SUPREME COURT OF QUEENSLAND

CITATION:	*Walters v Drummond & Ors* [2019] QSC 290
PARTIES:	**DARREN LESTER WALTERS** (Applicant) **v** **SHAUN DRUMMOND, HEALTH SERVICE CHIEF EXECUTIVE PURSUANT TO THE HOSPITAL & HEALTH BOARDS ACT 2011 (QLD)** (First Respondent) AND **METRO NORTH HOSPITAL & HEALTH SERVICE** (Second Respondent) AND **ANDREW HOWARD, INVESTIGATOR PURSUANT TO S. 190 OF THE HOSPITAL & HEALTH BOARDS ACT 2011 (QLD)** (Third Respondent) AND **ADAM FAIRHURST, INVESTIGATOR PURSUANT TO S. 190 OF THE HOSPITAL & HEALTH BOARDS ACT 2011 (QLD)** (Fourth Respondent)
FILE NO/S:	BS 14221/18
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11-12 June 2019; further submissions received 13-14 June 2019
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** **1. The findings contained in paragraphs 2.43-2.49, 2.52 - 2.53, 2.63, 7.44-7.48 and 7.54 of the report of the third and fourth respondents are set aside with effect from 17 August 2018;**

2. **The decision of the first respondent to suspend Professor Walters on 24 September 2018 is set aside from the date of this order;**
3. **The parties provide submissions as to costs and any further relief that they contend is required at a time to be fixed.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant was suspended under the *Public Service Act 2008* (Qld) while the third and fourth respondents investigated allegations arising out of incorrect claims for Commonwealth funding in relation to the Indigenous Cardiac Outreach Program – where the third and fourth respondents produced a Report making findings that the applicant had engaged in "maladministration" and "corrupt conduct" – where the third and fourth respondents have since conceded the finding of corrupt conduct involved an error of law and a denial of procedural fairness – where after receiving the final Report the first respondent suspended the applicant under s 189 of the *Public Service Act* on the basis he had formed a "reasonable belief" that the applicant was liable to discipline – where the applicant contends the third and fourth respondents made an error of law in misdirecting themselves as to the test for maladministration – where the applicant contends the third and fourth respondents made an error of law in conflating the concepts of maladministration and corrupt conduct – where the applicant contends the errors of law in the Report's findings of maladministration and corrupt conduct should be imputed to the suspension decision of the first respondent which he made in reliance on those findings – whether the findings of maladministration in the Report are affected by legal error – whether those errors of law if found to exist should also impugn the suspension decision – whether consideration of the Report was a condition precedent to the first respondent's suspension decision – whether the first respondent materially relied on the impugned findings in the Report

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the applicant contends the third and fourth respondents' decision making findings of maladministration was legally unreasonable – where the applicant contends the first respondent's suspension decision was legally unreasonable – whether the decisions of the first, third and fourth respondents were so unreasonable that no reasonable person could so exercise the power

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – where the applicant contends the third and fourth respondents denied the applicant procedural fairness in not informing the applicant of the elements of maladministration - where the applicant contends the third and fourth respondents further denied the applicant procedural fairness in failing to interview certain witnesses

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – where the applicant contends there was a reasonable apprehension of bias, actual bias and/or conflict of interest on the part of the first respondent

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the applicant contends the first respondent could not have formed a "reasonable belief" that the applicant was liable to discipline so as to enliven his power to suspend under s 189 of the *Public Service Act*– whether at the time the suspension decision was made the first respondent could have formed a reasonable belief the applicant was liable to discipline under a disciplinary law

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS

OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant contends the first respondent failed to take into account the mandatory consideration under s 189 of the *Public Service Act* of alternative duties that may have been available for the applicant to perform

Hospital & Health Boards Act 2011 (Qld), s 199

Judicial Review Act 1991 (Qld), s 20, s 23

Public Service Act 2008 (Qld), s 137, s 189, s 190

Accused A v Callanan [2009] 2 Qd R 112, cited

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, cited.

Attorney-General (NSW) v Quin (1990) 170 CLR 1, cited

Australia Pacific LNG Pty Limited & Ors v The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport [2019] QSC 124, cited

Australian Education Union v General Manager of Fair Work Australia (2019) 246 CLR 117, followed

Chen v Monash University (2016) 244 FCR 424, cited

Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389, cited

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576, cited.

Dorante-Day v Marsden [2019] QSC 125, distinguished.

Francis v Crime and Corruption Commission [2015] QCA 218, cited

George v Rockett (1990) 170 CLR 104, followed

Griffith University v Tang (2005) 221 CLR 99, cited

Isbester v Knox City Council (2015) 225 CLR 135, applied

Keating v Morris & Ors [2005] QSC 243, applied

Lo v Chief Commissioner of State Revenue (2013) 85

NSWLR 86, cited

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, cited

Minister for Immigration and Border Protection v SZVFW (2018) 163 ALD 1, applied

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, cited

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, cited

Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507, cited

Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) (2008) 251 ALR 80, followed

Prior v Mole (2017) 261 CLR 265, cited

COUNSEL:	J E Murdoch QC with S T Farrell for the applicant A L Wheatley for the first and second respondents R P S Jackson QC for the third and fourth respondents
SOLICITORS:	Franklin Athanasellis Cullen Lawyers for the applicant Clayton Utz for the first and second respondents McInnes Wilson for the third and fourth respondents

[1] Professor Walters, a cardiologist, was suspended while the third and fourth respondents, a partner and senior manager of BDO (Qld) Pty Ltd (**"the Investigators"**), investigated allegations relating to the incorrect lodging of claims for Commonwealth funding under the Indigenous Cardiac Outreach Program **("ICOP"**). While Professor Walters was exonerated of any fraud or dishonesty, the Investigators made findings of maladministration and corrupt conduct on his part in the report produced pursuant to the investigation (**"the BDO Report"**). As a result, Professor Walters was suspended by the first respondent, Mr Drummond, pending disciplinary proceedings. Mr Drummond is the chief executive of the second respondent, the Metro North Hospital and Health Service (**"Metro North"**). Professor Walters seeks to judicially review some of the findings of the Investigators in the BDO Report and Mr Drummond's decision to suspend him.

[2] The Investigators have conceded that in making the finding of corrupt conduct they denied Professor Walters procedural fairness and that there was no evidence to support such findings. Notwithstanding that concession, the Investigators contend the findings of maladministration were lawfully made and should not be impugned. Mr Drummond and

Metro North contend that the decision to suspend Professor Walters was also lawfully made. This Court must determine whether Professor Walters has established any ground of judicial review to justify further relief being granted, beyond relief in relation to the finding of corrupt conduct.

[3] Professor Walters has raised multiple grounds of review which he contends justify setting aside part of the BDO Report and Mr Drummond's decision to suspend him. As I have found that Professor Walters has established some grounds of judicial review that justify setting aside the findings in the BDO Report with respect to corrupt conduct and maladministration, it has not been necessary for me to consider all of the grounds raised. I have also found that Mr Drummond's decision to suspend Professor Walters should be set aside, because Mr Drummond materially relied upon the impugned findings in the BDO Report in reaching that decision.

