Counsel Assisting and question, indeed cross-examine, witnesses and thereby become a participant in the identification of and elucidation of relevant evidence and evidence that would be challenged or go untested. This reduced his capacity to step back and impartially assess the evidence. This is a basis for asserting unfairness.

74. In his Report, at page 275, the Commissioner said that he had decided against transcripts in favour of audio recordings as it saved an estimated sixty thousand dollars. The absence of transcripts would have been of particular concern to anyone who became a target of the Inquiry and who did not have the resources or time to attend the inquiry full time or listen to the audio recordings. Halfpennys' letter to the Commissioner of 26th February 2014 included:

> "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."

This is a basis for asserting unfairness.

75. In his letter of 17th February 2014 to Halfpennys, the Commissioner had said that after the preliminary evidence-gathering stage he would determine whether there may be grounds to make an adverse finding against any person, and should that eventuate he would provide the person with notice, all relevant materials and an opportunity to make submissions. However, he did not do so in the case of Ms Lawrie. He made adverse findings against her without doing what he said he would, in his letter of 17th February. Whilst this was a basis for asserting unfairness after the Report was published, it was not anticipated in Mr Wyvill's draft statement.

76. In the hearing on 19th February 2014 the Commissioner described the link between the Stella Maris site and Unions NT as "an urban myth". This was an apparent pre-judgement before hearing all the evidence. In the hearing on 10th March 2014, the Commissioner expressed himself in terms that indicated that he had pre-judged some other evidence before hearing all the evidence. These events provide a basis for asserting unfairness.

77. We turn to the statement that the unfairness reflected "we believe Lawler's lack of the qualifications, experience or skills, to run an Inquiry such as this". The evidence is that the Commissioner was not a retired or serving judge or senior barrister who would ordinarily be considered to have the qualifications and experience to run the Inquiry. That he had the qualifications and experience to be a Deputy Commissioner of the Australian Federal Police and a Member of the Australian Crimes Commission, does not establish that he had that which was appropriate to run the Inquiry. Mr Wyvill's evidence to the effect that the way the Commissioner conducted the Inquiry, the questions he asked and the things he did, demonstrated he did not have the capacities to run it, is relevant. As to the Commissioner's skills, the hearing on 10th March 2014 when he said that the statements in a document were clearly inaccurate, before hearing all the evidence, was cause for disquiet. Similarly, his response to complaints about his use of the term "urban myth" to describe the connection between Unions NT and the Stella Maris site was a cause for concern. He made adverse findings against Ms Lawrie in his Report without first providing her with notice in accordance with his letter of 17th February 2014. This would have provided a basis for the statement in contention had the dissenting report been published after the Report. More generally, the matters we have referred to referable to unfairness, provide a sufficient basis for a belief that the Inquiry was conducted unfairly from the beginning and this reflected the Commissioner's lack of the qualifications, experience or skills to run it.

78. For these reasons we are not satisfied that there was insufficient evidence to justify what was proposed to be said in paragraph 6 of Mr Wyvill's draft dissenting report. Allegation 2 is dismissed.

79. We turn to Allegation 4 which follows together with its particulars save for omissions because of parliamentary privilege.

Allegation 4:

On or about 25 August 2014, the Respondent engaged in professional misconduct, pursuant to section 465 of the LPA, or alternatively unsatisfactory professional conduct, contrary to section 464 of the LPA, by advising Ms Spurr to swear an affidavit dated 25 August 2014 V11/368 in the Supreme Court proceedings, containing assertions that he knew, or ought to have known were false or misleading.

Particulars to Allegation 4:

4.1. On the afternoon of 19 June 2014, Ms Spurr sought approval for a court filing fee for the filing of the Supreme Court Writ, by which the Supreme Court proceedings were initiated.

4.2. On 25 August 2014, Ms Spurr swore an affidavit ("Ms Spurr's 25 August 2014 affidavit") with a view to its use in the Supreme Court proceedings.

4.3. The Respondent advised in respect of and drafted Ms Spurr's 25 August 2014 affidavit.

4.4. The affidavit referred to the letters from the Commissioner dated 17 February 2014 and 26 March and the absence of any notice from the Commissioner, and went on to state (at paragraphs [7]-[8], with emphasis added):

> [7] **In these circumstances,** on or shortly prior to 14 April 2014, the Plaintiff [Lawrie] myself and counsel [the Respondent] concluded that the defendant was not considering making any adverse findings against the plaintiff.
>
> [8] **On that basis**:
>
> 8.1. on 14 April this firm and counsel advised the defendant that we were no longer representing the plaintiff in the Inquiry;
>
> 8.2. the plaintiff did not take an active role in the Inquiry after that, whether responding to inquiries from the defendant (Commissioner), by seeking to put in further evidence or by making further submissions, herself, or via this firm of counsel.

4.5. As at the time of drafting Ms Spurr's 25 August 2014 affidavit, the Respondent knew or ought to have known, that paragraphs [7] and [8] of Ms Spurr's 25 August 2014 affidavit were untrue or capable of misleading the Court, based on the following:

i. Between the 15 April 2014 letter from Ms Spurr to the Commissioner, in which she purported to notify the Commissioner of her and the Respondent ceasing to represent Ms Lawrie in the matter, and the issue of the Supreme Court proceeding, the Respondent provided or conducted substantial further advice and preparation on Ms Lawrie's matter, (contrary to the purported cessation of retainer as set out in that letter.)

ii. The Respondent's 23 April 2014 email to Mr Gleeson, in which he stated "If he was smart, Lawler would show us a draft to give is (sic) a chance to comment…"

iii. The Respondent's emails to and from Mr Gleeson on 19 May 2014 querying the wisdom of submissions to the Commissioner despite a concern that the Report contained adverse findings;

iv. The Respondent's dissenting report, a draft of which was attached to the email of 25 May 2019 and which included the statement (at [5]):

> "We are disappointed but not surprised that [the Commissioner] reached the conclusions he did, which we believe are misguided, wrong and unfair to the hard working cabinet members, union officials and others…"

v. …..

vi. The email from Ms Lawrie of 26 May 2014 in which she said "…we expect an ugly report because Lawler has shown his colours throughout the Inquiry.

vii. The email form the Respondent to Mr Gleeson of 10 June 2014 in which he said "*…hard to draft a response to something the precise detail of which we don't know…*" and cautioned that to do so would "*…add force to the criticism in the report by not responding to those we don't anticipate*" or would "*give them a chance to amend/explain the report to kill off our complaints"* and the response from Mr Gleeson that Ms Lawrie had accepted this advice.

viii. Ms Lawrie's email of 18 June 2014 t the Respondent, Ms Spurr and Mr McCarthy stating:

> *The advice I received today from Michael Gleeson is that there is nothing in the law that prevents a NT Govt referral to the Privileges Committee. (We suspect they will rely on a Recommendation from Commissioner Lawler under the LA Code of Conduct Act 2008)*

ix. …

x. The Respondent's emails of 23 May [V2/252] and 26 May [V2/272] … to recipients including Ms Lawrie attaching draft versions of the dissenting report or other proposed responses to anticipated adverse findings against Ms Lawrie by the Commissioner.

80. Sub particular (x) above has been revised to accord with the Applicant's identification of the emails it refers to and because of parliamentary privilege.

81. In her Affidavit dated 25 August 2014, V11/368, Ms Spurr sets out the part of the Commissioner's letter of 17 February 2014 that contains the statement that it will not be until at the end of the preliminary evidence gathering stage that I will:

> " 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."

Then follows paragraphs 4 to 8 below:

> 4. As part it appears of "the information gathering phase" on 13 and 14 March 2014, the plaintiff attended the Inquiry with counsel instructed by my firm and provided sworn testimony to the defendant.
>
> 5. On 27 March 2014, Halfpennys received a letter dated 26 March from the defendant advising that he wished to recall one of my firm's other clients, Mr McCarthy, to give further testimony, but that he did not wish to recall the plaintiff.
>
> 6. At no stage did the plaintiff (whether via this firm or otherwise) receive any notice from the defendant that, following her testimony, he considered that there may be grounds to make any adverse findings against the plaintiff as foreshadowed in the letter quoted in paragraph 3 above.
>
> 7 In these circumstances, on or shortly prior to 14 April 2014, the plaintiff, myself and counsel concluded that the defendant was not considering making any adverse findings against the plaintiff.
>
> 8 On that basis:

8.1. on 14 April this firm and counsel advised the defendant that we were no longer representing the plaintiff in the Inquiry;

8.2. the plaintiff did not take an active role in the Inquiry after that, whether responding to inquiries from the defendant, by seeking to put in further evidence or by making further submissions, herself, or via this firm of counsel.

Prospect of adverse findings.

82. Allegation 4 is based on paragraphs 7 and 8 above. The truth or otherwise of paragraph 7 is not only central to Allegation 4 it is also at the heart of Allegations 5, 6 and 7. So, did those concerned believe that by reason of the Commissioner's letters dated 17 February and 26 March the Commissioner would do that which he said he would in his letter of 17 February and in consequence did they conclude that the Commissioner was not considering making adverse findings against Ms Lawrie?

83. In his lengthy affidavit of 30 June 2020 Mr Wyvill said [par 127, iv and v] that he had thought that the Commissioner might make an adverse finding against Mr McCarthy in relation to the discrepancy referred to in the Commissioner's letter of 26 March 2014 and considered it likely that the Commissioner would make findings critical of the former Territory Labor Government. He did not expect the Commissioner to make adverse findings against Ms Lawrie without giving her notice of his intention to do so and an opportunity to respond.

84. When cross-examined as to his expectations with regard to adverse findings against Ms Lawrie, Mr Wyvill said, T206, there was always the likelihood but not the inevitability that the Commissioner's Report would be damaging to the Labor Party and Ms Lawrie in a general way, but without making specific adverse findings. As to findings against Ms Lawrie in a general way, he said, T207, that he thought

> *"she was Deputy Chief Minister. She was certainly Treasurer of the former Labor Government. A criticism of Cabinet was going to reflect on her."*

At another point, T233, he said he expected the Report to contain findings which would be damaging to the prospects of the Labor Party and by 23rd April he had formed the view that there was the potential for the Commissioner to inadvertently make adverse findings against Ms Lawrie, T236. Moreover, after 26 May when the Commissioner's Report had been handed to the Administrator, the risk of adverse findings against Ms Lawrie personally started to appear and became the gossip, which became more intense the closer the date for the release of the Report in Parliament approached.

85. When asked whether it was his evidence that after 15th April 2014 his work for Ms Lawrie was not undertaken in any respect in the belief that the Commissioner would make adverse findings against Ms Lawrie personally without notice at least until shortly before the Report was published, he replied:

> *"Just to make sure I understand your question correctly. If you're asking me about whether I didn't expect adverse findings of the kind covered by Ainsworth against Ms Lawrie personally up to the point the report was given to the [Administrator ,26 May 2014,] the answer is I didn't expect it. After that and prior to the publication of the report it became a risk of apparent*

increasing likelihood even to the point where I actually drafted a set of Supreme Court proceedings on the basis that that might happen."

86. In the course of his cross-examination, when referring to adverse findings, Mr Wyvill emphasised the distinction between damaging matters which fell outside of the Ainsworth principle and adverse findings that fell within it T239**.** He said at T240:

> *"The ambiguity about the use of the word 'adverse' has been the cause in many respects of this entire problem. People have not paid sufficient attention to the difference between adverse in terms of Ainsworth and adverse in the more general sense."*

87. At an earlier point, T239, he said he had addressed some of the findings against Ms Lawrie in the Report:

> *" To make the point about, what I understood, to be the difference between damaging matters which fell outside the Ainsworth principle and findings that fell, in my view, fairly and squarely within."*

88. He said of his comment in his email of 23rd April that if the Commissioner was smart he would show them a draft so as to give them a chance to comment before going public, T234:

> *"this is about him being smart, of him producing this general damaging narrative that I contemplated, but not appreciating that his narrative had crossed over to making adverse findings. Because that would be ... a way of protecting himself, ..., knowing that he hadn't given adverse findings but having produced a generally adverse report of making sure that he didn't accidentally breach his undertaking in relation to Ainsworth."*

89. In response to the proposition that there would be no need for the Commissioner to provide a copy of the Report prior to its publication if the findings were not adverse, Mr Wyvill said, T234:

> "*No, that is a complete over-simplification of the situation. There ... were infinite varieties …of ways that the Commissioner could have drafted this report in a way that was politically damaging to the Labor Party without making findings of the kind referred to by Ainsworth and that was what I was talking about there. A report of that kind where the Commissioner unintentionally included in his narrative something which did traverse or move into the Ainsworth area."*

90. The distinction drawn between generally damaging findings and adverse findings against a specific person or organisation as encompassed by the Commissioner's statement of 17th February has long been recognised by the law, albeit in varying terms. See *Kioa v West* (1985) 159 CLR 550, Mason J at 584, Brennan at 619 and Dean, J at 632 as well as *Annetts v McCann* (1990) 170 CLR 596, Mason CJ, Dean and McHugh JJ

at 601, and Brennan J at 608. After all, the obligation to give prior notice of adverse findings and that which follows is only practical in relation individuals and some organisations, it is not practical in relation to generally damaging findings, in some instances, against various entities. The evidence does not suggest that this distinction was an after the event concoction by Mr Wyvill. The documents on occasions contain reference to the possibility of findings that could be said to fall within one or other category. For example, the long draft dissenting report attached to Mr Wyvill's email of 25th May anticipates a generally damaging finding in paragraph 5 and makes no complaint about a lack of notice. It says:

> "We are disappointed but not surprised that the Commissioner reached the conclusions he did, which we believe are misguided, wrong and unfair to the hard-working Cabinet members, Union officials and others involved in getting this proposal through Cabinet to the stage of an acceptable letter of an offer."

In contrast, the draft one-page dissenting report attached to Mr Wyvill's email of 12th June, in the fourth dot point of paragraph 6, complains about no notice of possible adverse findings to Ms Lawrie and Mr McCarthy although it appears from recent statements by the Chief Minister that the Commissioner has made serious adverse findings against Mr McCarthy.

91. We are satisfied that by reason of the Commissioner's letters dated 17 February and 26 March, in the absence of any notice to Ms Lawrie about an adverse finding, those concerned believed that the Commissioner was not considering making adverse findings against Ms Lawrie.

Truth of advice that no longer representing clients in the matter.

92. By particular 4.5 the Applicant contends that Respondent knew or ought to have known that paragraphs 7 and 8 of Ms Spurr's affidavit were untrue or capable of misleading the Court based on the sub-particulars there listed. Sub-particular (i) in effect says the paragraphs were untrue as the Respondent provided or conducted substantial further advice and preparation on Ms Lawrie's matter, contrary to the purported cessation of the retainer as set out in the letter of 15th April.

93. We start with whether Mr Wyvill and Ms Spurr in fact terminated the arrangement they had made to represent Ms Lawrie in the Inquiry. The Applicant submits: "There is no document or piece of correspondence – email, file note or otherwise – recording the communication of the purported cessation of retainer to Ms Lawrie and Mr McCarthy or the reasons for it." We do not accept this. On 14 April they were both emailed a draft of the email sent to the Commissioner on 15 April and asked if they were happy with it being sent. Each emailed a reply that they were ok with the draft. The draft included the sentence:

> "Our Clients have exhausted their ability to access pro bono legal assistance. Accordingly, we will no longer be representing Ms Lawrie and Mr McCarthy in this matter. "

We construe this exchange as a record of the communication to each of them of the cessation of the retainer and the reasons for it. Moreover, Mr McCarthy's reply suggests that he so construed the exchange. Having said that he was ok with the draft being sent he concluded:

> "Thank you both for your advice and incredible professional service, much appreciated!"

94. When asked in cross-examination whether his lawyer/client relationship with Ms Lawrie had come to an end by 15 April 2014 Mr Wyvill responded, T209:

> *I believe it had both with Ms Lawrie and Mr McCarthy. We in fact as a result of that and I think it's referred to in the material, there were gifts exchanged gifts given by Mr McCarthy to myself and Ms Spurr to say thank you and Ms Lawrie did the same thing, took my wife and I to a charity ball to say thank you. So that was as I saw it, was the end of the professional relationship. I had given a commitment to Mike Gleeson to do the dissenting report whether or not that was providing legal services, I don't know. The next time I know I commenced a relationship of barrister and client with her in a formal sense was when I commenced to act for her ... in the prerogative writ proceedings.*

95. As to Ms Spurr there is no evidence that contradicts the statement that on 14th April 2014 she ceased representing Ms Lawrie in the Inquiry. The same can be said of Mr Wyvill in terms of him representing Ms Lawrie in the Inquiry.

96. In his lengthy affidavit of 30th June 2020 [par 89], Mr Wyvill said that after the 15th April letter he went back to the rest of his practice and organised the Dili Conference. Occasionally he would be asked by Mr Gleeson a question pertaining to the Inquiry or about other unrelated matters, but otherwise he moved on to other things. The Commissioner had publicly announced that he intended to submit his Report to the Administrator on 26th May 2014. As that date became closer and between that date and the publication of the Report on 19th June 2014, he gave advice and assistance to Ms Lawrie's office, most often through Mr Gleeson, in connection with the impending Report, including assisting in the drafting of a dissenting report.

97. When cross-examined, T206, Mr Wyvill agreed that after 15th April he had assisted Ms Lawrie's office in drafting the dissenting report and provided other advice from time to time. After confirming this later in his evidence, T208, he added:

> *" And just to be clear about this I wasn't in any way back permanently in her team at that stage on this matter. I was responding to occasional enquiries from Mike Gleeson. It was informal, causal responses to Mike Gleeson. I didn't consider myself under an ongoing responsibility so that sense of giving advice I don't want to be suggesting that I'm accepting that I had some sort of continuing retainer over this period. I didn't. I was responding to individual enquiries from time to time. I had made a commitment to provide the dissenting report and that's what Mike Gleeson asked me to do at some stage. But otherwise I was just responding to enquiries as he made them. That's not to the point of – and I should also indicate this. The presentation of the report to the administrator wasn't a date that was of particular significance to us say that it meant that at some point after that time it was going to be published and clearly not before then. The critical date for us was when it was going to be published.*
>
> *...You used the phrase or the term that you weren't back permanently in her team. What were you meaning to convey by using those words a short while ago?---Well I had, until 15 April been permanently in her team, in the sense that I was her legal representation or I was counsel on the instructions of Halfpennys representing her and Mr McCarthy in the inquiry. That stopped on 15 April.*

98. When Mr Wyvill was referred to his response to Mr Gleeson's email on 23rd April, the following exchange occurred, T211:

> *And you are responding to that in your capacity as a lawyer providing advice to Ms Lawrie, correct?---The question … you asked me before were about retainers. I had terminated the retainer in relation to the inquiry in a manner set out in the letter of 15 April. This is an unsolicited email as the last two sentences make clear from Mr Gleeson, who was a friend of mine, and for whom I was … , providing occasional advice of various different kinds in a very informal way, it was my informal response a short time after. I didn't copy Ms Spurr into it. It didn't occur for me for a moment that I was establishing a new retainer. Yes, it is legal advice and, yes, I am happy to accept that this advice is subject to professional rules as all advice would be. But I didn't consider this to be part of any kind of formal retainer.*

> *Mr Wyvill, do you accept the proposition that on 23 April 2014 that you were providing legal advice as the lawyer for Ms Lawrie? Correct?---All I'm accepting is that I responded to that email in the way I did. Now, yes, it came to me because I had been the lawyer. It would be silly if he went to anybody else. I had been a lawyer who had been formally retained. But, and clearly he was coming to me because he wanted legal advice and that was, I'd accept, legal advice. But it was given in an informal context and that's it. I see that as quite different from the kind of representation I was doing for Ms Lawrie in the course of the inquiry where I had solicitors involved, et cetera. I'm not seeking to gain any benefit from that. I'm just seeking to say that I think it's different.*

99. We accept this evidence. The last paragraph in Mr Gleeson's email of 23rd April:

> "Once again, apologies for asking for your valuable time. Your assistance on these matters has been greatly appreciated."

is not consistent with a formal retainer similar to that which had existed prior to 15th April. More materially, we do not accept that the services Mr Wyvill provided to Ms Lawrie or in her interests after 15th April go any way towards establishing that it had been untrue to tell the Commissioner that Ms Spurr and Mr Wyvill were no longer representing Ms Lawrie in the matter.

100. In sub-particulars (ii) to (iv), (vi) and (vii), the Applicant details statements that it contends show that the Respondent and Ms Lawrie anticipated adverse findings against Ms Lawrie. For the reason we have given in paragraphs 82 to 91, we are satisfied they did not. More specifically, sub-particular (iv) does not assist the Applicant. It anticipates a generally damaging finding against the hard-working Cabinet members, Union officials and others, not an adverse finding against Ms Lawrie. In the other sub-particulars, the statements relied on are equivocal. They could relate to a generally damaging finding, an adverse finding against a particular entity or both.

101. Sub-particular (viii) relates to a rumour of an adverse finding against Ms Lawrie on or shortly before 18th June, the day before the Report was released. This rumour has no bearing on what was believed on or shortly after 14th April.

102. As to sub-particular (x), no draft version of a dissenting report or other proposed response anticipated an adverse finding against Ms Lawrie by the Commissioner in the absence of prior notice. We are unpersuaded by the matters detailed in particular 4.5.

103. The Applicant's written submissions contend that that Mr Wyvill was cynical about the Inquiry from the outset. We agree, indeed we consider this to be an understatement. However, we do not accept the Applicant's submission that this cynicism, in conjunction with other evidence, is strong evidence contrary to Mr Wyvill's assertion that he did not expect adverse findings to be made against Ms Lawrie. The Commissioner, in his letter of 17th February, had gone to the trouble of detailing in writing what he would do if there were grounds for making an adverse finding against any person. What he wrote was consistent with the law with regard to procedural fairness. Whilst Mr Wyvill's loss of respect for the Commissioner was a significant step, for him to progress from that lack of respect to a belief that the Commissioner would not do what he had stated in writing he would do, is a huge step. It would have required Mr Wyvill to totally disregard the fact that in his letter of 26 March the Commissioner, in dealing with the discrepancy he addressed referable to Mr McCarthy, had very substantially complied with his statement of 17 February. It also flies in the face of Mr Wyvill's comment in his email of 31 March "no news from the Inquiry is good news?". The Applicant submits that what follows in that email as to "putting quotes on the record" and not giving the Commissioner the opportunity to "fix up the messes we say he has created." is critical evidence in support of the inference that Mr Wyvill was expecting adverse findings against Ms Lawrie. We do not agree. These comments are just as applicable to a generally damaging report and the inference advanced by the Applicant is not open in the face of the "no news from the Inquiry is good news?" comment. Logically that comment relates to adverse findings against Ms Lawrie as 'no news' did not indicate anything with regard to generalised damaging findings. The Commissioner's 17th February commitment to give notice does not extend to generalised damaging findings. It is confined to adverse finding against a person or organisation. The asserted inference is also contrary to the fact that Mr Wyvill failed to anticipate adverse findings against Ms Lawrie in his long draft dissenting report of 25th May and his one-pager of 12th June, although he did go so far in the latter as to say that it appeared from recent statements by the Chief Minister that the Commissioner had made serious findings against Mr McCarthy. We are satisfied that the Respondent and Ms Spurr believed that the Commissioner would do what he had said he would do in his letter of 17 February in the event that he was considering making adverse findings.

Was the Commissioner's advice the basis for Mr Wyvill and Ms Spurr ceasing to represent Ms Lawrie and her taking no further active role in the Inquiry?

104. As with paragraph 7 of Ms Spurr's affidavit, the truth of paragraphs 8.1 and 8.2 is not only a key aspect of Allegation 4, it also bears on Allegations 5, 6 and 7. So, accepting, as we have, that the Respondent and Ms Spurr believed that the Commissioner was not considering making adverse findings against Ms Lawrie, is it true that on this basis on 14th April Halfpennys and Mr Wyvill advised the Commissioner that they were no longer representing Ms Lawrie in the Inquiry and thereafter she did not take an active role in the Inquiry, whether by

responding to inquiries from the Commissioner, by seeking to put in further evidence or by making further submissions, herself, or via the firm or counsel.

105. Plainly it is true that that they so advised the Commissioner and it is true that after 14 April Ms Lawrie did not take an active role in the Inquiry in any way. However, the issue is whether the belief that the Commissioner was not considering making adverse findings against Ms Lawrie was a basis for this.

106. In his lengthy affidavit of 30 June 2020 Mr Wyvill says:

> *123. What I was seeking to convey by paragraphs 6 to 8 of the draft affidavit that I prepared and that Ms Spurr ultimately swore was that:*
>
> *(a) I (and, as I understood it, Ms Lawrie and Ms Spurr) had concluded on or shortly after prior to 14 April 2014 that the Commissioner did not propose to make any findings adverse to Ms Lawrie without first giving her a notice of the kind contemplated by the Ainsworth Letter; and*
>
> *(b) that that was a basis on which the 14 April 2014 letter was sent and on which Ms Lawrie did not take an active role in the Inquiry.*
>
> *124. Those matters were true. I was seeking truthfully to convey that I (and, as I understood it, Ms Spurr and Ms Lawrie) relied on the Commissioner's statement that he did not propose to make any findings adverse to Ms Lawrie without first giving her a notice of the kind contemplated by the Ainsworth Letter in sending the 14 April 2014 letter and in not taking an active role in the Inquiry.*

107. We recognise that the conclusion that the Commissioner was not considering making adverse findings against Ms Lawrie, is not the only basis for what occurred. Other reasons were the fact that Mr Wyvill and Ms Spurr were providing their services pro bono, Mr Wyvill had significant competing demands for his services and he did not believe that anything they said would change the Commissioner's mind. Nonetheless, we accept that a basis for what is said in the letter of 15th April was the belief that the Commissioner would do as he said he would in his statement of 17th February. If the situation had been the reverse and the Commissioner had given notice to Ms Lawrie of potential adverse findings, we are in no doubt that Mr Wyvill and Ms Spurr would not have ceased to represent her before the Inquiry and she would have participated in the Inquiry as necessary to deal with that notice.

108. For these reasons we are not satisfied that the assertions contained in paragraph 7 and 8 of Ms Spurr's affidavit are untrue, false or misleading. Allegation 4 is dismissed.

109. Allegation 5 and its particulars follow.

Allegation 5

On or about 24 September 2014, the Respondent engaged in professional misconduct, pursuant to section 465 of the LPA, or alternatively unsatisfactory professional conduct, contrary to section 464 of the LPA, by advising Ms Spurr to file the Plaintiff's Statement of Facts, Issues and Contentions in the Supreme

Court proceedings, when that document contained allegations that he knew, or ought to have known, were false or misleading, namely that: Ms Lawrie and her legal representatives had relied on certain statements in the letter from the Commissioner dated 17 February 2014 in determining how Ms Lawrie ought to participate in and contribute to the Inquiry, that Ms Lawrie and her legal representatives believed that, by reason of the Commissioner's conduct, including his letters dated 17 February 2014 and 26 March 2014 , the Commissioner was not considering making any findings in his report which were adverse to Ms Lawrie and that, by reason of that belief, from on or about 26 March 2014, Ms Lawrie did not seek to make any further contribution to the Inquiry, whether by responding to inquiries from the Commissioner, by seeking to put in further evidence, by making further submissions herself or via her solicitors or counsel, or otherwise, and that on 14 April 2014, Ms Spurr ceased representing Ms Lawrie in the Inquiry.

Particulars to Allegation 5

5.1. On or around 24 September 2014, the Respondent drafted and advised Ms Spurr to file the Plaintiff's Statement of Facts, Issues and Contentions in the Supreme Court Proceedings.

5.2. On 25 September 2014, Ms Spurr filed the Plaintiffs Statement of Facts, Issues and Contentions in the Supreme Court Proceedings.

5.3. Paragraph [7] of that document reads as follows:

The plaintiff [Lawrie] and her legal representatives relied upon the defendant's [the Commissioner's] statement in this letter [17 February 2014] in determining how the plaintiff ought to participate in and contribute to the enquiry.

5.4. Paragraph [11] of that document reads as follows:

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, or by making further submissions herself or via her solicitors or counsel, or otherwise.

5.5. Paragraph [12] of that document reads as follows:

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 in his report which were adverse to the plaintiff. In the circumstances, this belief is reasonable.

5.6. As at the time of drafting and advising Ms Spurr to file the Plaintiffs Statement of Facts, Issues and Contentions, the Respondent knew, or ought to have known, that paragraphs [7], [11] and [12] of that Statement were untrue or capable of misleading the Court, based on the matters outlined [in particular 4.5 of Allegation 4] .

110. Prior to the paragraphs in contention, paragraph 6 of Plaintiff's Statement of Facts Issues and Contentions, V11/373 set out the relevant portions of the Commissioner's letter of 17 February 2014 detailing what he would do if there were any grounds for making an adverse finding against any person. Paragraph 5 set out the relevant portions the letter from Halfpennys dated 14 February that had elicited the Commissioner's response Then followed paragraphs 7 – 13 as below:

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 (sic) 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 28 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 2014, 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 in his report which were adverse to the plaintiff. In the circumstances, this belief was reasonable.

13. The defendant presented his report to the Administrator on 26 May 2014. The Government released the report to the public on 19 June 2014. The plaintiff saw a copy of the report for the first time on 19 June 2014.

111. In his lengthy affidavit, paragraph 126 and when cross-examined, T285, Mr Wyvill confirmed his belief in the truth of the paragraphs in contention. As to the findings he was referring to in paragraph 12 of the Statement of Facts Mr Wyvill again distinguished particular adverse findings from other findings.

He said that in in paragraph 12 he was referring to adverse findings which attract the principle in Ainsworth, such that you cannot make them unless you give notice of them. The cross-examination continued:

"Yes, and that includes, findings that are adverse, do you accept, to Ms Lawrie, in relation to how she may or may not have dealt with issues concerning the Stella Maris lease, correct?---That's way too broad. ...the adverse findings, as I understand, that attract the principle in Ainsworth, are findings of the breach of an applicable standard of conduct. So some finding of impropriety. Breach of the law. Not simply a finding that she may have, in the opinion of the Commissioner, not paid sufficient attention to the interests of other people who are concerned with the site. That's not an adverse finding, that's just an expression of opinion about how the project – how the ultimate decision was made.

[S]o, again, in respect of what you understood, by the Ainsworth letter, that you say, you relied upon from the Commissioner as the lawyer acting for Ms Lawrie, you say that what was required to be given was notice by the Commissioner, if he was intending to make adverse findings of the kind that you've just told his Honour and the members of the Tribunal about?---That's right. Personally. That was a critical thing here. Because the target of the whole enquiry was a decision of Cabinet. Which was a decision of a collective. Nobody was suggesting that Cabinet didn't have power to make that decision. So the criticism was always going to be whether or not it was in the public interest. But to actually then go further and make a specific criticism of the individual Cabinet Ministers, you needed to articulate a basis in law for criticising that individual for that collectives' decision. And that – that had to be articulated."

112. Allegation 5 contends that Mr Wyvill knew, or ought to have known, that paragraphs [7], [11] and [12] of the Statement of Facts were untrue or capable of misleading the Court, based on the matters outlined in paragraph 4.5 of Allegation 4

113. We addressed each of those matters in the reasons we gave in relation to Allegation 4. Consistent those reasons we are satisfied that:

- Ms Lawrie and her legal representatives relied on the Commissioner's statements in his letter of 17 February in determining how the plaintiff ought to participate in and contribute to the Inquiry [paragraph 7];
- From on or about 28 March 2014, Ms Lawrie did not seek to make any further contribution to the Inquiry, whether by responding to inquiries from the Commissioner, by seeking to put in further evidence, by making further submissions herself or via her solicitors or counsel, or otherwise [and that] on 14 April 2014, Ms Lawrie's solicitors ceased representing her in the Inquiry[paragraph 11]; and
- Ms Lawrie and her legal representatives acted as set out in paragraph 11 as, by reason of the Commissioner's conduct, most particularly his letter of 17 February and his advice of 26 March that he did not wish to recall Ms Lawrie to give further evidence, they believed he was not considering making any findings in his report which were adverse to Ms Lawrie [paragraph 12].

114. We are accordingly not satisfied that Mr Wyvill knew, or ought to have known, that paragraphs [7], [11] and [12] of the Statement were untrue or capable of misleading the Court. Allegation 5 is dismissed.

115. Allegations 6 and 7

These Allegations are dealt with together in the Application. We will do the same. They and their particulars are as follows.