Introduction

[4] The applicant, Professor Walters, is the Director of Cardiology at the Prince Charles Hospital. The Prince Charles Hospital ("**TPCH**") is part of the Metro North Hospital and Health Service.

[5] Professor Walters proposed and was responsible, at least in part, for the implementation and conduct of ICOP, which has sought to improve cardiovascular health in Indigenous Australians since 2007. It was, for the period relevant to the present case, managed by a State Manager, Mr Rohan Corpus, who was responsible for a number of employees. A Business Manager responsible to the Executive Director of TPCH also had a role in supervising the finances of ICOP, although what that precise role was is a matter of controversy.[1] ICOP received funding from the Commonwealth Government's Rural Health Outreach Fund administered by the "CheckUp" program, pursuant to an agreement negotiated by Mr Drummond and Metro North. Under the Outreach Services Agreement, Commonwealth funds were provided for reimbursements of travel and accommodation expenses incurred by certain categories of staff attending regional communities. The categories of staff entitled to claim such reimbursements were defined under the Agreement and included nurses and health care workers. The claims for funds were made by lodging Local Visit Reports ("LVRs") with CheckUp.

[6] In 2015, an internal audit[2] found that three LVRs had incorrectly claimed for travel payments for administrative staff who did not belong to any of the categories of staff entitled to reimbursements under the Agreement. That and other matters raised by the internal audit were the subject of discussion between Mr Corpus, Professor Walters and Mr Anthony Williams, who was the Executive Director of TPCH. Professor Walters wrote a memo in December 2015 summarising the response to the matters raised in the internal audit. The Investigators regarded that response as significant in terms of Professor Walters' responsibilities in relation to ICOP and the findings made against him.

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1 The business manager changed a number of times during the period of investigation, a matter to which the Investigators attached some significance in holding Professor Walters responsible for the incorrect LVR claims, even though they acknowledged he had no direct role.

2 Instigated by Professor Walters.

[7] In 2016, issues arose in relation to certain conduct by Mr Corpus, for which he was subsequently suspended in February 2017 while investigations were carried out. He resigned in September 2017. He was replaced by Mr Peter Malouf, who commenced work in November 2017. Subsequently, in December 2017, Mr Malouf raised issues with Professor Walters, amongst others, in relation to the administration of ICOP, including, in particular, allegations that ICOP had incorrectly invoiced CheckUp for travel expenses for nurses and health workers when ICOP did not employ such workers and, secondly, that administrative staff were undertaking clinical tasks. Notwithstanding that steps were being taken to address the matters raised by Mr Malouf, Mr Malouf made further complaints as to his treatment and the lack of action taken in relation to his concerns. As a result, the Human Resources Manager of TCPH advised the Manager of the Integrity Unit of Metro North, Ms Jordan Sara Neri,[3] of Mr Malouf's concerns. Ms Neri then sent a notification to the Crime and Corruption Commission ("CCC"), which subsequently recommended a "Public Interest Review" be carried out by Metro North, with monitoring by the CCC. The CCC identified matters of concern which were to be investigated in a "Matters Assessed Report" ("MAR"). The MAR raised two allegations against Professor Walters to be investigated as potential "corrupt conduct": (1) reprisal for making a complaint or public interest disclosure and (2) "misappropriation or fraud".

[8] Mr Drummond appointed Mr Howard and Mr Fairhurst, the Investigators, who were employed by BDO in Forensic Services,[4] on 23 March 2018 to carry out a health service investigation under Part 9 of the *Hospital & Health Boards Act 2011* (Qld). Mr Drummond signed the Terms of Reference stipulating the matters that were to be investigated by them. The Terms of Reference provided for a broader investigation than the matters identified by the CCC in the MAR.

[9] Professor Walters was suspended by Mr Drummond under s 137 of the *Public Service Act 2008* (Qld) while the investigation was carried out, which included suspension from his extensive clinical practice. Neither his clinical competence nor his conduct in clinical practice were the subject of any allegation or finding.

[10] The Investigators found that the allegations of fraud, misappropriation and reprisal against Professor Walters were unsubstantiated in the BDO report dated 17 August 2018.[5]

[11] The Investigators did find, however, that Professor Walters was responsible for ICOP and therefore, on the balance of probabilities, had engaged in conduct amounting to "maladministration", which was said to also meet the criteria of "corrupt conduct", for the purpose of s 15 of the *Crime and Corruption Act 2001* (Qld).

[12] Following the BDO Report being provided first to Mr Drummond and then to the CCC, Ms Neri informed the CCC that Metro North was taking disciplinary proceedings against Professor

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3 Ms Neri was previously known as Ms Sarah Bentley.

4 Mr Howard is a chartered accountant and Forensic Services partner, while Mr Fairhurst is an investigator who formerly served with New South Wales and Queensland police and was Head of Internal Investigations of Metro South Hospital and Health Service. Neither are legally trained.

5 An earlier draft was provided to Mr Drummond, which I will later discuss.

Walters as a result of the BDO Report. On 21 September 2018 the CCC agreed with that course, although the basis upon which it was regarded as appropriate for them to comment on the matter is not apparent, given that none of the matters to be assessed on behalf of the CCC were found to be substantiated.[6] Mr Drummond subsequently decided to suspend Professor Walters on 24 September 2018, pursuant to s 189 of the *Public Service Act 2008* (Qld), which again suspended him from his clinical role at TCPH, not just his role in administration.

[13] Professor Walters challenges the decision by the Investigators in the BDO Report in finding that he engaged in corrupt conduct and their findings of maladministration. He seeks orders quashing the findings made with respect to those matters and setting them aside. The Investigators have conceded that there was no evidence to support the finding of corrupt conduct and that Professor Walters was denied procedural fairness in relation to the finding of corrupt conduct, because he was not given the chance to respond to those allegations before the findings were made. That concession was only made after an interlocutory decision of Applegarth J, in which his Honour raised questions about the finding of corrupt conduct.[7]

[14] The concession by the Investigators means that Professor Walters is entitled to relief insofar as the grounds of judicial review challenge the finding of corrupt conduct. The Investigators contend the relief should be limited to declarations, whereas Professor Walters contends parts of the BDO Report should be quashed and set aside. The Investigators contend, however, that the findings in the BDO Report, particularly as to maladministration, are not otherwise amenable to judicial review.

[15] Mr Drummond and Metro North contend the decision to suspend was independent of consideration of the BDO Report and is not amenable to judicial review, even if the BDO Report is so amenable.

Issues to be determined

[16] The grounds of judicial review relied upon by Professor Walters in relation to those parts of the decision contained in paragraphs [2.43]-[2.55],[2.63] and [7.44]-[7.55] (inclusive) of the BDO Report are whether the decision in relation to the findings of maladministration:[8]

(a) Contained an error of law insofar as the Investigators misdirected themselves as to the test for maladministration;

(b) Involved a conflation of maladministration with corrupt conduct and should be set aside on the same basis as the findings of corrupt conduct or error of law;

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6 However no issue was taken in this regard.

7 *Walters v Drummond & Ors* [2019] QSC 97.

8 These are drawn from the applicant's submissions, which sought to narrow the grounds raised in the amended originating application in some respects. Although the applicant sought to summarise the issues for determination in Annexure A, it did not in fact capture all the contentions contained in the body of the submissions. The present case is one which would have benefitted from the exchange of statements of facts and contentions.

(c) Involved a denial of procedural fairness in not informing Professor Walters of the elements of maladministration;

(d) Was made without evidentiary justification;

(e) Was made as a result of Professor Walters being denied procedural fairness or involved a failure to take relevant matters into consideration as a result of:

(i) Particular witnesses not being interviewed, including Ms Karen Leighton (the Human Resources Manager at TCPH), who was identified by Professor Walters as being able to give evidence in relation to the demarcation of responsibility for financial matters in relation to the ICOP;

(ii) The manner in which the Executive Director of TCPH, Mr Anthony Williams, was interviewed;

(f) Resulted from the Investigators having inadequate regard to, or failing to take into account, a relevant consideration, namely ICOP's true organisational structure and evidence that Professor Walters was not responsible for financial and business matters in concluding that Professor Walters was responsible for the financial oversight of the State Manager and implementation of the 2015 audit results;

(g) Was so unreasonable that no reasonable decision-maker could have made it.

[17] An additional ground of review on the basis of bias or apprehended bias was abandoned at the hearing.

[18] The Court does not need to determine all of the grounds raised if it finds some of the grounds are established which justify the granting of relief.

[19] Professor Walters seeks to challenge two decisions contained in Mr Drummond's letter to Professor Walters dated 24 September 2018, identified as:

(a) The decision that Professor Walters was liable to a disciplinary process, subject to his response ("**the disciplinary decision**"); and

(b) The decision of 24 September 2018 to suspend Professor Walters pursuant to s 189 of the *Public Service Act 2008* (Qld) ("**the suspension decision**").

[20] The decision to suspend was made, *inter alia*, on the basis that Professor Walters was liable to a disciplinary procedure. The relief sought by Professor Walters is to set aside the suspension decision. I proceed on the basis of considering the suspension decision, which encompassed the disciplinary decision insofar as it was relevant to the suspension decision, and do not consider them separately.

[21] The grounds of review relied upon in relation to the suspension decision are that:

(a) Mr Drummond relied upon the BDO Report and the findings in the BDO Report alleged to be affected by error would also affect the decision to suspend Professor Walters and commence disciplinary proceedings;

(b) The decision was made without evidentiary basis;

(c) The decision constituted an improper exercise of power by reason of:

(i) A failure to properly consider the organisational structure of ICOP and Professor Walters' role within the organisation;

(ii) Being so unreasonable that no reasonable person could exercise the power;

(iii) Constituting an error of law or otherwise being contrary to law.

(d) There was a reasonable apprehension of bias by association, actual bias and/or conflict of interest, such that Mr Drummond should have stood aside for the purposes of the investigation into ICOP and disciplinary considerations involving Professor Walters, given:

a. The history of the relationship between Professor Walters and Mr Drummond, which is said to have been acrimonious;

b. Mr Drummond's role in relation to the agreement between CheckUp and ICOP;

c. The involvement of Mr Drummond's office and line reports in the administration of ICOP;

d. The decision by Mr Drummond to suspend Professor Walters from clinical duties as well as administrative duties; and

e. The nature of Mr Drummond's relationship with Mr Curran, a partner of BDO who was also on the Board of Metro North;

(e) There was a breach of procedural fairness by Mr Drummond and Metro North insofar as Professor Walters was not given proper opportunity to reply to the report of BDO dated 17 August 2018 and/or given access to Karen Leighton;

(f) Mr Drummond was obliged to accord Professor Walters procedural fairness for the suspension in light of s 190(2) of the *Public Service Act 2008* (Qld), on the basis he was not suspended on his normal remuneration;

(g) Mr Drummond failed to consider all alternative duties Professor Walters could carry out as required pursuant to s 189(2) of the *Public Service Act 2008* (Qld) which was a precondition to suspending Professor Walters;

(h) Mr Drummond did not have the requisite reasonable belief as required under s 189(1) of the *Public Service Act 2008* (Qld) that Professor Walters was liable to discipline under a disciplinary law, nor was "maladministration" a breach of any disciplinary law.

[22] A significant part of Professor Walters' argument is based on Mr Drummond having relied on the BDO Report in making the suspension decision. As to the concessions made by the Investigators in relation to corrupt conduct, counsel for Mr Drummond and Metro North contend that it is unnecessary for them to actively engage in argument as to the legality of the findings in the Report, as the proper approach is to consider the decision at the time it was made, namely 24 September 2018, not with the benefit of hindsight or a court decision as to error. Thus, they contend that neither the concession now made by the Investigators that there is no proper foundation for the finding of corrupt conduct, nor any other ground of judicial review that may affect the findings in the BDO Report, affect the validity of the

suspension decision. Mr Drummond and Metro North contend that, in any event, other material was relied upon and taken into account in making the suspension decision apart from the BDO Report, including the observations and remarks of the CCC, which particularly dilutes the materiality of any error found in relation to the BDO Report.

[23] Mr Drummond and Metro North further contend that none of the other grounds of review are made out in relation to the suspension decision.

[24] A number of complaints have been raised on behalf of Professor Walters which include complaints as to factual findings. While factual findings may be the subject of judicial review, judicial review in that context is of limited scope.[9]

[25] In considering the matter, the Court must be mindful of the limits of judicial review. As was stated by Brennan J in *Attorney-General (NSW) v Quin*:[10]

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

[26] Unfortunately because of the nature of the arguments raised on both sides, it is however necessary to descend into the factual findings in order to consider the matters raised.

Application of *Judicial Review Act 1991* (Qld)

[27] In order for a decision to be subject to the *Judicial Review Act 1991* (Qld) ("**the JRA**"), it must relevantly be a decision to which the Act applies. That is "a decision of an administrative character … under an enactment".[11] A decision must be one that is "final and operative", such that it is a substantive determination and resolves a substantive issue.[12]

[28] The requirement for the decision to be "under an enactment" involves two criteria:

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9 See *Crime & Misconduct Commission v Assistant Commissioner J P Swindells &Ors* [2009] QSC 409 at [14], per Applegarth J. Findings of fact may be open to review where a factual conclusion is not reasonably open to a decision-maker acting according to law on the basis of probative evidence and it is a factual conclusion no reasonable decision-maker could reach. Such a finding may be an error of law if it is not one which it would be possible to reach on the basis of probative evidence without committing legal error.

10 (1990) 170 CLR 1 at 35-36.

11 *Judicial Review Act 1991* (Qld), s 4(a).

12 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337.