> Allegation 6: On or about 12 November 2014, the Respondent engaged in professional misconduct pursuant to section 465 of the LPA, or alternatively unsatisfactory professional conduct, contrary to section 464 of the LPA, by swearing an affidavit in the Supreme Court proceedings containing assertions that he knew, or ought to have known, were false or misleading, namely, that on the basis of the Commissioner's letter of 17 February 2014, the Respondent did not at any stage press for information concerning any particular adverse finding which the Commissioner was contemplating making against Ms Lawrie and the basis on which such a finding was being contemplated, and that he would have done so but for the Commissioner's letter of 17 February 2014, in circumstances where he believed by no later than 14 April 2014 that it was likely that the Commissioner would be critical of Ms Lawrie's involvement in Cabinet's decision to grant a lease over the Stella Maris site to Unions NT and deliberately refrained from or advised Ms Lawrie to refrain from seeking information from the Commissioner concerning any adverse finding or findings.
>
> Allegation 7: On or about 12 November 2014, the Respondent engaged in professional misconduct, pursuant to section 465 of the LPA, or alternatively unsatisfactory professional conduct, contrary to section 464 of the LPA, by swearing an affidavit in the Supreme Court proceedings, containing an assertion that he knew or ought to have known was false or misleading, namely that when he read the Commissioner's report shortly after it was made public, he was surprised to note that it contained findings adverse to Ms Lawrie concerning her involvement in Cabinet's decision to grant a lease over the Stella Maris site to Unions NT, in circumstances where he believed by no later than 14 April 2014 that it was likely that the Commissioner would be critical of Ms Lawrie's involvement in Cabinet's decision to grant a lease over the Stella Maris site to Unions NT.

Particulars to Allegations 6 and 7

6.1 On 12 November 2014 the Respondent swore an affidavit.

6.2 Paragraph [8] of that affidavit read as follows:

> *On the basis of the statement {by the Commissioner in his letter of 17 February 2014], I did not at any stage press the Commissioner further for information concerning any particular adverse finding which he* was *contemplating making against the plaintiff and the basis on which that finding* was *being contemplated. I would have done* so *if he had not given this reassurance.*

6.3 The text of the 17 February 2014 and 26 March 2014 letters from the Commissioner is set out above and included the statement:

> *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.*

6.4 Paragraph [17) of the affidavit read as follows:

> *When I read the [Commissioner 's] Report shortly after it was made public, I was*

surprised to note that it contained the following findings amongst others which I considered to be adverse to the plaintiff [Lawrie}, . .

6.5 As at the time of drafting the 12 November 2014 affidavit, the Respondent knew, or ought to have known, that paragraphs [8] and [17) of his affidavit were untrue or capable of misleading the Court, based on the following:

i. That in his 20 February 2014 email to Ms Lawrie, Mr McCarthy, Ms Spurr and Ms Taylor, the Respondent observed that *"given the statements in parliament and conduct of Commissioner to date Inquiry seems to be targeted at least in part at Delia Lawrie and Gerry McCarthy";*

ii. That neither at the pre-evidence meeting on 10 March 2014 nor during the hearings of the evidence of Ms Lawrie and Mr McCarthy at the Stella Maris Inquiry (on 13 March, 14 March and 1 April 2014), did the Respondent remind the Commissioner of the obligation to, or raised the consequences of any failure to, accord procedural fairness to his client;

iii. That by the 26 March 2014 letter from the Commissioner, the Respondent was aware that Mr McCarthy was to be recalled concerning an inconsistency between his evidence as to his whereabouts on 10 July 2012 and certain documentary evidence;

iv. That in his 31 March 2014 email at 3:35PM to Mr McCarthy, Ms Lawrie, Mr Michael Gleeson, Ms Mandy Taylor and Ms Spurr [set out in full in paragraph 31 above], the Respondent said *"it is important to put a few quotes on the record which you can later use to discredit his report without risking contempt/defamation"* and queried (with emphasis added *is it 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 to perform to 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??* ***And then*** **to** ***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.***

v. That in his 8 April 2014 email at 8:16 AM to Ms Spurr in relation to the Maher advice and Valuers report [set out in full in paragraph 37 above], the Respondent asked *"Do you think.it might be better to simply hold our fire and put our efforts into preparing our own account to be released at the same as his?"* Ms Spurr replied at 8:41AM [set out in paragraph 38 above] saying *"I am* *thinking we still need to respond to him so he can't say we had an opportunity but ignored it..."*

vi. That during a teleconference on 11 April 2014 the Respondent advised Ms Spurr to notify the Inquiry that the inability to respond to the outstanding material (Maher advice and Valuers report) was on the basis of their clients having exhausted the ability to draw on pro bono legal support;

vii. That in her 15 April 2014 email to the Commissioner, Ms Spurr stated that Ms Lawrie and Mr McCarthy had "exhausted their ability to access pro bona legal assistance", that Ms Spurr and the Respondent would no longer be representing Ms Lawrie and Mr McCarthy in this matter and that in those circumstances, Ms Spurr and the Respondent did not propose to respond to the advice of Mr Maher or to the subsequent valuation report of Mr Harris. Contrary to the representation by Ms Spurr, however, that the Respondent had ceased to represent Ms Lawrie and Mr McCarthy, from 15 April 2014 onwards the Respondent advised on the content of public statements to be made by Ms Lawrie in relation to the Inquiry and the Commissioner's Report, was involved in the preparation of the dissenting report, drafted and settled affidavits and other documents intended for use in the Supreme Court proceeding and communicated regularly with Ms Spurr, Ms Lawrie and Mr Gleeson, respectively, about the matter;

viii. That in his email of 23 April 2014 at 9:16AM the Respondent said "If he was smart, Lawler would show us a draft to give is [sic] a chance to comment before going public...";

ix. That notwithstanding being made aware (by the email of 19 May 2014 from Mr Gleeson) of rumours that Mr McCarthy was considered to have mislead the Stella Maris Inquiry, the Respondent did not seek information concerning any particular adverse finding which the Commissioner was contemplating making against Ms Lawrie;

x. That in no communication prior to the 26 May 2014 email from the Respondent to Ms Lawrie, Mr Gleeson and Ms Spurr in relation to the 17 February 2014 letter from the Commissioner, which is set out in full above at [paragraph 48], ("check out the highlighted passage on page 2") did the Respondent mention reliance upon the 17 February 2014 letter from the Commissioner in the manner suggested by paragraph [8] of his affidavit;

xi. That the text of the 26 May 2014 email from the Respondent to Ms Lawrie, Mr Gleeson and Ms Spurr in relation to the 17 February 2014 letter from the Commissioner demonstrated an intention by the Respondent to represent, untruthfully, that his client had relied upon the 17 February 2014 statement by the Commissioner that he would provide her with notice and an opportunity to respond before making an adverse finding or findings against her.

6.6 The Respondent knew that his claim (at paragraph [8] of his affidavit) that the statement in the 17 February 2014 letter from the Commissioner formed the basis for his not pressing for information about any adverse findings against Ms Lawrie was not true and he knew this at the time that he prepared and swore the affidavit in November 2014.

6.7 The Respondent therefore knew, or ought to have known, as at the time of preparing and swearing the affidavit on 12 November 2014 that his claims (at paragraphs [8] and [17] of his affidavit dated 12 November 2014) were not true.

116. In his affidavit of 12 November 2014, which is the basis of these allegations, Mr Wyvill set out that part of the Commissioner's letter of 17 February that contains his commitment in respect of adverse findings against a person or organisation. What follows includes the below paragraphs, 6, and 8 to 11.

> 6. I was reassured by his statement in this letter that the Commissioner intended to follow what I understood to be the usual process for inquiries, 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.
>
> 7. …….
>
> 8. On the basis of the statement in his letter of 17 February 2014, I did not at any stage press the Commissioner further for information concerning any particular adverse finding which he was contemplating making against the plaintiff and the basis on which that finding was being contemplated. I would have done so if he had not given this reassurance.
>
> 9. On 13 and 14 March 2014, the plaintiff attended the inquiry where she 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 17 February 2014 letter. I listened carefully to the questioning from the Commissioner and the answers from the plaintiff. I considered that the plaintiff 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 the plaintiff 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 the plaintiff's evidence should be accepted and that there was no basis for concluding that the plaintiff had any case to answer such as to necessitate giving notice of a possible adverse finding. Further, they 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 in what particular respects the commissioner believed that the plaintiff's conduct could be open to adverse comment by him and why, and with reference to what material, he considered that may be the case. If, following my comments to what material, he considered that may be the case. If, following my comments on 13 and 141 March 2014, the Commissioner nevertheless believed that the plaintiff's conduyct 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 the plaintiff's case in response as fully and as persuasively as possible. I had this expectation because of his statement in his letter of 17 February 2014 referred to at paragraph 5 above and also because I considered that to be a requirement of the applicable rules of natural justice in any event.

10. On 27 March 2014, Halfpennys received a letter dated 26 March 2014 from the Commissioner … advising that he wished to recall Mr McCarthy to give further testimony, but that he did not wish to recall the plaintiff. This letter did not suggest to me that the Commissioner was contemplating making any adverse findings against the plaintiff – quite the contrary.

11. I saw two further letters from the Commissioner, the first dated 28 March 2014 … and the second dated 3 April 2014… I did not read either of these to suggest that the Commissioner was contemplating making any particular adverse finding or findings against the plaintiff.

117. In his lengthy affidavit Mr Wyvill confirmed that the statements in his affidavit of 12 November 2014, that are the basis for Allegations 6 and 7, are true. He referred to the Commissioner's letter of 17 February which included the statement that should the Commissioner determine that there may be grounds to make any adverse findings he would provide any such person or organisation with notice, all relevant materials, and an opportunity to make submissions in relation to the matter. In the following paragraphs he went on to basically reiterate and expand on what he had said in his affidavit of 12 November 2014.

43. I was reassured by the final sentence quoted above that the Commissioner intended to follow what I understood (and understand) 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 as per Ainsworth.

44. On the basis of the statement in the Ainsworth Letter, thereafter I appeared in the Inquiry believing that, if the Commissioner was contemplating making adverse findings against my clients or either of them personally, he would comply with his duty to afford procedural fairness to Ms Lawrie and Mr McCarthy as per Ainsworth. As the Commissioner appeared to understand his duties in that regard, I did not press the Commissioner on behalf of my clients 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 the Commissioner had not given the reassurance in the Commissioner's letter of 17 February 2014.

45. In this respect I refer to Halfpennys' letter of 1 March 2014 … I drafted this letter for Ms Spurr to send to the Commissioner after attending the meetings with the Commissioner referred to in the first paragraph of that letter. In the 11 March letter I note (in the second paragraph on the second page) that the Commissioner in his questioning appeared to infer that my clients' conduct might be criticised but without identifying in any respect what the *basis of that criticism might be. I completed that paragraph by saying that my clients' rights were fully reserved. The only relevant right my clients had to reserve in his respect was their right as per Ainsworth which because of the Ainsworth Letter I considered was uncontroversial. Had the position been otherwise, I would have pressed the Commissioner to articulate what these criticisms might be and how they might be justified.*

46. There were other ways in which I relied on this statement in advising Ms Lawrie. For example, in February 2014, I was considering whether I should proof Ms Lawrie and Mr McCarthy (that is, take a draft written statement of evidence) about their involvement in Stella Maris. Because of the Commissioner's letter of 17 February 2014, I understood that I would have an opportunity to proof them on any particular concerns which the Commission might have which could lead to an adverse finding against them. I decided therefore that I did not need to proof them generally about any personal involvement at that stage. Further, I did not attempt at any stage to provide full submissions in defence of Ms Lawrie's and Mr McCarthy's actions as individual members of Cabinet, including, for example, as to the significance of the collective responsibility of Cabinet members for their positions individually. It appeared to me that this collective responsibility necessarily implied an area of individual immunity on the part of Cabinet ministers in their role in relation to Cabinet decisions and that any suggested criticism of them personally needed to articulate how this basis for criticism falls outside this immunity. I was also concerned to emphasise to the Commissioner what I said in Halfpennys' letter of 11 March 2014 about the need to identify a proper basis — that is, an identified legal standard — for assessing Ms Lawrie's and Mr McCarthy's conduct as Ministers. Because of the Ainsworth Letter, I believed that I would have an opportunity to do or raise these matters when the Commissioner gave me the notice he said he would give me.

47. In this respect I refer specifically to my statement at the end of Ms Lawrie's testimony on 14 March 2014 where I said ..."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."

48. I expressly qualified the general submissions I was about to make in these terms to remind the Commissioner that he should not take the submissions I was about to make as being a complete statement of Ms Lawrie's position for the purposes of the Inquiry and that I did not wish to say anything further on her behalf I specifically had in mind my right to make submissions on receipt of a notice of possible adverse findings as per the Ainsworth Letter. I said this to make sure that it was clear that by making these short submissions I was not giving up this right.

49 I took the Commissioner's response "Indeed"...as an acceptance of this.

50 I then completed these submissions by saying...`There's nothing further that we would say ***at*** *this stage, Mr Commissioner.' (emphasis added)*

51 That was an express reference by me to the 'stages of the Inquiry' as advised to me by the Commissioner in the Ainsworth Letter.

118. Nothing emerged during Mr Wyvill's cross-examination in relation to Allegation 6 that causes us to doubt his evidence referable to this matter.

119. Paragraph 6.5 of the particulars to Allegations 6 and 7 details why the Applicant contends that Mr Wyvill knew, or ought to have known, that paragraphs 8 and 17 of his affidavit of 12 November 2014 were untrue or capable of misleading the Court.

120. Sub-particular (i) is correct insofar as Mr Wyvill in his email of 20 February said words to the effect of those set out in the sub-particular. He said:

> "Given the statements in Parliament and the conduct of the Commissioner to date, inquiry seems to be targeted at least in part at her and Gerry."

That this is what he said does not provide any basis or reason for asserting that Mr Wyvill believed the Commissioner would not act in accordance with his commitment in his letter of 17 February referable to adverse findings.

121. Sub-particular (ii). It is correct that when Mr Wyvill appeared before the Commissioner between 10 March and 1 April he did not he expressly remind the Commissioner of his obligation to accord procedural fairness to Ms Lawrie, or raise the consequences of any failure to do so. However, in the absence of the Commissioner saying or doing something to suggest that he had forgotten his commitment of 17 February or would not honour it, there was no reason to remind him of it. This was particularly so after the Commissioner's letter of 26 March in which the Commissioner, by substantially complying with that commitment, appeared to show that he had not forgotten about it and would comply with it.

122. Sub-particular (iii) makes the point that by his letter of 26th March, the Commissioner made Mr Wyvill aware that Mr McCarthy was to be recalled concerning an inconsistency between his evidence and certain documentary evidence. That this is so does not assist the Applicant. Moreover, it provided good reason to believe that the Commissioner would comply with his 17th February commitment.

123. Sub-particular (iv) refers to Mr Wyvill's email of 31 March. That email is set out in full in paragraph 34 above. When cross examined about the email, Mr Wyvill agreed that when he appeared before the Commissioner on 1st April 2014 he did what was proposed in the first dot point of the email, that is, he gave the Commissioner both barrels, and put a few quotes on the record that Ms Lawrie could use later to discredit his report, T216.

124. As to what was proposed in the second dot point in that email he said, T216:

> *This was ..., I accept a no guts, no glory strategy ... I was putting forward, it expressed my frustration at what I could see was a real risk of partiality in the report and what I was suggesting was a public statement to Mr Lawler along the lines set out here. And that because it would be a public statement of disengagement necessarily it followed, that we would disengage. We had to, having said it publicly.*
>
> …
>
> *[It] was a topic I put up for discussion, hence the double question marks and the words at the start, is it also time to say to him, it was a proposal I put up for consideration.*
>
> ...
>
> *[T]his advice was never acted upon and a different strategy or plan was pursued.*
>
> ...

125. In response to the proposition that his advice to, in effect, stage a walkout was not acted upon, he agreed and added, T217:

> *"Well, not only that, but nobody else responded approving of that paragraph… nobody came back saying it was going ahead and the idea just fell by the wayside."*

126. As to Ms Lawrie's response to his email saying,

> "I fully concur with your advice" and "Give it to them both barrels",

he said that was a response to the first dot point in the email.

127. A little later in his cross examination the following exchange occurred, T218:

> *And just in relation to the answer that you gave earlier that that advice of 31 March 2014 was not acted upon but a different strategy was acted upon, do you recall giving that evidence?...Yes.*
>
> *The different strategy that was embarked upon and the one that you had advised, was to write a letter to the Commissioner saying that you had exhausted as set out in the letter dated 15 April 2014, that was the different strategy wasn't it?......Well the – to be careful about answering your question ..., that strategy that we decided was reflected in that letter. As I've indicated there were errors in the drafting in the letter, but the strategy was implemented by that letter, yes.*
>
> *And what was that strategy sir?---That strategy was to save our resources, that was the point. The strategy was to – my decision to stop spending a lot of time in an inquiry where I had no confidence of the work I was going to do was going to advance my client's interests and the strategy was to stop doing that work, to take it on the chin that there was going to be a damaging narrative, political damage from the report probably, not for sure, but probably, and to put our resources into a dissenting report to deal with that damaging narrative. Relying on and noting at the same time and that's why this is the actual point or one of the critical points about that letter, is that we were taking instructions not to waive Delia and Jerry's entitlement to getting notice in terms of Ainsworth and that was expressly part of that letter and expressly part of what we had in mind in that strategy. We knew we had that protection.*

128. The above evidence, which we accept, explains that the emphasised portion of the email of 31st March upon which this sub-particular relies, was not acted upon. Moreover, for reasons already given, the statement in the email "Given what is happening elsewhere, no news from the inquiry is definitely good news?" is evidence of Mr Wyvill's reliance on the Commissioner's statement of 17 February. This portion of the email is not referred to in sub-particular (iv). We do not accept that the email assists the Applicant.

129. What is detailed in sub-particulars (v), (vi) and the first sentence of (vii) is correct but in the context of all the evidence it does not satisfy us that Mr Wyvill's averment in paragraph 8 of his Affidavit of 12th November 2014 is untrue. For the reasons we have given in paragraphs 82 to 91 above we are satisfied that he believed and relied on the commitment given by the Commissioner in his letter of 17 February and consistent with that reliance, reinforced by the Commissioner's letter of 26 March, there was no reason for Mr Wyvill to press the Commissioner for further information concerning any particular adverse findings that he was contemplating making against Ms Lawrie. We are also satisfied that had it not been for that commitment Mr Wyvill would have done so.

130. The gist of the assertion made in the second sentence of sub-particular (vii) has been dealt with in paragraphs 92 to 99 above.

131. Sub-particular (viii) details Mr Wyvill's comment in his email of 23 April that "If he was smart, Lawler would show us a draft to give is [sic] a chance to comment before going public..." As explained by Mr Wyvill, this comment relates the risk of what was thought to be a general damaging narrative becoming an adverse finding against Ms Lawrie. We dealt with this in paragraphs 88 to 91 above. This comment does not cause us to doubt that Mr Wyvill relied on the Commissioner's commitment of 17th February as stated in paragraph [8].

132. Sub-particular (ix) relates to a rumour on 19th May of adverse findings against Ms Lawrie. That nothing was done in relation to the rumour is consistent with Mr Wyvill's reliance on the Commissioner's commitment of the 17th February.

133. Sub-particular (x) contends that as no communication by the Respondent prior to 26th May mentioned reliance upon the Commissioner's 17th February statement, this suggests that the Respondent did not rely on that commitment as asserted in paragraph [8]. As explained in paragraphs 53 to 56 above, we are satisfied that procedural fairness was at the front of Mr Wyvill's mind from the outset. He wrote and said things that are consistent with this and which satisfy us that he had not forgotten about the Commissioner's commitment of 17th February at any stage.

134. Sub-particular (xi) contends that the text of Mr Wyvill's email of 26 May demonstrates an intention by him to represent untruthfully that his client had relied upon the Commissioner's 17 February statement that he would provide her with notice and an opportunity to respond before making an adverse finding or finding against her. That short email is set out in full in paragraph 51 above. We are unable to construe the text in any way that demonstrates an intention by Mr Wyvill to make an untruthful representation.

135. We are accordingly satisfied that none of the matters detailed in 6.5 provide a basis for doubting the truth of paragraphs 8 and 17 of Mr Wyvill's affidavit. However, as Allegation 7 specifically asserts that it was false and misleading for Mr Wyvill to say that when he read the Report shortly after it was made public, he was surprised to note it contained adverse findings against Ms Lawrie we will address this assertion.

136. Paragraph 17 of the Affidavit follows.

> 17. *When I read the Report shortly after it was made public, I was surprised to note that it contained the following findings amongst other which I considered to be adverse to [Ms Lawrie]:*
>
> *(page 12)*
>
> (a) Minister Lawrie acted with bias over many years, forming a view in 2009 that Unions NT should be exclusively granted a lease over the site without an expression of interest process.
>
> *(b) Notwithstanding that Minister Lawrie may have genuinely believed that granting the site exclusively to unions NT was in the public interest, the way she involved*

herself in the process was not proper and was unfair to the public and other community groups.

(page 37)

(c) …the fact remains that Minister Lawrie acted with bias in favouring Unions NT over other community groups.

(page 58)

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

(page 59)

(e) Notwithstanding her knowledge of the Northern Territory, Minister Lawrie could not have possibly known who else might have expressed an interest in the site and what partnership arrangements that might have been involved.

(page 60)

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

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

(h) and (i) [These are Finding 10 and Recommendation 6 which are set out in paragraph 139 below]

137. What follows is a small part of what Mr Wyvill said in his lengthy affidavit of the allegation that the statements made in paragraph 8 and 17 of his affidavit of 12 November were not true and that he knew or ought to have known that they were untrue:

109. I deny those allegations. The statements quoted… are true.

110. As I have explained above …after I received the Ainsworth Letter, I appeared in the Inquiry believing that — if the Commissioner proposed to make any adverse findings against any person or organisation — the Commissioner would (to quote the Ainsworth letter) "provide any such person with notice, all relevant materials, and opportunity to make submissions in relation to the matter".

111. Further, as I have explained above …while I expected the Report to contain findings adverse to the former Territory Labor government generally, I did not expect the Commissioner to make specific findings adverse to Ms Lawrie such as the finding that Ms Lawrie "acted with bias over many years" and that her conduct was "not proper" and "unfair" ,,, . I was and remain surprised that he made such findings in absence of giving Ms Lawrie notice of the kind contemplated by the Ainsworth Letter.

138. When cross- examined with regard to adverse findings made in the Report against Ms Lawrie, Mr Wyvill referred to the portion of the Report headed: "Performance of Minister Delia Lawrie" which included the finding:

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

Mr Wyvill said of this paragraph that it was something he believed fell within the Ainsworth principle. At a later point he linked the following further paragraph to the above bias finding:

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

Mr Wyvill said of this paragraph:

> *"Now, to the best of my recollection that was never suggested to Ms Lawrie in the course of her examination. What was suggested to her, and it was right at the beginning of her examination as I recall, was that, "Ms Lawrie, are you biased in favour of the Union movement?" And her response to that was, "I love the Union movement." And that, as I recall, is as far as that point was taken. But I anticipated that the Commissioner might think there was something in the biased point. So at the end of that course of examination I made a number of short submissions and clearly reserved my position at the end on the basis that they weren't intended to be complete. But one of those submissions I made, was to point out to the Commissioner that this notion of alleged biased in favour of the Unions of a Member of a Labor Cabinet was incoherent. The Labor Cabinet was necessarily a political institution. It necessarily had within it the Labor Cabinet, a commitment to the values of the Labor movement. She wouldn't have been a member of a Labor Cabinet if she didn't, use her words, love the Union movement or love the unions. So to say that that was a basis for bias in the exercise of a power of Labor Cabinet Minister was, in my respectful opinion, nonsense.*
>
> *I didn't say that to him in those terms, but I made that point clearly to him and he didn't come back to me and say, "I disagree with that and here's why." ... to my mind, that had settled the matter so I did not anticipate findings of that kind or the logic of that argument leading to finding 10 at all. All of that was a surprise to me."*

139. Finding 10 and Recommendation 6 in the Report are :

> *Finding 10:*
>
> *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.*
>
> *Recommendation 6.*
>
> *I recommend that the Legislative Assembly consider whether there has been an alleged breach of the Northern Territory of Australia Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act 2008, by Ms Delia Lawrie and Mr Gerald McCarthy, and whether under the provisions of s.5 (1) it wishes to refer any alleged breach of the code to the Privileges Committee.*

140. As to this finding and this recommendation, Mr Wyvill said:

> *"I remember reading the report for the first time and looking at finding 10 and being quite stunned that somebody like the Commissioner, holding such a serious position, ... - would*

produce a finding of that in his report, which I thought to be directly contrary to what he had said he would do. ... that's exactly the thing that I had in mind that he wouldn't do without giving us notice. Now, in addition to the fact that he didn't give me notice of that finding, the other way in which it simply wasn't possible to contemplate is that I have no idea of what the relevant legal principles are that the Commissioner is applying. I approached the inquiry on the basis that the Commissioner would apply the law, and the law requires the Commissioner, if he's going to make a finding of fault, to identify a relevant legal standard which applied to, in this case Ms Lawrie, and make the assessment against that standard. That's what I expected him to do because that's what I understood was his legal obligation. I have no idea what the legal standard or standards are that he's applying in finding number 10, and for that reason I could never have anticipated it because they seem to be standards that he has invented. Recommendation 6, I didn't even know of the existence of that Act until the day before the report came down. That was the first time I had heard mention of it in my career. I had no way of anticipating that he was going to make that recommendation, which I considered to be adverse. "

141. As explained in paragraphs 82 to 91 above we are satisfied that Mr Wyvill did not expect the Commissioner to make adverse findings against Ms Lawrie in the absence of notice to her in accordance with his 17th February statement. In these circumstances we accept Mr Wyvill's evidence that he was surprised that the Commissioner's Report contained the adverse findings against Ms Lawrie identified by Mr Wyvill. We are satisfied that paragraphs 8 and 17 of Mr Wyvill's affidavit of 12th November are true and not false or misleading. Allegation 6 and 7 are dismissed.

142. We address Allegation 9 next as it raises issues similar to those we have been dealing with. We will deal with Allegation 8 last. Allegation 9 and its particulars follow:

Allegation 9

> On 27 January 2015 the Respondent engaged in professional misconduct, pursuant to section 465 of the LPA, or alternatively unsatisfactory professional conduct, contrary to section 464 of the LPA, by swearing an affidavit in the Supreme Court proceeding containing assertions that he knew or ought to have known were false or misleading, namely that by 14 April 2014 he was not prepared to take on the responsibility of responding to the advice of Mr Maher or the valuation report of Mr Harris but that had he have known of a possible adverse finding, he would have reconsidered that decision.

Particulars to Allegation 9

9.1. By the 15 April 2014 letter from Ms Spurr to the Commissioner (set out in full [in paragraph 39 above]), it was communicated to the Commissioner that Ms Spurr and the Respondent would no longer act for Ms Lawrie or Mr McCarthy.

9.2. On 27 January 2015 the Respondent swore an affidavit in which he addressed the 15 April 2014 email from Ms Spurr to the Commissioner. The affidavit contained (at paragraph [11]) the following statement (with emphasis added):

> *Looking at that letter now, it would have been better expressed if "assistance" in line 3 was replaced with "representations." I was prepared to continue to assist the plaintiff and Mr McCarthy in the inquiry by providing advice from time to time and assisting in the drafting of* a *report of [sic] 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 to these two further letters from the Commissioner on their behalf and dealing with the matters which might flow from that.* ***However*** *as stated in paragraph 13.3 of my earlier affidavit,* ***if notice of* a *possible adverse finding was received I would have reconsidered that decision.***

9.3 On 8 April 2014, the Respondent sent an email to Mr Gleeson in relation to the letters from the Commissioner seeking responses to the Maher advice and the report of Mr Harris. The Respondent stated to Mr Gleeson that he was *"still happy to do* a *response to these 2 matters but wanted some further time to do* so".

9.4 The Respondent therefore knew, or ought to have known, as at the time of preparing and swearing the affidavit on 27 January 2015 that his claim (at paragraph [11] of the affidavit) was false or misleading.

143. Mr Wyvill's Affidavit of 27th January 2015 was prepared, inter alia, to add to what he had said in his Affidavit of 12th November 2014 about not continuing to act for Ms Lawrie in the Inquiry on a pro bono basis. The Affidavit of 27th refers to Mr Wyvill settling the letter of 15th April 2014 and continues:

> *7. My opinion that there was little point in preparing a response to the two further letters was based also on my belief that:*
>
> > *7.1. we were unlikely to persuade the Commissioner of the positive case which we had put to him, most particularly that cabinet's decision to approve the grant of a lease of Stella Maris to Unions NT was the right decision. Instead, he was likely to be critical of that decision.*
> >
> > *7.2. in this respect, our efforts were better spent on preparing our own report justifying cabinet's decision than responding to the two further letters.*
>
> *8. Whilst I expected him to be critical of the cabinet decision and the processes leading up to it, at that time I did not expect his criticism to extend to making any particular finding of misconduct on the part of the plaintiff or Mr McCarthy (with the possible exception of the allegation that Mr McCarthy had deliberately given false evidence about his attendance at the cabinet meeting on 10 July 2012.)*
>
> *9. I did not mention the absence of any notice of proposed adverse findings in my emails sent to Ms Spurr because it was not in the forefront of my mind at the time. My mind was focused on what I understood then to be within the range of possible findings available to the Commissioner. This reflected my belief that this would not extend to making any particular finding of misconduct on the part of the plaintiff or Mr McCarthy (with the possible exception of the allegation that Mr McCarthy had deliberately given false evidence about his attendance at the cabinet meeting on 10 July 2012).*

10. However, when I settled the draft letter to include the words "Please note our clients remains (sic) vitally interested in the outcome of the enquiry" (which were words I suggested Ms Spurr include during the conversation referred to in paragraphs 3 and 4 above) I did have in mind 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 ensuring that the plaintiff's and Mr McCarthy's right to receive any such notice was preserved.

11. Looking at that letter now, it would have been better expressed if 'assistance' in line 3 was replaced with 'representation'. I was prepared to continue to assist the plaintiff 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 to these two further letters from the Commissioner on their behalf and dealing with the matters which might flow from that. However, as stated in paragraph 13.3 of my earlier affidavit, if notice of a possible adverse finding was received I would have reconsidered that decision.

144. Allegation 9 contends Mr Wyvill knew or ought to have known it was false and misleading, to say that by the time he settled the letter to the Commissioner (ultimately dated 15th April 2014), he was not prepared to take on the responsibility of responding to the advice of Mr Maher or the valuation report of Mr Harris, but that had he known of a possible adverse finding he would have reconsidered that decision.

145. Particular 9.3 contends that on 8th April 2014 Mr Wyvill sent an email to Mr Gleeson in relation to letters from the Commissioner seeking responses to the Maher advice and the report of Mr Harris and in the email Mr Wyvill said he was "still happy to do a response to these 2 matters but wanted some further time to do so". Particular 9.4 contends that this shows that the impugned portion of paragraph 11 of his Affidavit was false or misleading.

146. We cannot locate an email of 8th April 2014 from Mr Wyvill to Mr Gleeson in evidence. There is, however, an email of that date to Ms Spurr which contains a similar statement to that set out in particular 9.3. This email is set out in paragraph 40 above. In it, Mr Wyvill explains his reasons for not wanting to respond to outstanding correspondence from the Commissioner and concludes: "Still happy to do a response to him but I will need until early (sic) week. What do you think?"

147. This email establishes, that subject to Ms Spurr's thoughts, on 8th April, Mr Wyvill was willing to respond to the Commissioner's correspondence. His then somewhat hesitant willingness to do so contrasts with the significant effort he had made at an earlier date to explain to the Commissioner the law in relation to public interest immunity and Cabinet-related documents. On 10th March 2014, Mr Wyvill provided the Commissioner with a five-page document in which he carefully detailed his reasons,

with authorities, for submitting that both Cabinet documents and Cabinet deliberations attracted public interest immunity in the circumstances he canvased. Over the course of the matter Mr Wyvill's attitude changed to the point that he was not prepared to volunteer his time, subject to the qualification that he would have done so had notice been given of a potential adverse finding against Ms Lawrie. This change is consistent with him changing his mind about whether he would respond to the Maher advice and the report of Mr Harris. That he was not prepared to go to the trouble of doing so by 14th April is explicable on the basis that he had changed his mind. It does not make what he said in paragraph 11 of his Affidavit false or misleading and this includes his statement that had notice of a possible adverse finding been received he would have reconsidered his decision.

148. We are not satisfied that Mr Wyvill knew or ought to have known that any assertions in paragraph 11 of his Affidavit of 27th January 2015 were false or misleading. Allegation 9 is dismissed.

149. In Application No 1of 2019 the allegations and their particulars are as follows.

Description of the Conduct complained of

1. By sending to the Northern Territory Bar Association Council **(Bar Council**) an email in which he impugned the independence, character and motivations of Justice Southwood, the Respondent:

a) made inappropriate and unsubstantiated allegations which a lawyer should not make against a Judge of the Supreme Court;

b) further or in the alternative, alleged with no basis that the findings made by Southwood J in the decision *Lawrie v Lawler* [2015] NTSC 19 dated 1 April 2015 were "suggestive of malice" or "[call] into question his fitness to be a judge"; and

c) further or in the alternative, suggested, improperly, that Southwood J was politically partisan.

Background

2. At all material times, the Respondent was an Australian legal practitioner pursuant to section 6 of the *Legal Profession Act 2006* (NT) **("LPA"),** and held a barrister practicing certificate.

The Stella Maris Inquiry

3 . On 10 July 2012, the Cabinet of the then Northern Territory Government approved the offer of a Crown Lease over land in Darwin known as the Stella Maris site to Unions NT. On 3 August 2012 the documents offering and setting out the conditions for the lease were stamped by the then Minister for Lands and Planning, Mr. Gerald McCarthy **(Mr McCarthy).**

4. A general election for the Northern Territory Parliament was to take place on 25 August 2012 **(the election).** The government was to enter caretaker mode on 6 August 2012.