> "…first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment."[13]

[29] None of the respondents contend that the JRA does not apply to the decisions the subject of the statutory order of review identified in this hearing, including in relation to the BDO Report. I proceed on that basis. This issue had been raised in an earlier application to dismiss the application for a statutory order of review under s 48 of the JRA. In *Walters v Drummond & Ors,*[14] Applegarth J determined the application, albeit on an interlocutory basis, and found that the BDO Report is amenable to judicial review under the JRA. His Honour relevantly found:[15]

> "The report was made under an enactment, namely s 199 of the *Hospitals & Health Boards Act*. It was a precondition to the taking of action under s 199 by the first respondent and is itself taken to be the making of a decision. The decision, in the form of the report, was "final and operative". In the language of *Bond*, it was a substantive determination and resolved, at least in a practical sense, a substantive issue that had called for investigation." (footnotes omitted)

[30] His Honour further found that the making of the Report exposed the applicant to adverse action under s 199(8) of the *Hospitals and Health Boards Act 2011* (Qld) ("**the HHBA**") and thereby affected his legal rights.[16] His Honour found that the BDO Report was a statutory precondition to the first respondent taking action under s 199(8) of the HHBA. The action which the first respondent decided to take included suspending the applicant on 24 September 2018 and the action taken was based on the BDO Report.[17]

[31] His Honour considered that even if he was wrong that the BDO Report was taken to be the making of a decision for the purposes of the JRA, at the very least Professor Walters' reputation was seriously affected by the Report. Accordingly, if the Report did not afford procedural fairness to Professor Walters, he would be entitled to the grant of declaratory relief in accordance with the decision of *Ainsworth v Criminal Justice Commission*.[18]

[32] His Honour further found that the decisions to suspend and institute a disciplinary process were decisions "under an enactment", within the meaning of the JRA. The decision was made

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13 *Griffith University v Tang* (2005) 221 CLR 99 at [89].

14 [2019] QSC 97.

15 At [44] and [51]. His Honour considered that the present decision was not materially different from that considered in *Vega Vega v Hoyle & Ors* [2015] QSC 111.

16 At [48], which included the action that Mr Drummond was authorised to take under the law of contract or under the statutory powers governing suspension and discipline.

17 At [46]. Metro North disputes that the Report was a precondition to action under s 189 of the PSA.

18 (1992) 175 CLR 564*;* [2019] QSC 97 at [49]. The applicant did not at the hearing seek any relief under Part 5 of the *Judicial Review Act 1991* (Qld).

under a statute, namely s 189(1) of the PSA. That decision can only be made if the chief executive reasonably believes the employee "is liable to discipline under a disciplinary law". His Honour considered the relevant question as to whether the decision was reviewable, namely whether or not the decision to suspend was a final and operative decision, which was a substantive determination that resolved a substantive issue. Professor Walters had provided evidence that the suspension said to be on "full pay" did not take into account overtime and fees earned from private practice.[19] Under the terms of the suspension, he was permitted to engage in alternative work but not any other employment he held at the time of his suspension, including any private practice work for hospitals within Metro North. Given the restrictions placed upon Professor Walters, and the fact that there was evidence that he was not being remunerated to take into account overtime and fees earned from private practice, his Honour found that the suspension did have an immediate effect by precluding him from performing his ordinary duties and that it was a decision which was therefore amenable to judicial review.[20]

[33] There is no question that Professor Walters is relevantly aggrieved by the respective decisions of the respondents and thus has standing to bring the application for a statutory order of review.[21]

Legislative Framework – appointment and investigation by BDO

[34] Section 190 of the HHBA provides for the chief executive to appoint a person as a health service investigator to undertake an investigation under Part 9 of the Act. Pursuant to s 189 of the HHBA:

> "The functions of a health service investigator are to investigate and report on any matters relating to the management, administration or delivery of public sector health services, including employment matters."

[35] Pursuant to s 191 of the HHBA, a health service investigator holds office on any conditions stated in, relevantly, the investigator's instrument of appointment. A health service investigator is given broad powers under s 194 of the HHBA for the purpose of carrying out the investigation.

[36] Pursuant to s 199(1) of the HHBA, a health service investigator must prepare and provide a report to the appointor for each health service investigation. In the present case, the appointor was Mr Drummond.

[37] Section 199(4)-(8) of the HHBA provides as follows:

> "(4) Subsection (5) applies to a report provided to the chief executive after an investigation in a Service.

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19 This is distinct from the issue of whether "full pay" was "normal remuneration" for the purposes of s 189 of the PSA, which is the subject of a separate dispute.

20 Referring to *Dunstan v Orr* (2018) 217 FCR 559, particularly at [101].

21 *Judicial Review Act* 2000 (Qld), s 20.

(5) After considering the report, the chief executive may issue a direction to the Service.

(6) The Service must comply with the direction.

(7) Subsection (8) applies to a report provided –

(a) to the chief executive after an investigation in the department; or

(b) to a health service chief executive after an investigation in the Service.

(8) After considering the report, the chief executive or the health service chief executive may take the action he or she considers appropriate in relation to the matters identified in the report." (emphasis added)

[38] Professor Walters was suspended during the investigation pursuant to s 137 of the *Public Service Act 2008* (Qld). That section relevantly provides:

"(1) The chief executive of a department may, by notice, suspend a public service officer from duty if the chief executive reasonably believes the proper and efficient management of the department might be prejudiced if the officer is not suspended. "

Terms of Reference

[39] The CCC received a notification from Ms Neri of matters which she considered raised questions of corrupt conduct. The CCC created a Matters Assessed Report ("**MAR**"). The MAR was provided by the CCC to Metro North to conduct a CCC public interest review, noting that Metro North intended to engage external investigators to examine the issues and report to the CCC. The matters to be investigated were, firstly, a misuse of authority arising out of an alleged reprisal, and secondly misappropriation or unauthorised use of resources. The subjects of the investigation were employees of Metro North including Professor Walters. The CCC directed that no action was to be taken by Metro North until the CCC had reviewed the report and provided advice to Metro North.

[40] Draft Terms of Reference were prepared by Ms Neri and provided to Mr Drummond, who signed them. The Terms of Reference provided that, inter alia:[22]

"The Health Service Chief Executive has determined it is appropriate to undertake an investigation (the Investigation) to examine the allegations, and to appoint an external investigator (the Investigator) under Part 9 of the *Hospital and Health Boards Act 2011*.

The Investigation will seek to examine allegations identified by the CCC and will further, identify any systemic weaknesses or workplace culture deficiencies and make recommendations for system and culture improvements."

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[22] Affidavit of J S Neri, affirmed 3 May 2019, Exh JSN-4.