5. The election resulted in a change of government. The new government (the Country Liberal Party) opposed the lease and, in December 2013, commissioned an inquiry into the circumstances of the purported decision to offer the lease and associated matters **(the Inquiry).** Mr John Lawler **(the Commissioner** or **Mr Lawler)** was Commissioner of the Inquiry.

6. At the Inquiry the Respondent acted as counsel for Ms Delia Lawrie **(Ms Lawrie)** and Mr McCarthy. Ms Lawrie had been the Deputy Chief Minister and Treasurer of the NT prior to August 2012. Mr McCarthy had been the Minister for Lands and Planning prior to August 2012.

7. The Inquiry took place and on 26 May 2014 the Commissioner presented his report. The report contained a number of adverse findings concerning Ms Lawrie's conduct.

The Supreme Court Proceeding

8. On 30 July 2014, Ms Lawrie instituted a proceeding in the Supreme Court of the Northern Territory against the Commissioner, being proceeding number 68 of 2014 **(the Supreme Court Proceeding).**

9. Justice Southwood presided over the Supreme Court Proceeding.

10. Ms Lawrie complained that the Commissioner had denied her procedural fairness. The Respondent, who initially was acting for Mr Lawrie, filed two affidavits and also drafted a pleading. The Respondent subsequently ceased to act in the Supreme Court Proceeding.

11.0n 1 April 2015, Southwood J delivered his decision dismissing Ms Lawrie's action in *Lawrie v Lawler* [2015] NTSC 19 **(the Decision).** In the Decision, Southwood J found that Ms Lawrie:

a) Was accorded procedural fairness by the Commissioner; and

b) Had waived the right to claim procedural fairness beyond what Ms. Lawrie was in fact accorded by the Commissioner.

12. In the course of explaining his conclusions on the finding outlined above (in paragraph 10 (2) (sic) [11(b)]), Southwood J made certain findings which were critical of the Respondent's conduct at the Inquiry and, to an extent, in the Supreme Court Proceedings.

13. On 26 May the Respondent swore a further affidavit in the Supreme Court Proceedings responding, inter alia, to Southwood J’s findings and disputing his Honour’s criticisms of the Respondent (the Third Affidavit). The Third Affidavit was filed on 1 June 2015.

The Email

14. At approximately 9.22.51 on June 2 2015 the Respondent sent an email to the Bar Council, which then comprised Ben O'Loughlin, Sonia Brownhill, John Lawrence, Jodi Truman, Duncan McDonnell, Pat McIntyre, Lyma Nguyen, Mark Johnson, Bronwyn Haack, Miles Crawley, Tom Berkley and Andrew George.

15. As at the time of sending the email, the Respondent had stepped down as President of the Bar Council but remained, as immediate-part-president, a member by default.

16. The email listed as its subject 'Lawrie v. Lawler' and attached the Third Affidavit.

17. The content of the email is set out in full, immediately below:

> Dear all
>
> I attach my affidavit which was filed in the proceedings yesterday and which sets out my response to the principal findings in Southwood J's judgment. I'm sorry that it has not been possible to provide you with my detailed response prior to now.
>
> In addition to making findings with which I disagree, the judge failed to afford me natural justice contrary to authority: Bale v Mills (2011) 81 NSWLR 498 at [79]: Ashby v. Slipper [2014] FCAFC 15 at [141]-[143]. Further, by his associate's letter of 2/4/2015 (p23 of the annexure) it appears that he was aware (a) of the seriousness of the findings he made against me; (b) of the fact that I had not been heard in relation to them; (c) of my correlative right to be heard in relation to them before decisions which may impact upon my professional standing were made, and (d) because I had not been heard, there was at least the prospect that, once I had been, different conclusions might have been drawn. However, (i) by delaying his notification to me until the day after he published his judgment, and (ii) by not noting in his judgment that I had not yet been given this opportunity and the significance of this for his findings but instead expressing his conclusions in absolute terms, he caused extraordinary damage to my professional reputation which will be irreversible to a significant extent regardless of what I might have to say and what any other tribunal, having heard what I have to say, might find. **This in my view is suggestive of malice and calls into question his fitness to be a judge**. I have a number of other serious concerns about the judge's intentions as revealed in the judgment.

The pleaded case of a 'deliberate and deceptive strategy' was confined to:

27A. By no later than 15 April 2014, alternatively by no later than 18 June 2014, the plaintiff and/or alternatively her legal representatives Mr Wyvill and Ms Spurr:

(a) ... understand the issues that were being examined by Mr Lawler that could lead to adverse findings about Ms Lawrie;

and

(b) ... believed that it was likely that Mr Lawler would make one or more findings that were adverse to Ms Lawrie in his report.

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

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

The judge's findings went well beyond this pleading.

I also believe he made findings which we [sic] both unnecessary and politically partisan, e.g his finding at [192] that "what is being counselled by Mr Wyvill is a strategy to make the incredibly serious and completely baseless allegation that the Country Liberal Party Government picked Mr Lawler on the basis that he would find what they wanted him to find." This was not the subject of any pleading or evidence. It was quite unnecessary for the judge to make this finding to dispose of the matter. In addition, I believe there is a reasonable argument to the contrary. This begs the question as to why he would so this.

There will be further developments on Friday when Delia Lawrie makes an application for the judge to disqualify himself.

I will advise you further advise you further after then. I will be suggesting that the Bar Council refers this entire matter to the Australian Bay Association for investigation and advice – we are too close to it.

I will not be taking part in any deliberations of the Bar Council to do with this matter. In relation to my involvement in the Bar Council otherwise, I would wish to continue working on matters concerning Timor and the 2016 conference but am happy to abide by your decision in this respect.

Please treat this email as confidential to members of the Bar Council.

Regards

Alistair.

Alistair Wyvill SC

(emphasis added)

18. The specific comments made by the Respondent within the email that are for the subject of complaint are:

i. "This in my view is suggestive of malice and calls into question his fitness to be a judge", and

ii. "I also believe he made finding (sic) which [were] both necessary (sic) and politically partisan" **(the Conduct).**

The Applicant's Allegations

19. By the Conduct, set out in paragraphs 18i and 18ii above, the Respondent

a. Made inappropriate and unsubstantiated allegations which a lawyer should not make against a Judge of the Supreme Court.

b. Alleged, with no basis, that the findings made by Southwood J in the Decision were "suggestive of malice" or "[call] into question his fitness to be a judge".

and

c. Suggested, improperly, that Southwood J was politically partisan.

And the Applicant Alleges

20. That the Conduct set out in paragraphs 18i and 18ii above, constitutes professional misconduct as defined by the common law, being conduct in a manner that would reasonably be regarded as disgraceful or dishonourable by his or her professional brethren of good repute and competency.

150. The following is an extract from Mr Wyvill's response to this Application in his lengthy affidavit.

> *"177 Justice Southwood was the trial judge for the Supreme Court Proceedings. In the course of his Honour's reasons for dismissing Ms Lawrie's originating motion (Lawrie v Lawler [2015] NTSC 19 (1 April 2015)…, Southwood J made a number of very serious findings against me (Adverse Findings): see, in particular, [150]-[151], [163], [170]-[175], [183], [191]-[192], [212]-[215], [219]-[221], [223]. Those findings were made even though I was not a party to the Supreme Court Proceedings, was not called as a witness in those proceedings … and was not given notice that his Honour was considering making any such findings against me.*
>
> …
>
> *184. I resigned as President of the Northern Territory Bar Association because of the Adverse Findings on 2 April 2015 … and, on 9 April 2015, gave notice that insofar as my resignation as the President of the Northern Territory Bar Association did not automatically terminate my position on the Australian Bar Association and Law Council of Australia, I also resigned from those….*
>
> *185. On or about 10 April 2015, Mr Maher (the solicitor for the Commissioner) sent a letter to Ms Spurr asserting that given the "numerous damning observations" against Ms Lawrie and the unfavourable findings in respect of Ms Spun and me in Southwood J's decision, Mr Lawler was entitled to "full and true indemnity costs" and to personal costs orders against Ms Spun and against me…. The letter attached proposed consent orders and requested that Ms Lawrie, Ms Spurr and I each sign orders the effect of which would be that Ms Spurr and **I** would personally be required to pay the Commissioner's full solicitor/client costs. I did not agree to that request.*
>
> *186. Mr Maher filed a summons in the Supreme Court proceedings seeking a personal costs order against me on 8 May 2015… . **I** swore an affidavit in relation to that application on 26 May 2015 that was filed on 1 June 2015. The application for a personal costs order against me was not pressed.*

187. *On 2 June 2015, I sent the email **(Email)** that was the subject of the Maher Complaint. That email was sent on a confidential basis to the persons who I believed at that time were members of the Bar Council.*

188. *In my experience, the Bar Council (and, before the Bar Council was created, the Bar Association) regularly dealt with highly confidential matters including complaints about the conduct of its own members, complaints of judicial misconduct, disputes within the judiciary, allegations of misconduct in relation to appointments of judges, magistrates and lawyers to senior positions in the Executive, and disputes or complaints over the appointment of persons to the rank of Queen's Counsel or Senior Counsel. To perform its function properly in such sensitive matters, strict confidence is required. I cannot recall any other occasion on which a sensitive communication on a confidential matter to other members of the Association or the Council like the Email was released to a person outside the Association or the Council without the permission of the Association or the Council or the author.*

189. *I do not know how the Email came to be in Mr Maher's possession. ...*

190. *As noted in the first paragraph, the Email attached my affidavit of 1 June 2015... which contained a detailed response to the Adverse Findings and explained why I contended that they were wrong in fact. That affidavit was the first occasion on which I produced a detailed account to explain why the Adverse Findings were false outside privileged communications between myself and my legal advisors.*

191. *I deliberately sent the Email to the members of the Northern Territory Bar Council because I thought that the Bar Council was the most appropriate recipient of a confidential complaint regarding Justice Southwood's conduct. The Northern Territory did not then have a judicial commission or like body with jurisdiction to investigate complaints against judicial officers in the Territory and the Northern Territory Bar Council and the Bar Association before it had previously assumed a role in taking action in relation to judicial conduct of concern. For example, the Bar Council took action in 2014 (whilst I was Vice President) when it became aware that a magistrate appeared to have involvement in the Country Liberal Party after his appointment as a magistrate including by handing out "how to vote" cards for the Country Liberal Party and serving as a director of a company which appeared to be a fundraising entity of the Country Liberal Party.*

192. *I considered at the time I sent the Email that the Bar Council was the most appropriate entity to consider my complaint. Further, I did not think that there was any realistic alternative. For example, the Territory Attorney-General was part of the Country Liberal Party Government and I did not trust him to deal with my concerns appropriately.*

193. *I also considered at the time that I sent the Email (and still consider) that the matters that I raised in the Email were most appropriately investigated by persons outside of the Territory. That is why, in my Email, I said that "I will be suggesting that the Bar Council refers this entire matter to the Australian Bar Association for investigation and advice — we are too close to it".*

194. *As I understand it, two (and only two) sentences or parts of sentences of my Email are alleged to have involved professional misconduct ... .*

(a) *first, the sentence reading "[t]his in my view is suggestive of malice and calls into question his fitness to be a judge"; and*

(b) *secondly, "I also believe he made findings which we[re] both unnecessary and politically partisan".*

195. *While I acknowledge that the allegations made in those two sentences or parts of sentences are serious allegations to be made against anyone let alone a judge of the Supreme*

Court (even if made confidentially), I was of the view at the time that I sent my Email and remain of the view that I had a reasonable basis for saying what I did … .

151. The following is a portion of Mr Wyvill's evidence when cross-examined in relation to Application 1:

Can you explain to the Tribunal why on 2 June 2015 you sent this email to the Bar Council?---For several reasons, most importantly, because I wanted the matter referred to the Australian Bar Association. That was the outcome I was looking for, that this issue in relation - these issues of concern I had in relation to his conduct, were referred to an independent body to give us advice about what ought to happen. That was the reason why I sent this email.

So that was the only reason?---That was the outcome I was looking for. But I was also concerned to make sure that this - I was very concerned about this because, as far as I could see, Delia Lawrie certainly appeared to me to be a completely honest plaintiff, who had come to court seeking justice, and she didn't get it. In other words quite the opposite, she had her career destroyed. And she was the Leader of the Opposition and I thought that was a very serious matter. I knew that I couldn't form any – couldn't be involved in any way in the deliberations about that, but I was very concerned to make sure that somebody, independent did. So it was that concern about the interference with Parliament by the judge's decision and particularly that woman's life. My own concern about his criticisms of me. This was, I thought, the most appropriate way of starting the process of me raising my concerns of the criticism that he made, criticisms he made of me were unfair. So they were at least two of the reasons. I think there probably were others but they were the two that came to mind. And particularly also, I think, I knew that this was an issue of general concern as you would expect in the professional community in Darwin. And I had, not yet, put my detailed response to my colleagues particularly in the Bar and I wanted to do that. I thought they were entitled to know what my answer was to these allegations. Because I – I was very concerned when this judgement came out as to how to respond to it properly. I wasn't a party to the proceedings. I knew it was a - clearly involved the - a judgement of the court and I had to be concerned about the not undermining confidence and the integrity of the Supreme Court. It was very difficult to know how to react to that judgement and I took my time. And once I prepared the answer to the judgement for the purpose of cost application I thought that was an appropriate time to initiate steps to get this issue looked at and that was why I sent the email.

…

MR MOSES: In terms of the use of the term, "Politically partisan", do you recall using the phrase to that effect in the email?---I recall using the phrase, "Findings that are politically partisan."

So what you said was, "I also believe he made findings which" – I think you were saying, "-which were both unnecessary and politically partisan, for example, his finding at 192, that what is being counselled by Mr Wyvill is a strategy for making incredibly serious and completely baseless allegation that the Country Liberal Party government picked Mr Lawler on the basis that he would find what they wanted him to find. Do you see that?---Yes.

That's what you said?---Exactly.

Yes. And you accept don't you, in terms of the use of the term, "Partisan", you understand what that means is, "A firm adherent to a party faction cause or person, especially one exhibiting blind prejudice and unreasoning allegiance." Do you understand that's what partisan means?---Yes, I would accept that as a fair definition of partisan.

And you were using that phrase to describe a finding of a Supreme Court

Judge---Yes, I was.

And your evidence is that you adhere to that view, before this Tribunal,

correct?---Yes, I do.

And you take the view, that Southwood J's finding were politically partisan, correct?

---There were at least two that were politically partisan. There was that one. But there was one I think which was worse, which was more partisan that that, and that was finding that Delia Lawrie had given evidence which was dissembling, which I thought was quite extraordinary.

... Are you suggesting that a Supreme Court Judge making observations about the evidence of an individual, given by that individual, that if those findings are adverse to that individual they are politically partisan, the findings?---No, that's not what I'm suggesting, Mr Moses.

So what makes that finding that you've just referred to, to be a finding that you say is politically partisan?---I've explained it in my affidavit. It was a finding that was entirely unnecessary for the proceedings. I don't think it was even submitted, in fact I'm reasonably confident that finding wasn't even asked for by the respondent. It was completely irrelevant for the disposal of the case. Further, it was inconsistent with the Commissioner's own finding. And you can see that I think, in finding 10 in the report, where the Commissioner said, not – "Notwithstanding – I think these were his words, "That Ms Lawrie genuinely thought that, what she was doing was in the public interest", et cetera, et cetera. The Commissioner was as impressed by the genuineness of her concerns as I was, when she gave evidence.

...

Now, sir, in terms of the use of the word, malice, were you suggesting by this email to the Bar Council, that the judicial officer was setting out to harm you?---No, I wasn't. I didn't express – I did not – I carefully prepared this email so that it did not express a final view about anything, it simply indicated that there were matters which required examination.

But what you said ... It's in the complaint. Is that after you referred to (inaudible) in the email that proceeds it, including the extraordinary damage to your professional reputation, you go on to say, "This in my view is suggestive of malice, can calls in to his question – calls in to question, his fitness to be a judge. Do you see that?---Yes, I do.

"And I have a number of other serious concerns about the judge's intentions as revealed in the judgement." Do you see that?---Yes, I do.

So I just want to ask you the question. Were you meaning this, by the use of the word, "Malice", that the judge was intending to harm you?---No, I wasn't expressing a final view about his intentions. I have got no idea, ultimately, what he – why he did this.

...

Okay. and in terms of the definition of "Malice", do you accept that that includes, "The desire to cause pain or harm to another". Do you accept that?---Absolutely. Absolutely. That's precisely what it means.

Yes, an intent to cause harm without legal justification or excuse,

152. In order to deal with the allegations, we address the circumstances that precipitated Mr Wyvill's email. Before doing so, we re-emphasise what we said in paragraph 10 of these reasons. In brief, it is most important to keep in mind that whilst we will express views and conclusions based on the evidence before us, they are not findings against non-parties or anyone who has not given evidence. Our findings are solely as between the

parties to these proceedings. Experience teaches that commonly, one side of a story is good only until the other side has been heard.

153. Justice Southwood, in his reasons for judgment of 1st April 2015, made a number of serious findings against Mr Wyvill that were extremely damaging to his professional standing and reputation and, if correct, would have warranted his name being struck off the Roll of legal practitioners. This had occurred in the course of his Honour's consideration of a contention that Ms Lawrie had waived her entitlement to procedural fairness. There was no need for his Honour to consider that contention. It was clear from the sentence: "Please note that our clients remains (sic) vitally interested in the outcome of the enquiry." in Halfpennys' letter to the Commissioner of 15th April 2014 that procedural fairness had not been waived. That this was so has been confirmed by the Court of Appeal in *Lawrie v Lawler* [2016] NTCA 3, Doyle and Duggan AJJ, paras 247 – 250, and Heenan AJ para 437. The meaning and effect of the letter of 15th April fell to be determined from its text, not any perception about the motive or strategy behind it. However, his Honour in effect dismissed the sentence in question in paragraph 171 of his decision in *Lawrie v Lawler* [2015] NTSC 19 where he said that it "is not a true statement of their clients' position. It is a device to deflect any suggestion that Ms Lawrie has abandoned the Inquiry." On the evidence before us this finding was erroneous and it opened the way for his Honour to unnecessarily consider waiver and make a number of serious findings against Mr Wyvill and others.

154. In response to an application to make Mr Wyvill personally responsible for the costs of the Supreme Court proceedings, he swore an Affidavit on 26th May 2015 and filed it on 1st June 2015. In paragraphs 94 – 118 of the Affidavit Mr Wyvill sets out twelve passages from his Honour's judgment that contain serious and damaging findings against Mr Wyvill and responds to the findings. In one instance he said that he did not agree that an email could be construed as it was by his Honour for the reasons Mr Wyvill gave. In each other instance Mr Wyvill, having set out the finding in contention, said: *"With respect, this is incorrect:"* and then explained why. An illustration is the following:

> 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 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.

155. In the Affidavit Mr Wyvill deals with his Honour's findings against him in a considered and courteous manner. The reasons he sets out for saying that his Honour's findings are incorrect appear to be sound and when coupled with the evidence before us about matters that are the subject of his Honour's challenged findings, we agree that the findings are incorrect

156. Mr Wyvill's decision to write to the Bar Council about Justice Southwood is understandable. As a consequence of his Honour's findings, as a matter of public record, Mr Wyvill was not a fit and proper person to be a member of the legal profession. As Mr Wyvill believed the findings to be erroneous he sought to contest them. He was not a party to the proceedings before his Honour, so it was not open to Mr Wyvill to appeal against the findings as of right. At the time there was no judicial commission or like body in the Northern Territory. Such a body was not created until this year when the *Judicial Commission Act* 2020 (NT) was enacted. As a consequence of his Honour's findings Mr Wyvill resigned from his position as President of the Bar Council. Having done so, there was logic in him putting his concerns before his peers on the Council. There was nowhere else that he could go and this had been done before in loosely similar circumstances. He did so by providing them with the email in question, together with a thirty-three page affidavit plus attachments. It was reasonable for Mr Wyvill to anticipate that the members of the Bar Council were aware of the damaging findings that had made against him. We consider it significant that he supplied the material in question to a closed group, the members of which, he was entitled to assume, had the capacity and application to assess the material that he provided and form their own opinion on it. In result, the course embarked upon by Mr Wyvill was unlikely to improperly impact on his Honour. To the extent that any recipient agreed with Mr Wyvill this did not improperly impact on his Honour. To the extent that any recipient disagreed with any views expressed by Mr Wyvill, those views should have no impact. Mr Wyvill did not provide his email and the accompanying affidavit to the media or an audience, the members of which may not have had the necessary qualities to assess the material and form an independent opinion about it.

157. Before dealing with the two comments in contention, we refer to paragraph 1 of the Application which says that Mr Wyvill's email "impugned the independence, character and motivations" of his Honour. Unfortunately, in the course of the operation of our judicial system this is not particularly unusual. It is a consequence of an adversarial system that requires a reasoned decision that is open to appeal. Acceptance of the privilege of judicial office carries with it exposure to grounds of appeal that can impugn the independence, character and motives of the judicial officer. Obvious examples are a ground of bias and a ground that raises judicial bullying. Most grounds involve an allegation of error on the part of the judicial officer and this may

stray into manifest error when dealing with a sentence, and incompetence or ignorance when dealing with a finding of fact or law. That this is so is a necessary aspect of the judicial process and no lawyer should shirk from pleading and pursuing an arguable ground of appeal because it reflected on the independence, character or motives of the decision-maker.

158. The two comments made in the material provided by Mr Wyvill that are the subject of complaint are:

- "This in my view is suggestive of malice and calls into question his fitness to be a judge"; and
- "I also believe he made findings which [were] both unnecessary and politically partisan."

159. We deal with the latter first. For the reasons we have already given we are satisfied that his Honour made findings which were unnecessary.

160. In his email Mr Wyvill gave paragraph 192 of his Honour's decision as an example of why he expressed a belief that his Honour made findings that were politically partisan. That paragraph is as follows:

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

161. It is apparent from paragraphs 190 and 191 of his Honour's reasons that the basis for this finding is an email exchange on 19th May 2014 between Mr Gleeson and Mr Wyvill, specifically Mr Wyvill's email to Mr Gleeson at 12:02 pm on that day. For the reasons that we published on 5th August 2020 we consider that email to be subject to parliamentary privilege. As no mention was made of parliamentary privilege in his Honour's decision or the transcript of the hearing before him, we assume that it was not adverted to by anyone involved.

162. The paragraph in the email to the members of the Bar Council that contains Mr Wyvill's politically partisan comment reads:

> I also believe he made findings which [were] both unnecessary and politically partisan, e.g his finding at [192] that "what is being counselled by Mr Wyvill is a strategy to make the incredibly serious and completely baseless allegation that the Country Liberal Party Government picked Mr Lawler on the basis that he would find what they wanted him to find." This was not the subject of any pleading or evidence. It was quite unnecessary for the judge to make this finding to dispose of the matter. In addition, I believe there is a reasonable argument to the contrary. This begs the question as to why he would so this.

163. In the above paragraph Mr Wyvill says that the finding that he counselled the completely baseless allegation that the Country Liberal Party Government picked Mr Lawler on the basis that he would find what they wanted him to find, was not the subject of any pleading or evidence. We accept this save insofar as the finding is based on the email of 19 May that we referred to above. His Honour heard no evidence from Mr Wyvill, Ms Spurr, Mr Gleeson or Ms Lawrie, those involved in the strategy that his Honour found had been decided on and pursued. The finding in question was made in the course of his Honour's consideration of the issue of waiver. We are unable to see how it has any relevance to that issue. An implication that may be drawn from the finding is a favourable view of Country Liberal Party. In his email Mr Wyvill expresses the belief that the finding was politically partisan. In the overall context of what was "inherently political" litigation *(Lawrie v Lawler* [2016] NTCA 3 para 105*)* we accept that the finding provides a basis for that belief. In terms of the gravity of what Mr Wyvill said we consider it significant that he set out in the email the example of why he held the belief. The confined group of readers of the paragraph could readily form their own view about whether his Honour's finding, as quoted, was politically partisan.

164. In the course of his cross-examination Mr Wyvill referred to another finding that he believed was politically partisan. It is a finding that: "Much of Ms Lawrie's evidence [before the Commissioner] was dissembling and it was apparent that she was not conscientiously endeavouring to assist the Inquiry." This finding is dealt with in paragraph 97 to 101 of the affidavit that accompanied Mr Wyvill's email to the members of the Bar Council.

165. The finding forms part of paragraph 151 of his Honour's decision and follows his reference to an email from Mr Wyvill to his clients dated 31st March 2014 that is set out in paragraph 34 of these reasons. Paragraph 151 of his Honour's decision is:

> The email 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. 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.

166. Mr Wyvill was present when Ms Lawrie and Mr McCarthy gave evidence to the Commissioner on Thursday 13th and Friday 14th March 2014. On Sunday 16th March Mr Wyvill sent an email to Ms Spurr with copies to his clients and Mr Gleeson. It opens:

> "We had a successful Thursday and Friday at the Inquiry. Both Gerry and Delia were brilliant. We really pushed the burden, not a benefit point and it seems to be gaining traction with Lawler."

This email shows that the finding that "It must have been obvious to Mr Wyvill that the Inquiry was not going well" is not correct.

167. However, the email dated 16th March 2014 was not in evidence before his Honour. Ms Lawrie's counsel before Southwood J, was Anthony Young who is now a judge in the Federal Circuit Court. On the second day of the hearing before his Honour, V12/56 Mr Young, as he then was, informed his Honour that he had noticed that the email had not been included in the four folders of documents that had gone in by consent. Mr Young explained that it was relevant to an allegation raised that morning that Ms Lawrie's advisers had engaged in a course of deception. In response to his Honour's query as to how it was relevant to that, Mr Young said:

> *Well, it's inconsistent with that, your Honour, because it shows that at the conclusion of the plaintiff's evidence, or two days later, the assessment of the plaintiff's counsel was that the issues were as set out there…*
>
> *So it's inconsistent with a course of deception because it suggests there was no reason to engage in a deception because he didn't think they were at risk. It's also relevant to the suggestion that the state of affairs and the risk of adverse findings was apparent to him on 14th March.*

168. Counsel for Mr Lawler objected to the document going in. He said that once a document goes in, it's evidence for all purposes and the document contained an assertion about a state of mind. His Honour responded:

> *Well you say if it does go in then Mr Wyvill ought to be made available for cross-examination.*

Counsel for Mr Lawler agreed and when Mr Young confirmed that Mr Wyvill would not be made available, his Honour handed the email back.

169. Judge Anthony Young gave evidence before the Tribunal. He said that in the first day of the hearing before Southwood J, his Honour encouraged him to drop the issue of reliance on the letter of 17th February 2014 as the letter was irrelevant and the issue of reliance on it would extend the proceedings and expose a number of witnesses to quite serious cross-examination and serious factual findings. Following this, Mr Young, as he then was, took instructions from Ms Lawrie and consistent with those instructions he did not pursue the issue of reliance and did not read the affidavits of Ms Spurr, Ms Lawrie and Mr Wyvill. This is the background to Mr Wyvill being unavailable for cross-examination. Judge Young's recall of what occurred is consistent with our reading of the transcript of the hearing before Southwood J.

170. We return to the portion of his Honour's finding in paragraph 151 that is in question. It is:

> "Much of Ms Lawrie's evidence was dissembling and it was apparent that she was not conscientiously endeavouring to assist the Inquiry."

171. We accept Mr Wyvill's evidence before us that he thought Ms Lawrie had performed well when she gave evidence. His evidence is backed up by his emailed comment of 16th March that Ms Lawrie had been "brilliant". His evidence also finds support, in a somewhat backhanded way, in the Commissioner's Report. Although the Commissioner made a number of adverse findings against Ms Lawrie, Finding 10, which is set out in paragraph 139 above suggests that he accepted her credibility insofar as he found that "she may have genuinely believed that granting the site exclusively to Unions NT was in the public interest."

172. The Commissioner did not make any findings to the effect that Ms Lawrie had been untruthful was dissembling or had not conscientiously endeavoured to assist the Inquiry. We assume his Honour based his findings against Ms Lawrie on his reading of the transcripts of her evidence before the Inquiry. We turn to them.

173. On 10th March 2014 Ms Lawrie, accompanied by Mr Wyvill, attended before the Commissioner on a preliminary hearing. The Commissioner showed Ms Lawrie documents that he intended to ask her questions about when she returned to give evidence on Thursday 13th March. The Commissioner enquired of Ms Lawrie as to whether she would like to take the documents away. Mr Wyvill asked the Commissioner to take Ms Lawrie to the particular documents the Commissioner thought stood out. The only thing that Ms Lawrie said that was of any significance in the preliminary hearing was her response when the Commissioner showed her Cabinet meeting document 479 referable to the meeting that discussed the future of the Stella Maris site. It did not record that Mr McCarthy had been in attendance. Ms Lawrie said: "*Well he was sitting opposite me….in the room*" and a little later she said: "*He was there.*" We are unable to find anything in the transcript, V2 /78 -92, that could warrant describing Ms Lawrie as dissembling or not conscientiously endeavouring to assist the Commissioner.

174. On 13th March Ms Lawrie, accompanied by Mr Wyvill, attended before the Commissioner. As we read the transcript of her evidence, A2, she was a good and forthcoming witness. Our reading finds confirmation in an exchange at the end of the hearing when, in response to a self-deprecating remark made by the Commissioner to the effect that he was having difficulty in seeing the time, "*my eyes are going with age*", Mr Wyvill said well, this is *"after a hard day's work".* The Commissioner responded "*No, it's been made easy by the people in the room, so that's been very, very good.".* Mr Wyvill and Ms Lawrie were the people in the room. On our reading of this transcript there is no basis for saying Ms Lawrie's was dissembling or that she was not endeavouring to assist the Commissioner.

175. On Friday 14th March 2014 Ms Lawrie attended before the Commissioner accompanied by Mr Wyvill. The transcript of her evidence on this day runs to seventy-seven pages. On our reading of it, V8/ 2020 – 2096 she was a good forthcoming and forthright witness. She readily acknowledged her strong view that the lease should have exclusively gone to Unions NT, responding: " *Yes, absolutely*" and "*Yes, yes"* to questions from the Commissioner to that effect. This prompted the Commissioner to say "*Good. Well I think that will circumvent a lot of questions.",* V8/2029. A further illustration of her ready acknowledgment of her strong view is her response to the proposition that it would have been fair and transparent to give another party interested in leasing the site an opportunity to express an interest. She said, V8/2025:

"Look, I was of the firm view that the union movement had been intrinsically a partner in the (inaudible) of the operation of the site and, you know, evidence has been led to the tune of $300,000. So I was of the firm view that it would be unfair to the union movement to say "Well, look we'll just ignore your participation in the site, we'll ignore your financial investment in the site, we'll ignore all the work and effort you have done over the years with the site and we're going to put it up to any taker." That would be like saying to another community organisation who had been part-custodians of the site that we're just going to ignore your existing relationship and put it up to any taker. I didn't think that was fair."

176. In the course of her evidence, she was shown an attendance record for a Cabinet meeting that had occurred some twenty months previously on 10th July 2012. She confirmed that she was present but said she could not confirm the accuracy of the list of the others present and absent as "it's a long time ago, I'm sorry." When Mr Wyvill asked her to particularly focus on Mr McCarthy, the following exchange occurred.

Yeah look I thought he was there but I don't know, you know really, sorry, it's I've got to put this in context for you Commissioner I'm not being deliberately vague, um, it was an extraordinarily busy time and I don't have complete recall of, um, Cabinet meetings, who was there, who wasn't there, sorry.

Commissioner: Right, I did understand you to tell me on ..

On Monday, I did, I was like yeah Gerry was there.

Commissioner: Sitting next to him, yes?

Yes, he sat opposite me at every Cabinet meeting that he was in attendance at, so I thought he was there. If the records show he wasn't there then my recollection's wrong.

Commissioner: Okay, alright, and you would've heard the testimony of Mr McCarthy where he was very clear that he was there?

Yes, yes, yes. Yeah.

Commissioner: And we've got processes underway to try and establish that one way or the other.

Absolutely, I can't categorically say, so.

177. The Commissioner then told Ms Lawrie that Minister Vatskalis had referred to Ministers attending Cabinet meetings by phone and invited her to comment about that. This followed:

Look the comment I'll make is that my recollection of that Cabinet meeting is that Minister McCarthy fully participated, so whether it was by phone or in person, I'm now going on, you know, I thought he was there but if it was by phone, you know …

Commissioner :I think your testimony before was that you were just not sure.

I'm not sure, but what I can say is that..

Commissioner: Ok well I won't press you on that

I know Minister McCarthy spoke to his Cabinet Submission

Commissioner: Yes, it's just that…

I won't go into the deliberations because that's the public immunity issue but I know that he was participating.

Commissioner: I don't want to talk about those deliberations, but uh you did say - you've just acknowledged that on Monday…

It's plausible…

Commissioner: you had a clear recollection …

Yeah, I did think he was there

Commissioner: and then today you're not sure. Now I perfectly understand that, but I just want to make - I want to make sure that you're not sure.

Wyvill: (Inaudible) not absolutely sure

I'm not absolutely sure, you know I really thought he was there, if he was on the phone, - I can't remember.

Commissioner: I'm not saying he was on the phone, just to be very clear.