[41] The scope of the investigation provided for in the Terms of Reference stated:[23]

> "**Scope of the Investigation**
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> The focus of the Investigation is to assess the allegations initially referred by MNHHS to the CCC and to determine whether the alleged conduct relating to fraudulent invoicing to CheckUp by any subject officer(s) identified as a result of the Investigation, is capable or not capable of being substantiated on the balance of probabilities. Further allegations have been made by the discloser indicating he has suffered reprisal action as a result of making his initial disclosure. The investigation should also seek to determine if the allegation of reprisal action against the discloser is capable or not capable of being substantiated on the balance of probabilities.
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> In addition, the Investigation is to examine the governance of the ICOP Service, and the management and processes (or lack of) utilised in:
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> - Local Visiting Reports (LVR) and invoices issued to CheckUp in order to receive federal funds as reimbursements for expenses such as travel costs, accommodation and meal allowances.
> - Storage and handling of confidential patient information.
>
> The Investigators have been appointed under section 190 of the *Hospital and Health Boards Act 2011* to specifically investigate the allegations which were subject of the referral to the CCC and any subsequent allegations identified during the course of the Investigation.
>
> The Investigation Report prepared by the external investigator, should:
>
> 1. Identify **any matter** where there is sufficient evidence to substantiate an allegation (on the balance of probabilities) which may be considered corrupt conduct (in accordance with the definition), including maladministration against an identified subject officer. [emphasis added]
> 2. Identify **any other matters** where there is sufficient evidence to substantiate an allegation (on the balance of probabilities) which may be a breach of MNHHS or Queensland Health policy, procedure, guideline or a breach of the Code of Conduct which is not considered corrupt conduct, against an identified subject officer.
> 3. Identify **any matter** which has the potential to negatively affect the professional and appropriate operation of the ICOP service.
> 4. Review departmental systems(s) related to individual staff performance where relevant.
> 5. Examine the administration and governance arrangements related to the travel, accommodation, car hire and meals and/or incidental claims for

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[23] Affidavit of J S Neri, affirmed 3 May 2019, Exh JSN-4.

ICOP administration staff who attended clinics in the place of health care professionals….."

("**matters to be addressed**")

[42] The Terms of Reference also outlined the matters that were to be contained in the Investigation Report as follows:[24]

"The comprehensive Investigation Report should be in the required format and include detailed findings and recommendations, and include:

- an **executive summary** suitably worded for **broad distribution to staff and stakeholders** including a summary of findings and recommendations;
- where possible, findings of fact in respect of the issues referred to the CCC as suspected corrupt conduct;
- where possible, a comprehensive account of any identified breaches by any individual(s) of any policy/procedure or departmental guiding documentation and the evidence relied upon;
- an assessment in relation to the findings, and any evidence relied upon to form these conclusions;
- a comprehensive account of the actions of individuals that may require remedial management action;
- clearly identify any inferences derived from hearsay;
- include all documentary evidence, including any signed records of interview/statements and append these to the report;
- include, in the body of the report, relevant excerpts from records of interview/statements that are credible and significant to the findings made by the Investigator.

Any systemic issues identified during the course of the Investigation should be addressed and recommendations for systems improvements made where appropriate (or otherwise recommendations as to further investigation by persons in other fields of expertise)."

[43] The Terms of Reference required that the Investigators provide the chief executive with a draft of the Report for consideration as to whether the Terms of Reference had been met. The scope of the investigation, matters to be addressed and matters to be included in the Investigation Report were expressed in different terms, making it difficult for the Investigators to determine the proper scope of their investigation. They prepared a summary of allegations

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[24] Affidavit of J S Neri, affirmed 3 May 2019, Exh JSN-4.

in Table 2.2 of the BDO Report which they extrapolated from the Matters Assessed Report and Terms of Reference, which was in broader terms than the Terms of Reference had been.[25]

[44] Instruments of Appointment were signed by Mr Drummond appointing Mr Fairhurst, Mr Howard and Ms Corbett as investigators, pursuant to s 190 of the HHBA. The Instruments of Appointment provided for each of the Investigators to undertake an investigation into ICOP and review the five matters identified in the Terms of Reference,[26] including to "[i]dentify **any matter** where there is sufficient evidence to substantiate an allegation (on the balance of probabilities) which may be considered corrupt conduct (in accordance with the definition), including maladministration against an identified subject officer", with two additional matters:[27]

- "Make recommendations that when implemented would lead to the remediation of any identified deficits.
- Any other issues identified by the investigation team."

[45] The Instruments of Appointment further stated that "the investigation should be conducted in accordance with the relevant Terms of Reference which may be amended from time to time during the course of the investigation".[28] There was no evidence of any amendments being made.

Circumstances leading to the BDO Report

[46] Three investigators were originally appointed: Mr Howard, Mr Fairhurst, and Ms Corbett, all of whom worked for forensic services at the firm BDO. Ms Corbett did not in fact undertake the task as investigator and was removed as a party to this action. The Investigators were provided with CCC "Corruption in Focus" guidelines, which included guidelines for the assessment of evidence.

[47] During their investigation, the Investigators reviewed a number of documents, including the Metro North internal audit report dated 23 April 2015 and the responses prepared by Professor Walters on 21 and 23 December 2015; findings contained in the Livingston Report of June 2017; and various other correspondence in 2017 and 2018.[29] Mr Malouf, the Complainant State Manager of ICOP from November 2017, was interviewed. The Investigators also interviewed Mr Goodman, who was a Senior Project Officer with ICOP; Professor Walters; Mr Stephenson, the Business Manager of TCPH; Mr Adrian Hobbs and Miss Hale Robertson, who worked with CheckUp; Mr Mark Beilby, a previous Business Manager of Heart and Lung at TCPH; and Mr Hayden Beilby, a Project Officer with ICOP. The Interim Executive Director of TCPH, Mr Williams, was interviewed by a senior manager of BDO, but not by either of the

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25 No issue has been raised for the Court's consideration in this regard.

26 See [40] of the reasons above.

27 Affidavit of J S Neri, affirmed 3 May 2019, Exh JSN-4.

28 Affidavit of J S Neri, affirmed 3 May 2019, Exh JSN-4.

29 Affidavit of A Fairhurst, sworn 17 May 2019, [6].

Investigators. Ms Gorring, a Project Officer with ICOP, Mr Corpus and Ms Leighton were not interviewed. According to Mr Fairhurst, he listened to the interview with Mr Williams before reaching his own conclusions.[30]

[48] Despite Professor Walters suggesting that the Investigators should interview Ms Karen Leighton, particularly in relation to the demarcation of roles in ICOP and responsibility for financial matters, the Investigators did not interview her. Mr Howard and Mr Fairhurst stated in their affidavits that they did not consider she could provide relevant evidence.[31]

[49] A list was provided to Professor Walters by the Investigators which outlined what were said to be the types of allegations which Professor Walters had to address. The list of allegations referred to included:

No	Type	Allegation
…	…	…
2	Misappropriation or unauthorised use of resources	Involved in fraudulent application and receiving of federal funding
3	Misappropriation or unauthorised use of resources	Involved in fraudulent completion and submission of Federal funding forms such as LVR's
4	Misappropriation	Reporting of non-existent staffing costs for reimbursement of Federal funding
…	…	…
6	Misuse of Authority	Involved in or allowing staff to personally profit from ICOP program whilst out on clinic.
7	Failure in duties	No governance surrounding program scope, deliverables, formal processes/quality controls in place surrounding ICOP practices.
…	…	…

[50] In the BDO Report's Summary of Allegations,[32] item 2 above was said to arise out of the MAR of the CCC and the category of allegations was said to be "fraud". The remaining matters 3, 4,

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30 Affidavit of A Fairhurst, sworn 17 May 2019, [22].