No, no, no, but Minister Vatskalis gave that as an explanation

Commissioner: He did, and I thought it fair to put that to you.

Yeah sure.

Commissioner: Ok.

178. At a later point when Ms Lawrie was handed an Executive Council document that suggested that Mr McCarthy had not been at the Cabinet meeting, she responded to the Commissioner:

No, no, I can assure you he participated in the Stella discussion, he led it at Cabinet, whether he was on the phone or in the building I'm sorry I'm hazy ….

179. The Commissioner's letter of 26th March includes the sentence:

"I have also attached the transcript of Ms Delia Lawrie on this issue [whether Mr McCarthy attended the meeting in person] and given she was more equivocal (with the assistance of Mr Wyvill), I did not intend to recall her."

180. The Commissioner's decision not to recall Ms Lawrie was consistent with what he had foreshadowed at the end of her evidence on 14th March V8/2090, when he said to Ms Lawrie and Mr Wyvill:

"We are very thankful for the time you spent before the Inquiry, and indeed, Mr Wyvill, for your support in facilitating some of the testimony yesterday. That's the way inquisitorial inquiries should work and I have been very pleased with how that's unfolded."

At the conclusion he said*:*

"The hearings are adjourned, and I think we could somewhat say we've done very well"

181. We agree with the Commissioner's description, in his letter, of Ms Lawrie's evidence about whether Mr McCarthy attended the meeting in person as equivocal. This does not suggest to us that he thought she was dissembling when she, in substance, said Mr McCarthy participated in the Cabinet discussion but she was not sure whether he participated in person or via 'phone. When she expressed this uncertainty, the Commissioner responded *"I perfectly understand."* We are unable to derive from the transcript any support for his Honour's findings that Ms Lawrie's evidence was dissembling and she was not conscientiously endeavouring to assist the Commissioner.

182. The findings were extremely damaging to Ms Lawrie who was the then Leader of the Labor Party and for that reason the findings were beneficial to her political opponents, the Country Liberal Party Government. The findings were made in the course of his Honour's unnecessary consideration of the issue of waiver. Their apparent relevance was to justify the incorrect finding that "It must have been obvious to Mr Wyvill that the Inquiry was not going well". We are satisfied that what we have canvased provides a basis for a belief that the findings were politically partisan.

183. The paragraph of Mr Wyvill's email that includes the second comment in contention follows. The comment has been highlighted.

> In addition to making findings with which I disagree, the judge failed to afford me natural justice contrary to authority: Bale v Mills (2011) 81 NSWLR 498 at [79]: Ashby v. Slipper [2014] FCAFC 15 at [141]-[143]. Further, by his associate's letter of 2/4/2015 (p23 of the annexure) it appears that he was aware (a) of the seriousness of the findings he made against me; (b) of the fact that I had not been heard in relation to them; (c) of my correlative right to be heard in relation to them before decisions which may impact upon my professional standing were made, and (d) because I had not been heard, there was at least the prospect that, once I had been, different conclusions might have been drawn. However, (i) by delaying his notification to me until the day after he published his judgment, and (ii) by not noting in his judgment that I had not yet been given this opportunity and the significance of this for his findings but instead expressing his conclusions in absolute terms, he caused extraordinary damage to my professional reputation which will be irreversible to a significant extent regardless of what I might have to say and what any other tribunal, having heard what I have to say, might find**. This in my view is suggestive of malice and calls into question his fitness to be a judge.** I have a number of other serious concerns about the judge's intentions as revealed in the judgment.

184. No challenge has been made to accuracy of the matters that Mr Wyvill lists as being, in his view, suggestive of malice and call into question his Honour's fitness to be a judge. As to the last point made by Mr Wyvill we note that in paragraph 185 of his Honour's reasons his Honour said:

> 185: I have not reached any of the conclusions I set out in (181) above against Mr McCarthy. Mr McCarthy was not a party to the proceedings before Court. He has not been given an opportunity to state his understanding of the contents of Ms Spurr's draft letter of 14 April 2014.

185. Mr Wyvill, like Mr McCarthy, was not a party to the proceedings. Had counsel for Ms Lawrie elected to submit Mr Wyvill to cross-examination no doubt he would have been given an opportunity to state his understanding of the letter of 14th April 2014. However, that was not the case, so Mr Wyvill was not a party or a witness. Notwithstanding that this was so, as asserted by Mr Wyvill, his Honour made findings against Mr Wyvill expressed in absolute terms that could cause extraordinary damage to Mr Wyvill's professional reputation, which would be irreversible to a significant extent regardless of what Mr Wyvill might have to say and what any other tribunal, having heard what Mr Wyvill had to say, might find. On the evidence before the Tribunal, his Honour's findings were erroneous

186. As the victim of his Honour's findings, we are satisfied that Mr Wyvill had a sufficient basis for saying that the matters that he detailed were in his view suggestive of malice and call into question his Honour's fitness to be a judge.

187. We refer to other evidence before us that is capable of providing a basis for suggesting that his Honour bore ill-will towards Mr Wyvill and calls into question his Honour's fitness to be a judge.

188. On 15th March 2013 a lawyer appeared before his Honour on a preliminary hearing in a jury trial. It was the lawyer's his first jury trial. The transcript of what occurred is in evidence. On our reading of it, his Honour bullied and belittled the lawyer. Following the hearing, the lawyer obtained instructions from his client to apply to his Honour to disqualify himself on the grounds that his treatment of the lawyer during the preliminary hearing gave rise to a reasonable apprehension that his client, represented by the lawyer, would not get a fair trial. The hearing resumed on Monday 18th March. Before the jury was empanelled the lawyer made his application but before he had made any submissions in support his Honour stated that he was against the lawyer. The lawyer persisted and was allowed to make his submissions. When he finished, his Honour said that he was against the lawyer and with regard to what had occurred during the preliminary hearing he said: "T*he exchange was ordinary. The dialectic was normal*." On our reading of the transcript what had occurred was not ordinary or normal. Having so described that what had occurred, his Honour added: "*I have a concern about your capacity to properly conduct this case on behalf of the accused. That will result in me ensuring he gets a fair trial despite the level of your competence*." The hearing culminated with his Honour requiring the lawyer to show cause why he should not be cited for criminal contempt in the face of the Court for non-compliance with his Honour's rulings in relation to evidence.

189. The lawyer was employed by the North Australian Aboriginal Justice Agency. Mr Wyvill was engaged by the Agency to represent the lawyer in responding to the requirement to show cause. This involved Mr Wyvill assisting the lawyer to prepare an affidavit in which the lawyer detailed the manner in which he had been bullied and belittled by his Honour, V8/2182. As counsel for the lawyer, Mr Wyvill prepared and signed written submissions that were filed with the Court, V8/2174. They included a submission that his Honour was precluded on the ground of a reasonable apprehension of bias from making any decision in relation to whether or not the lawyer's conduct amounted to a contempt as it might reasonably be apprehended by a fair-minded lay observer that his Honour might not bring an impartial mind to the resolution of the matter. A basis for the ground was that the reasonableness and fairness of his Honour's treatment of the lawyer and the role that

treatment played in relation to the matters relied upon in the draft charge were at issue in the proceedings and a judge could not rule impartially on a matter where his or her conduct was in issue. A further basis for the ground was that his Honour's treatment of the lawyer, as set out in six paragraphs of the lawyer's affidavit, suggested that his Honour had formed a view adverse to the lawyer. Mr Wyvill appeared before his Honour in relation to the matter. The possibility of contempt proceedings was ultimately avoided following an agreement negotiated by Mr Wyvill with the Solicitor-General on the terms of a statement from the lawyer that contained a qualified apology.

190. As a consequence of what had occurred, the then Principal Legal Officer of the Agency that employed the lawyer requested the then Director of Legal Aid to join him in attending on the then Chief Justice of the Northern Territory Supreme Court to tell him of their concerns about his Honour's behaviour, and this they did. The evidence of the Principal Legal Officer is that he and the Director had similar concerns in relation to what he characterized as bullying or bullying-type behaviour by his Honour against practitioners and when they met the Chief Justice in his Chambers, they both expressed their concern that the matter involving the lawyer was one of a number of incidents. In his affidavit he said that the Chief Justice informed them both that he would convey their concerns to his Honour. In her affidavit, the Director said that the process was rather informal and the complaint was noted. In her oral evidence she said that the Chief Justice made a comment to the effect that it would either be admitted or not and left his chambers. When he returned, he said "*Yes, it's been noted. Thank you".* We consider that the evidence of his Honour bullying and disparaging the lawyer provides a basis for calling into question his Honour's fitness to be a judge and the evidence of Mr Wyvill's involvement provides a basis for suggesting that his Honour may have been ill-disposed towards Mr Wyvill.

191. Focusing on the two comments that are the subject of the allegations, we are not satisfied that Mr Wyvill did improperly make inappropriate and unsubstantiated allegations against his Honour. We dismiss Application 1.

192. Allegation 8 and its particulars follow:

Allegation 8

> In around November 2014 the Respondent engaged in professional misconduct, pursuant to section 465 of the LPA, or alternatively unsatisfactory professional conduct, contrary to section 464 of the LPA, by drafting and/or settling the affidavit of Ms Spurr dated 13 November 2014 and the affidavit of Ms Lawrie dated 14 November 2014, in circumstances where he knew that he was likely to be a witness in the proceedings.

Particulars to Allegation 8

> 8.1. On 4 November 2014 the Respondent emailed Ms Spurr and Mr Tony Young of counsel advising that Ms Spurr, Ms Lawrie and the Respondent would *"have to do a statement"* in connection with the Supreme Court proceeding.

8.2. On 7 November 2014 the Respondent declined a meeting invitation from Ms Spurr for a meeting with Ms Lawrie on the basis that he should not be present but noting that he would speak with Ms Lawrie beforehand.

8.3. On 10 November 2014 at 10:36am the Respondent emailed Ms Lawrie stating that he would like *"to have* a *quick chat"* before 2:00pm. By reply email a discussion was arranged for 12:00pm.

8.4. On 10 November 2014 at 11:29am the Respondent emailed Mr Young attaching a draft affidavit of the Respondent.

8.5. On 10 November 2014 at 11:43am Mr Young emailed Ms Spurr attaching a draft affidavit of Ms Lawrie which he described as *"Alistair's draft"* and as being *"unfinished, hence the abrupt ending"*. At 11:46am Ms Spurr forwarded the email and attachment on to Ms Lawrie.

8.6. On 10 and 11 November 2014 Ms Lawrie, in conference with Mr Young, prepared a draft affidavit in her own name in connection with the Supreme Court proceeding.

8.7 On 11 November 2014 at 12:31PM the Respondent emailed Mr Young asking for the draft affidavit of Ms Spurr so that he could *"put some suggested changes in it'*. At 1:21pm that day Mr Young replied by email, attaching the draft affidavits of Ms Spurr and Ms Lawrie.

8.8 On 11 November 2014 at 6:48pm the Respondent emailed Mr young attaching a copy of the draft affidavit of the Respondent.

8.9 At 6:58pm on the same day the Respondent emailed Mr Young attaching suggested amendments to the affidavit of Ms Lawrie, namely:

i. Warning Mr Young to be careful not to waive privilege in respect of one paragraph;

ii. Correcting the spelling of the word "adverse", and

iii. Deleting the first section of paragraph 14, which linked the decision to cease to act with the fact no notice had been received as to potential adverse findings.

8.10 On 12 November 2014 at 8:27am the Respondent emailed Mr Young, stating *"my reworked version of Cathy's statement attached for your consideration."*

8.11 At 12:38pm on the same date Mr Young emailed the Respondent and Ms Spurr attaching final draft affidavits of Ms Lawrie, Ms Spurr and the Respondent, asking that they be read to ensure accuracy.

8.12 At 12:40 pm on the same date the Respondent emailed Mr Young and Ms Spurr indicating that he wished to add two matters to his affidavit.

8.13 At 4:06 PM on the same date Halfpennys emailed Mr Young and the Respondent seeking approval of the final affidavit of Ms Spurr. At 4:13PM that day the Respondent responded, approving Ms Spurr's affidavit subject to a typographical error and some *"tidy up"* of the formatting.

8.14 At the time the Respondent received and amended the draft affidavits of Ms Spurr and Ms Lawrie, he had identified that there was a prospect of him being a material witness in the appeal proceedings. Mr Young had been approached to appear for Ms Lawrie. Ms Spurr remained involved in the matter as instructing solicitor.

8.15 The Respondent was aware, or ought to have been aware, that his own interests- whether his reputation or his other pecuniary interests - may have been affected by the outcome of the proceedings in which he was now a witness.

8.16 Notwithstanding being a lawyer who was a witness in the proceedings, the Respondent was involved in the preparation or settling of the affidavits of Ms Lawrie and Ms Spurr, who were known to him to be witnesses in the proceeding.

8.17 By reviewing or settling the affidavits of Ms Spurr and Ms Lawrie at a time when he was also a witness in the proceedings, the Respondent affected the integrity of the evidence in the proceedings.

193. In its written closing submissions, the Applicant contended that the Respondent's conduct amounted to a breach of r13 of the *Law Society Northern Territory Rules of Professional Conduct and Practice*. The Applicant withdrew that contention when the Respondent pointed out that those Rules do not apply to barristers. The Applicant maintains its reliance on Allegation 8 as drawn, which does not rely on any rule of conduct but asserts in particulars 8.16 and 8.17 that notwithstanding that the Respondent was a lawyer who was a witness in proceedings, he was involved in the preparation or settling of the Affidavits of Ms Lawrie and Ms Spurr, who were known to him to be witnesses in the proceedings and by reviewing or settling the affidavits of Ms Spurr and Ms Lawrie at a time when he was also a witness in the proceedings, he affected the integrity of the evidence in the proceedings.

194. The rules that apply to barristers are the *Northern Territory Bar Association Incorporated – Barristers' Conduct Rules*. Whilst allegation 8 does not assert that the Respondent has breached any of these rules, r101 is informative. It is as follows:

101. A barrister who has reasonable grounds to believe that there is real possibility that the barrister may cease to be solely a disinterested advocate by becoming also a witness in the case or a defender of the barrister's own personal or professional conduct against criticism must return the brief as soon as it is possible to do so without unduly endangering the client's interests, unless:

(a) the barrister believes on reasonable grounds that:

(i) allegations which involve the barrister in that way have been raised in order to remove the barrister from the case, and

(ii) those allegations can be met without materially diminishing the barrister's disinterestedness; and

(b) a member of the Bar Council is a Queen's Counsel approves of the barrister accepting the brief after the barrister has informed that Queen's Counsel of the circumstances.

195. Consistent with this rule, a barrister who has become a witness in proceedings in the circumstances specified must return the brief "as soon as it is possible to do so without unduly endangering the client's

interests." This indicates that a barrister who has returned a brief should only refuse to assist in settling affidavits necessary for the proceedings when to do so would not unduly endanger the client's interests. The relevance of this is that Mr Wyvill's explanation for the assistance he provided on 10 to 12 November 2014 is that Ms Lawrie's affidavits were due for filing on 11th November. His assistance was needed because of that time table and because Mr Young was new to the matter.

196. In its written submissions the Applicant submits that it is no defence to say that the scope of the Respondent's involvement in the present case may not have in fact affected the integrity of the evidence in the Supreme Court proceedings. We do not understand this to be the Respondent's position. He simply denies that his conduct affected the integrity of the evidence in the proceedings.

197. We turn to Mr Wyvill's explanation for what occurred. In his lengthy affidavit he said:

> *155. As I understand it, Law Society NT accepts that I was not acting as counsel briefed in the Supreme Court proceedings when the affidavit of Ms Spurr dated 13 November 2014 and that of Ms Lawrie dated 14 November 2014 were prepared. As discussed in further detail below by mid-November 2014 I had ceased to be counsel in the Supreme Court Proceeding and instead had arranged for Mr Tony Young (as his Honour Judge Young then was) to act as counsel in those proceedings.*
>
> *156. Instead, as I understand it, Law Society NT alleges that I affected the integrity of the evidence in the Supreme Court Proceedings: Statutory Supervisor Application at [8.17].*
>
> *157. I deny that allegation.*
>
> *158. The extent of my involvement in the preparation of Ms Spurr and Ms Lawrie's affidavits of 13 and 14 November 2014 respectively was to make suggestions to Mr Young in light of my superior knowledge of the underlying matter to assist him to come to grips with it. I deny that any contribution that I made did or could have affected the integrity of the evidence in the Supreme Court Proceedings.*
>
> *My role in the preparation of evidence **in mid-November 2014***
>
> *159. On 30 July 2014, Ms Lawrie commenced proceedings in the Supreme Court of the Northern Territory seeking, amongst other things, a declaration that — in reporting adversely to Ms Lawrie — the Commissioner failed to observe the requirements of procedural fairness: .... I agreed to act in that proceeding on Ms Lawrie's behalf [on] a conditional fee basis.*
>
> *160. Ms Lawrie's case in the Supreme Court Proceedings (as articulated in her statement of facts, issue and contentions:...) included allegations (at [7], [12]) to the effect that Ms Lawrie and her legal representatives relied upon the Ainsworth Letter.*
>
> *161. A directions hearing was held in the Supreme Court Proceedings on 14 October 2014. I appeared for Ms Lawrie at that directions hearing. Mr Michael Maurice QC appeared for the Commissioner. Before that directions hearing, Mr Maurice sought by agreement [two] discovery orders in relation to:*
>
> *(a) the reliance alleged at paragraph 7of Ms Lawrie's SFIC: the reliance alleged at paragraph 7 of Ms Lawrie's SFIC;*

(b) the state of mind alleged at paragraph 12 of Ms Lawrie's SFIC.