31 Affidavit of Fairhurst sworn 17 May 2019 [20]; Affidavit of A Howard affirmed 17 May 2019, [20].

32 BDO Report, Summary of Allegations, Table 2.2.

6 and 7 were said to be "considerations", not allegations, and to be derived from the Terms of Reference.[33]

[51] The Investigation Report was to be completed by 23 June 2018. In fact, it was not completed until early August.

[52] A draft report was provided to Ms Neri on 8 August 2018, who provided it to Mr Drummond on the same date.[34] The final report was provided by the Investigators on 17 August 2018. The draft report was subsequently amended in a number of respects, as was evident from a comparison with the final report.[35]In particular, a number of findings against Professor Walters were strengthened in the final report, for unexplained reasons. The Investigators submit that given the Report was to be provided to Mr Drummond to determine whether the Terms of Reference had been met, the Court could readily infer the reasons for the changes for the Report based on that process.

The BDO Report

[53] The BDO Report is lengthy. I highlight in a summary form some of the matters relevant to this proceeding. However, in determining this matter, I have had regard to the whole of the BDO Report.

[54] The Terms of Reference did not define "maladministration", nor give any explanation of its origin. The term was not referred to at all by the CCC.

[55] In the Executive Summary of the BDO Report, under the heading "Maladministration", the Investigators stated that Professor Walters is responsible for ICOP "as outlined in his interview, statement, witness versions, and his contract of employment".[36] Professor Walters had in fact outlined in his statement the areas for which he was responsible and those where he considered he had nominated others to be responsible, the latter of which included all financial matters. Paragraph 2.44 set out matters that are said to demonstrate his involvement in identifying and resolving ICOP issues, which were ad hoc matters including addressing issues identified as a result of the 2015 internal audit report. The Report stated that Professor Walters did not directly get involved in the issues concerning misleading LVRs.

[56] At [2.45] - [2.47], the Investigators referred to a definition of "maladministration" as follows:

> "[2.45] The Queensland ombudsman defines maladministration; 'includes administrative actions that are unlawful, unreasonable, unfair, improperly discriminatory, taken for an improper purpose or otherwise wrong and has the charter to investigate matters of maladministration

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33 BDO Report, Summary of Allegations, Table 2.2.

34 Affidavit of SPC Drummond, affirmed 14 May 2019, [40].

35 Applicant's Outline of Argument, Annexure B.

36 At [2.43].

in public sector entities'. Generally, maladministration relates to conduct involving an action or inaction of a serious nature.

[2.46] In relation to the element of being 'unreasonable' this includes failures to rectify identified mistakes, errors, oversights or improprieties.

[2.47] In relation to the element of 'otherwise wrong' this includes negligent conduct, failures to meet acceptable or industry standards for public administration, good judgement, integrity and the like."

[57] The origin of the definition is unknown and was not clarified in this proceeding by evidence from either Mr Fairhurst or Mr Howard.

[58] At [2.48], the Report stated that "[t]he relevant ac ts or omissions are maladministration". Although the Report did not specifically identify the acts or omissions themselves, they were said to constitute maladministration for the following reasons:

"(i) There is clear action in 2015 of submitting misleading LVR's that are factually 'wrong' and an omission of ensuring they do not continue and are still considered 'wrong' for a number of years. This was highlighted in the Internal Audit Report.

(ii) There is a clear 'unreasonable' action of omission in resolving or rectifying the mistakes, errors, oversights and impropriety leading to continued 'wrong' LVR's for a number of years.

(iii) In relation to the above matters there has to be an act or omission. There is an 'unreasonable' act of continuing to submit the LVR's that are misleading and there is an omission from ensuring they do not continue to be submitted in a way that is misleading.

(iv) There appears to be a distinct lack of judgement, integrity, governance and industry standards for public administration in failing to rectify identified mistakes and errors and to provide instruction or guidance to ICOP staff."

[59] Under the heading "Findings – LVRs and Governance", the Report made the following findings:

"2.52 Subject Walters is responsible for ICOP and therefore **on the balance of probabilities the actions of Subject Walters is considered 'maladministration'.**

2.53 Maladministration also meets the criteria of corrupt conduct as per Section 15 of the Act.

2.54 Subject Walters is responsible for ICOP and therefore has allowed Subject Goodman and Subject Gorring to perform roles and misrepresent roles of AHPRA registered practitioners. By doing so these **ICOP staff have, on the balance of probabilities, breached the National Law – *Health Practitioner Regulation National Law 2009***. Consideration should be given to referring this issue to AHPRA."

[60] The Investigators contend that the matter to which the finding of "maladministration" was directed was the failure by Professor Walters to follow up on whether actions identified in a memo dated 23 December 2015 had been implemented. The Executive Summary at [2.40], under the heading "Considerations – LVRs and Governance", identified matters in Table 2.2 and the Terms of Reference to which consideration was given, namely the involvement of all subject officers including Professor Walters in:[37]

> "…ICOP's governance of LVRs and invoices issued to CheckUp in order to receive federal funds as reimbursements for expenses such as travel costs, accommodations and meal allowances…'
>
> '… Allowing of Administration Officers to practise as health workers that are not eligible…'
>
> 'Non-governance surrounding program scope, deliverables, formal processes and quality controls relating to ICOP…'"

[61] At [2.42], under the heading "BDO Observations", the Investigators stated that having regard to the investigations completed they had reached a number of views, which included:

(a) That no improvements were made to the LVR submission process, as LVRs submitted between 2015 and 2017 continued to incorrectly claim reimbursements for a cardiology nurse and health worker;

(b) They did not observe any evidence of follow up by subject Walters regarding the undertakings provided by him to witness Williams to resolve ICOP issues identified in the 2015 audit report findings;

(c) There was a lack of governance around the review and approval of documentation and information. No process could be identified at that time indicating a review process of LVRs completed prior to submission.

[62] Although the findings in paragraphs 2.52 – 2.53, under the heading "Findings – LVRs and Governance", appear to have relied on some of the matters identified in paragraphs 2.40 – 2.42 of the BDO Report, the findings of "maladministration" extended beyond those matters.

[63] Section 7 of the BDO Report is headed "Consideration – LVRs and Governance". It is a more expansive explanation of the evidence and reasoning relevant to the matters in the Executive Summary. It set out a summary of witnesses' interviews, evidence and BDO's observations.

[64] Table 7.2 at [7.39] outlined a number of potential breaches of the Agreement with CheckUp. Paragraph 7.40 of the BDO Report noted that s 6.1 of the Agreement provided for the contractor to provide to CheckUp a nominated contact person, with whom to liaise in relation to the Agreement. While it did not suggest that person was Professor Walters, the Report proceeded in the following paragraph to discuss Professor Walters' employment contract.