162. I did not think that that request was inappropriate and agreed to it. Orders were made accordingly.

163. From my discussion with Mr Maurice and the terms of this order, it became clear to me there was a real likelihood that I may have to give evidence as to my reliance on the Ainsworth Letter and my belief that, because no notice had been given, I did not think that adverse findings would be made against Ms Lawrie. In those circumstances, I decided that I could not continue to be counsel in the matter. After speaking to Ms Spurr, I spoke to Mr Tony Young of my Chambers (as his Honour Judge Young then was). Mr Young agreed to take over as counsel on a conditional fee basis. Prior to my conversation with Mr Maurice, I did not expect there to be any challenge to the reliance by Ms Lawrie, Ms Spurr and me on the Ainsworth Letter and therefore did not think that I would be a witness in the matter.

164. Although, by about the time of the directions hearing on 14 October 2014, I anticipated that it would be necessary for me to prepare an affidavit, I had no reason to believe at that stage that the Commissioner would challenge my credit or the credit of Ms Spurr or Ms Lawrie. I had known Mr Maurice QC for about 30 years at that stage and regarded him as a friend. I had been his junior on many occasions before I took silk. I had also known his instructor, Paul Maher, for about 25 years and also regarded him as a friend. He had briefed me in a number of matters. It did not occur to me that they would conduct a case challenging my credit. That possibility only became apparent to me in January 2015. Had I been made aware of that possibility; I would have ceased to have any role in the matter save as a witness and a person who was in possession of relevant documents. I would not have had any contact with the other witnesses or their evidence.

165. I was grateful that Mr Young was prepared to take over the matter as I was concerned that I might not be able to find someone whom I trusted to take my place. To assist him to familiarise himself with the matter, and as I did not expect that Halfpennys would be able to do it, in late October I asked the research assistant I was employing at the time on a casual basis, Ms Nadya Berova, to prepare a proper brief for Mr Young and to prepare a full chronology. As I recall, this was quite a significant job which she did not complete until mid to late November 2014.

166. Ms Lawrie's affidavits were due for filing on 11 November 2014. It seemed to me at that stage that Ms Lawrie, Ms Spurr and I would each have to provide affidavits. By his email of 4 November 2014, Mr Young asked me to tell him what assistance he required for this process ...I knew that it would be inappropriate for me, as a witness, to be present during the conferences to proof or finalise the affidavits of either Ms Lawrie or Ms Spurr. At some point — I don't recall when — I communicated this to Mr Young. I then made arrangements for Ms Lawrie to confer with Mr Young on Monday 10 November 20 for the purpose of providing a proof for a statement.

167. On 10 Nov 2014 at about 10:36 am, I sent an email ...to Ms Lawrie stating that I wanted to "have a quick chat" with her before 2pm (the time that had been set for her conference between her and Mr Young).

168. I had a quick chat with Ms Lawrie sometime between 12 noon and 2pm prior to her meeting with Mr Young. During that chat, I explained to her that I was no longer able to advise or appear for her in the Supreme Court proceedings and why. I explained to her that I had complete confidence in Mr Young's ability to represent her in the Supreme Court proceedings.

169. It appears ... that, at about 11:43am on 10 November 2014, Mr Young provided Ms Spurr with a document described as "Alistair's draft" of Ms Lawrie's affidavit (which was then forwarded onto Ms Lawrie:).

170. I do not recall how that document came to be created.

171. I have checked my electronic records and identified a document entitled "Affidavit Delia Lawrie UNSIGNED.doc". The text of that document appears to be identical to the text in the draft affidavit ... (that is, the "Alistair's draft" version of Ms Lawrie's affidavit). The metadata for "Affidavit Delia Lawrie UNSIGNED.doc" indicates that that document was created by me on 10 August 2014 and last modified on 21 August 2014

172. I did not attend the conferences that Mr Young had with Ms Lawrie and Ms Spurr to prepare their affidavits. I prepared a draft of my affidavit which I provided to Tony for him to settle at about 11:29pm on 10 November 2014 ... .

173. Mr Young provided me with drafts of at least Ms Spurr's affidavit on 11 November 2014 ... . Mr Young was still new to the matter, had not yet been fully briefed and as I recall he wanted my assistance to check that the affidavits met the requirements of the case. As Mr Young was supervising the matter and making the final decisions as counsel and as I was not speaking directly with either Ms Lawrie or Ms Spun¯ about their evidence, I felt comfortable doing this in the circumstances.

174 On 11 November 2014, I marked-up some minor suggested amendments to Ms Lawrie's draft affidavit and forwarded them by email to Mr Young at about 6:58pm .

175 In relation to Ms Spurr's affidavit I reworked some of the paragraphs to make the language clearer and to make explicit what I thought was implicit. I sent the draft with my suggested changes to Mr Young and Ms Spurr by email on 12 November 2014 for their "consideration" ... .

176 After 12 November 2014, I was not involved in the settling of Ms Lawrie's affidavit or Ms Spurr's affidavit into final form or with their execution.

198. In the course of Mr Wyvill's cross-examination the following exchange occurred, T 310:

> *Mr Wyvill, can I go to allegation 8. You accepted on the first day that you gave evidence a proposition that ... it has long been regarded as proper practice for legal practitioners to take affidavits of evidence from witnesses separately and to encourage witnesses not to discuss their evidence with others and particularly not with other potential witnesses, do you recall that I put that proposition to you on the first day that you commenced giving evidence in this matter?---You qualified it, I think, by adding the words as a general rule.*
>
> *As a general proposition. I think you said, if you accept it, as a general proposition you accepted that, correct?---Yes.*
>
> *And in relation to this allegation, you understand of course that the allegation is that you engaged in professional misconduct or some degree unsatisfactory professional misconduct by drafting that or accepting the affidavit of Ms Spurr dated 13 November 2014 and the affidavit of Ms Lawrie dated 14 November 2014 in the circumstances where you knew that you were likely to be a witness in these proceedings, correct?*
>
> *---Yes.*
>
> *And you don't ... deny that at the time that you drafted the affidavit of Ms Spurr dated 13 November 2014, you knew that you were likely to be a witness in the proceedings?---No, I don't deny that.*

And you don't deny that at the time at you drafted the affidavit of Ms Lawrie dated

14 November 2014, you knew that you were likely to be a witness in the proceedings, you don't deny that, do you?---No, I don't.

And can you explain to the Tribunal why, sir, you thought it was appropriate in those circumstances, to draft the affidavit of Ms Spurr, I'll start with Ms Spurr, by drafting the affidavit of Ms Spurr dated 13 November 2014?---I didn't draft her affidavit. She provided a first draft of it.

You settled it?---I changed it significantly and gave it to Mr Young.

So, when you say you changed it significantly, do you say that you – you say that you redrafted it, is that a better use of the term?---Look I think redrafting would probably be an accurate characterisation of it. What I did was, Ms Spurr provided a draft of her statement. It was clear to me in a form simply that wasn't capable of being used in a proceeding. I suspect it came to my attention because Mr Young gave me a hard copy of it to look at, to see whether I thought it was good enough and I then asked him to email it to me so I could do some changes to it. And what I did, because when you look at the affidavit, when you look at the draft affidavit, you will see that it's chronologically disorganised, that was its first problem. And its second problem, was that it stated – it inferred rather, than expressed the evidence. For example, Ms Spurr identified the importance of the statement in the letter in April 2014 that we remain - the clients remain, vitally interested in the outcome of the proceedings. She refers to that in her draft. What, of course, she means, is the background to that which was there was the Ainsworth reassurance et cetera. So, what I did to assist Mr Young was, and bearing in mind that I had her earlier affidavit, was to make that draft, put that draft into a useable form that was appropriate for the case. I was doing that because I knew we were under a tight timetable for providing those affidavits, the were due within a matter of days, perhaps a week or so and

I knew that Mr Young was very knew into the matter and I knew that without my help, they were unlikely to achieve that deadline with an affidavit that was going to be of the quality required for the case. That's what happened and that's why I did it.

… [A]s you can see from my emails, I was alive to the issue of need to protect the integrity of the evidence and hence, I didn't have any dealings direct with Delia and I left the entire matter, except for the final form and arranging for the execution to Mr Young as he was running the case. I thought that was an appropriate balance for the competing professional responsibilities in the case at that point.

Mr Wyvill, the answer that you've just given in respect of Ms Spurr, do you say equally applies to the affidavit of Ms Lawrie?---No, it doesn't, that was very different.

Did you draft that affidavit?---I did produce the first draft of it and I just gave it to Mr Young for him to do with it what he wanted to do with it. For him to treat it as he wished. That's as I recall it. That's my recollection. I had no dealings with her about her affidavit.

When you say it was very different, from Ms Spurr's the work you did with Ms Spurr's affidavit, by that were you referring to the fact that you drafted that affidavit rather than redrafting Ms Spurr's, correct?—No, no, it was because I just provided a draft to Mr Young and it was entirely up to him as to what he did with it. I think, I would have given, I would have copied Cathy in on the email with the amended draft probably direct to her. So, I didn't have the same reluctance about dealing with Ms Spurr, because she is a solicitor. I knew she is aware of the course about protecting evidence so I didn't have the same reluctance, but I still had some distance in relation to the matter.

On reflection sitting here today, on 11 September 2020, do you accept that you should not have had any involvement first of all in the redrafting of Ms Spurr's affidavit who is to be a witness in this proceedings? Do you accept that?---I don't accept - -

Sorry, thank you?---What I would say is that given what's happened, given with the experience of hindsight, if I looked at that matter again, as a pure question of prudence, I would have recommended to everybody that we give ourselves more time, get an extension of the time and then I would have given it to Mr Young, just to avoid this argument, not because I think it's the wrong thing, I did the wrong thing, but to avoid this contention as a pure question of risk management. But if that extension of time hadn't been granted and we were stuck in the same position, then I would have done exactly the same thing. I think the point you're missing, Mr Moses, if I may respectfully suggest to you, by the proposition you put to me about integrity of witness, is that this was settling the evidence for the record of court proceedings. And in my experience, that rule doesn't apply in anything like the same way as it does in ordinary ligation. I have done a lot of cases involving prerogative relief and it would be more than 20 or 30, and in most of those occasions, my solicitor and I will draft the affidavit afresh without consulting the client and present it to the client. Now, I had this - it has arisen on two occasions in my experience. One, that was a case I had against you where there were complexities over evidence about long meetings with traditional owners by the Land Council and we thought it necessary in that case to protect the integrity of the evidence and it arose in this case. I was alive to the issue and I made the judgment I made. But I do see it as being very different when you're dealing with cases where you're seeking to prove the record of legal proceedings.

…

And so you don't accept a proposition, sitting here today, that you should not have drafted Ms Lawrie's affidavit, correct?---Correct.

And you don't accept the proposition that you should not have redrafted Ms Spurr's affidavit, correct sir?---Correct.

And you say that if the time pressures were the same now in a matter as they were back then, in that matter, as they were back then, you would have done the same thing, correct?---Correct.

And that the only reason why you wouldn't do it now if there was more time was because of risk management - I think you used that phraseology, is that right?

---That's right, to avoid the risk of a concern, just as a prudential approach is always prudent in this situation, if it is available.

In ... terms of your understanding of this proper practice that you accept that as a general proposition, can we assume that in your time as a practitioner you have had cause to read decisions of Courts of Appeal about this issue?---Yes, I have researched - since this matter has arisen, for my own purposes I have undertaken a lot of research on this question and particularly on the research on the question of what the role is, what is appropriate in relation to proving the record in legal proceedings and as far as I am aware, that issue hasn't been examined. But I know what the practice is pretty well universally.

And in your researches did you come across the decision of the NSW Court of Appeal in Day v Perisher Blue Pty Ltd [2005] 62 NSWLR 731?---Yes, I did.

Yes, and it probably would have taken you not by surprise when I put to you the general proposition that I did on the first day of you giving evidence, which you accepted, correct?---Well, the answer to - - -

That is you - - -?---I am not aware, Mr Moses, of this - the point that you put to me on the first day of my cross-examination, being articulated in the case against me by the Law Society in the application. I don't think it's in there and I may be wrong, but I am not sure if it has been articulated, at any stage in the past. I don't think it has ever been said to me, on behalf of the Law Society, that that proposition from that decision in Day applies in relation to judicial review proceedings and proving a record. I don't think that's been put to me - until you did.

Sir, yes, sir, but you understand the allegation that's been made against you, which you have denied - because you've denied it, on your oath, on a couple of occasions now, that you deny that you engaged in professional misconduct, or alternatively unsatisfactory professional conduct by drafting and/or settling the affidavit of Ms Spurr and Ms Lawrie. You've denied that - that is, that allegation, in circumstances where you knew you were likely to be a witness in a proceeding. Do you deny that allegation, correct?---I deny it, yes.

199. The Applicant called Judge Anthony Young as a witness. Before his appointment as a judge of the Federal Circuit Court he had practised as a barrister in the Northern Territory. It was to the then Mr Young that Mr Wyvill turned when he realised, he could no longer act as counsel for Ms Lawrie in the proceedings against Mr Lawler, ultimately heard by Southwood J.

200. An affidavit from Judge Young was put into evidence and he was cross-examined. His first involvement in the matter appears to be his receipt of an email from Ms Spurr of 20th October 2014. By 10th November 2014 he was sufficiently involved for Ms Lawrie to attend on him. He believed he received formal instructions to act for Ms Lawrie in or about November 2014.

201. As Ms Spurr was a possible witness in the proceedings, Mr Young addressed the question of whether she should be present when he conferred with another witness and concluded that this would not be a breach of r17.30 of the *Law Society Northern Territory Rules of Professional Conduct and Practice* because he was satisfied that she was not "a lay witness" within the meaning of that rule. He so advised Ms Spurr. There is no suggestion that he contemplated that Mr Wyvill's on-going assistance might affect the integrity of the evidence in the proceedings or otherwise be improper. The contrary is the case. As explained in his affidavit

he continued to seek Mr Wyvill's assistance because the substance of the case involved details of the conduct of the Inquiry before Mr Lawler. Mr Young had no direct knowledge of any of these matters and he was largely dependent on Mr Wyvill and to a lesser extent, Ms Spurr, for information about them.

202. Mr Wyvill prepared the draft of Ms Lawrie's affidavit on 10th August 2014 and modified it on 21st August 2014. This was well before the complications associated with Mr Wyvill and Ms Spurr giving evidence in the proceedings emerged. Mr Wyvill provided this draft to Mr Young on 10th November 2014. Mr Young settled the draft in a conference with Ms Lawrie on that day and sent the settled draft to Mr Wyvill for comment. Mr Wyvill corrected the spelling of "adverse" and according to Particular 8.9.iii he deleted the first section of paragraph 14 in the draft. On our reading of the draft dated November 2014 the information in that section was duplicated in the next paragraph. We infer this is why it was deleted.

203.We are not satisfied that this involvement by Mr Wyvill in Ms Lawrie's affidavit affected the integrity of the evidence.

204. A draft of Ms Spurr's affidavit was provided to Mr Wyvill for comment on 11th November 2014. Mr Wyvill re-worked some of the paragraphs to make the language clearer and to make explicit that which he thought was implicit. He sent the draft to Mr Young and Ms Spurr on 12th November for their "consideration". According to Particular 8.1.iii he was later provided with a revised draft as to which he drew attention to a typographical error and some "tidy up" of the formatting.

205.When considering whether this involvement by Mr Wyvill affected the integrity of the evidence, we take into account the fact that Ms Spurr was a lawyer and not a lay witness. We are not satisfied that this involvement by Mr Wyvill in the preparation of Ms Spurr's affidavit affected the integrity of the evidence.

206. Allegation 8 is dismissed.

207. All the allegations having been dismissed, we dismiss Applications 1 and 2 of 2019.

THE HONOURABLE PETER EVANS: ______________________________

NARDINE COLLIER: ______________________________

HEATHER KING; ______________________________