[65] The Report further referred at [7.41] to the employment contract of Professor Walters and identified his key responsibilities as including "Outreach Services".

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37 At [2.40].

[66] The key responsibilities of Professor Walters identified in Professor Walters' contract included "Lead development of Department of Cardiology on the TPCH campus and outreach services". The Investigators stated in the BDO Report that they understood Outreach Services to include ICOP and further stated that, "therefore the responsibility of ICOP rests with Subject Walters".[38] There was no analysis by the Investigators of the organisational chart or demarcation of responsibilities within ICOP.

[67] At [7.43], it was stated:

> "Further, BDO understands that MNHHS would not be able to be directly responsible for all contracts they administer and as such divulges responsibility to a responsible official.
>
> Having regard to ICOP, on 20 July 2015 Subject Walters responded in an email to Anthony Williams, indicating that he established and sponsored the program since inception."

[68] The conclusions in [7.42] and [7.43] involved a convoluted and somewhat tenuous chain of reasoning founded on little evidence and without any detailed analysis of the roles of staff within ICOP or the ICOP structure for lines of reporting.

[69] Under the heading of "Maladministration", [7.44] of the BDO Report began with the conclusion that:

> "Subject Walters is responsible for ICOP, therefore on the balance of probability, the actions of Subject Walters is considered 'maladministration'.

That finding was repeated in [7.54].

[70] After repeating the definition of "maladministration" provided at [2.45] – [2.47] and at [7.45] – [7.47], the Report proceeded in [7.48] to state that "the relevant acts or omissions are maladministration", again without specifically defining the "acts or omissions" being addressed.

[71] [7.48] of the Report stated that:

> "7.48 The relevant acts or omissions are maladministration, the reasons for which include the following:
>
> i) There is clear action in 2015 of submitting misleading LVR's that are factually 'wrong' and an omission of ensuring they do not continue and are still considered 'wrong' for a number of years. This was highlighted in the Internal Audit Report.
>
> ii) There is a clear 'unreasonable' action of omission in resolving or rectifying the mistakes, errors, oversights and impropriety leading to continued 'wrong' LVR's for a number of years.

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[38] BDO Report, [7.42].

iii) In relation to the above matters there has to be an act or omission. There is an act of submitting of the LVR's that are misleading and there is an omission from ensuring they do not continue to be submitted in a way that is misleading.

iv) There appears to be a distinct lack of judgement, integrity, governance and industry standards for public administration in failing to rectify identified mistakes and errors and to provide instruction or guidance to ICOP staff.

v) Walters has demonstrated his involvement in identifying and resolving ICOP issues including:

a) Acknowledging Mr Anthony William's [sic] request to resolve the issues identified as a result of the 2015 Internal Audit Report.

b) Taking responsibility to lead meetings with Witness Williams and Mr Rohan to resolve the Audit identified issues.

c) Chairing the monthly ICOP meetings.

d) Endorsing documentation outlining that as the Director of Cardiology he is also responsible for ICOP.

e) Admitting to the investigators as of 2015 he became the direct line supervisor of the ICOP State Manager.

f) Heavily involved in the HR process involving disciplinary issues with Mr Rohan Corpus in 2017.

g) Directly involved in resolving the ICOP issues again identified by the Complainant in late 2017. Subject Walters was directly involved in dealing with the HR issues raised by the Complainant also in relation to attempting to amend the relationships between ICOP staff, specifically the breakdown in the relationship between the Complainant and Subject Goodman. Subject Walters however, did not appear to be directly involved in the issues concerning the misleading LVRs. (emphasis added)

vi) Having regard for Section 15 of the Qld *Crime and Corruption Act 2001*, the below points indicate non-compliance and reasoning:

a) Section 15.1 Corrupt Conduct *means conduct of a person, regardless of whether the person holds or held an appointment*.

Observation: *Subject Walters holds an appointment as a public official indicated by his Contract of Employment with MNHHS. Subject Walters' contract indicates he has a key responsibility for outreach services.*

b) Section 15.1 a) adversely *affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of* –

i. a unit of public administration

Observation: *The misleading LVR's submitted to CheckUp has directly and adversely affected the performance of functions of MNHHS as a unit of public administration. CheckUp inform that due to the LVR issues the Service Agreement between CheckUp and MMHHS has been amended. ATSI Branch also inform that due to the LVR issues they have reviewed their annual funding of approximately $950,000 and are going to cut it to approximately half this amount. Also, during investigations the ICOP service was suspended, meaning no community outreach for Cardiology Services was being provided.*

c) Section 15.1 b) *results, or* could *result,* directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that –

ii. involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or

Observation: *Subject Walters, Mr Rohan Corpus and Witness Beilby were aware of the issues identified in relation to the LVR's and did not rectify the issues in a timely manner. This resulted in LVR's being submitted with misleading information to a Federal Organisation from 2015 to 2018, the period under investigation.*

Subject Walters, who holds an appointment and under his employment contract was entrusted with the key responsibility of outreach services; *which includes ICOP. Subject Walters had knowledge of the 2015 Audit report, informed witness Williams he would have it fixed and omitted in following this through.* (emphasis added)

iii. involves a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment.

Observation: The misuse, misleading information submitted to CheckUp on the LVR's resulted in public funding being paid / misused for a purpose not agreed to by the Commonwealth. As noted, ICOP is the key responsibility of Subject Walters, a person holding the appointment.

d) Section 15.1 c) *is engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person;*

Observation: *As a result of the incorrect reimbursement funding received from CheckUp ICOP / MNHHS would have more ATSI branch funding available to improve operations at ICOP as they did not claim reimbursement for the AO's from the ATSI funding.* ***MNHHS has also received a financial benefit in LVR reimbursement from CheckUp for a Cardiology Nurse and Cardiology Health Worker that did not attend ICOP*****.** (emphasis added)

e) Section 15.1 d) *would, if proved, be* –

i. a criminal offence; or

ii. a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment.

Observation: As a result of the limited action taken to resolve the misrepresentation of information provided in the LVR's submitted to CheckUp, this has led to a breach of the agreement between CheckUp and MNHHS."

[72] In [7.54], under the heading "Findings", the Report stated, "Subject Walters is responsible for ICOP; therefore on the balance of probabilities the actions of subject Walters is considered 'maladministration'".

[73] A finding was also made in [7.55] that Professor Walters "is responsible for ICOP and <u>therefore</u> has allowed Subject Goodman and Subject Gorring to perform roles and misrepresent roles of AHPRA registered practitioners" (emphasis added). The Report contended that, on the balance of probabilities, Subject Goodman and Subject Gorring were staff who had breached the *Health Practitioner Regulation National Law 2009*. That was based on matters addressed in [7.51] - [7.53]. There was also separately a statement in [7.49] and [7.50] about the possibility of a criminal offence having been committed.

[74] Given the terms of [7.48], and the finding of maladministration in [7.54], Professor Walters submits that the finding of "maladministration" implicitly incorporated a finding of "corrupt conduct". The Investigators, however, submit that the findings of maladministration were distinct from the findings of "corrupt conduct", and relate to low level conduct of Professor Walters in failing to follow up to ensure the staff were identified in the LVRs appropriately as set out in the 23 December 2015 memo, but not any misconduct by Professor Walters.

Complaints as to the finding of maladministration and the definition adopted

[75] Professor Walters complains that the Investigators made an error of law in adopting the definition of "maladministration" and that the definitions of "unreasonable" and "otherwise wrong" have no basis other than, seemingly, the opinion of the Investigators that they were apt definitions.[39] In making that contention, Professor Walters assumes that the correct definition of "maladministration" to adopt or that was intended to be adopted is the definition contained in the *Public Interest Disclosure Act 2010* (Qld). However, the definition actually adopted only partially reflected the definition of "maladministration" in that Act. Professor Walters further contends that the findings against him were made against a standard that was not defined at law, that adopted a notion of strict liability rather than "reasonableness" and that the Investigators seemed to formulate themselves. In particular, Professor Walters complains that the adoption of the definition of "unreasonable" provided no objective standard by which to assess his actions.[40]

[76] Following the concession by the Investigators that the finding of corrupt conduct was affected by error, Professor Walters' principal contention is that the findings of maladministration and corrupt conduct were entwined and the same conduct formed the basis for each finding, such that the findings of maladministration could not stand independently of the finding of "corrupt conduct" and should be set aside on the same basis, or as an error of law.[41] Counsel for Professor Walters contends that, given the genesis of maladministration as a subject of investigation in the Terms of Reference, when the Investigators made a finding of maladministration in the BDO Report it also amounted to a finding of corrupt conduct.[42]

[77] Professor Walters particularly relies on the stated findings under the heading of "Findings" in the BDO Report as to maladministration, and the reference to "also" in [2.53], as evidencing the interrelationship between the findings of corrupt conduct and of maladministration. Professor Walters submits that [7.48] and particularly the consideration of corrupt conduct in (vi) of that paragraph in the consideration of maladministration approaches the matter in the converse way such that they conclude that there was "maladministration" on the basis of "corrupt conduct",evident from the finding of "maladministration" in [7.54]. Professor Walters therefore contends that the findings of maladministration are necessarily infected by or conflated with the notion of corrupt conduct.[43]

[78] Professor Walters also contends that there was a denial of procedural fairness, insofar as the Investigators failed to explain to him the nature of "maladministration" as they defined it or to identify the actions or omissions of his that might amount to maladministration, so that he

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39 Issues for Determination, 1(c); Applicant's Outline of Argument, [181(a)].

40 Applicant's Outline of Argument, [97(a)].

41 Applicant's Outline of Argument, [84] and [146] – [156].

42 T1-34/40-44; T1-35/17-19.

43 T1-36/30-33; T1-37-/1-3.

could fairly respond to the allegation.[44] Professor Walters also complains that the failure to interview relevant witnesses in the course of the investigation, as well as the manner in which a certain interview was conducted, constituted failures to accord procedural fairness.

Contentions of the Investigators in Respect of "Maladministration"

[79] The Investigators contend that on proper analysis of the BDO Report, a distinction was made between corrupt conduct and maladministration and the latter cannot be impugned on any ground of judicial review. Counsel for the Investigators submitted that the focus on the definition of maladministration referred to in the Report was a matter of distraction, particularly where there is no evidence before the Court as to the source of the definition. The Investigators therefore contend that the submissions made by Professor Walters as to the definition contained in the *Public Interest Disclosure Act 2010* (Qld) are irrelevant, since it does not appear to be the definition that was in fact adopted.[45] The Investigators submit that the term maladministration addresses conduct ranging from the trivial to the most serious which could constitute corrupt conduct. Counsel for the Investigators sought to detract from the label of maladministration and contend that what is important is to look at the underlying factual findings made in the Report.

[80] Counsel for the Investigators contend that a two-step process was adopted in the BDO Report in relation to maladministration:

(a) First, findings were made about maladministration on the basis of underlying factual findings of failing to follow up and/or ensure that Professor Walters fulfilled what he had undertaken to do in the 23 December 2015 memo which were unrelated to misconduct or the definition of maladministration;

(b) Secondly, that the findings of maladministration were then said to constitute "corrupt conduct".

[81] Counsel for the Investigators contend that it is only the second step which involves error, whereas the first step did not, and those findings should stand.[46] The Investigators contend that the Report should not be regarded or analysed as a carefully drafted legal document, notwithstanding the serious nature of the findings that were made, and that one should not conclude from the Report, particularly [7.48(vi)], that the authors thought maladministration arose because of the findings of corrupt conduct or vice versa.[47] Counsel for the Investigators draw from various other aspects of the Report to show the point of distinction, particularly the findings that there was a lack of dishonesty. Counsel particularly relies on the absence of a finding of intentional conduct on behalf of Professor Walters as supporting the submission

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44 Applicant's Outline of Argument, [84] and [146] – [156].

45 Applicant's Outline of Argument, [88] – [89]. Although there are similarities in the definition adopted by the Investigators in the BDO Report, it is a definition said to be derived from the Ombudsman, rather than the *Public Interest Disclosure Act 2010* (Qld).

46 T2-18/20-30.

47 T2-18/39-44.

that the finding of maladministration was only based on a failure to follow up a memo of 23 December 2015, which was described by counsel for the Investigators as a "low level" finding.

[82] Counsel for the Investigators submit that the Terms of Reference, which referred to corrupt conduct including maladministration, were speaking of only one species of maladministration which was sufficient to give rise to a conclusion of corrupt conduct. Maladministration is a term said to encompass a broad spectrum of conduct. The other factual findings based on the failure to follow up which were also said to lead to a conclusion of maladministration were quite separate. The Investigators gave evidence as to the methods of gathering evidence in which they had engaged during the investigation, to further explain the findings in the Report. They stated that the maladministration was in Professor Walters' failure to ensure that the ongoing claims to CheckUp for administrative staff as if they were clinical staff, which had persisted since 2015, were redressed. The Investigators were not cross-examined. While that may have been what they intended, the question for this Court substantially turns on the terms of the decision made.[48]

[83] Professor Walters contends that it is an impermissible exercise to try to separate out the findings in the way that the Investigators have sought to, which effectively reconstructs the Report.

[84] Professor Walters contends that the Report and the findings cannot be separated to support an argument that the findings of "maladministration" stand alone and arose from Professor Walters' failure to follow up the memo of 23 December 2015. He contends that the Terms of Reference and Instruments of Appointment elevated maladministration to the level of corrupt conduct and that is consistent with the approach adopted by the Investigators in their findings of "maladministration" and "corrupt conduct" in the BDO Report.

[85] Professor Walters submits that the fact that the findings in respect of maladministration go beyond the failure to follow up the memo of 23 December 2015 is demonstrated by the reasons, acts and omissions that are said to be maladministration. They included that "[t]here appears to be a distinct lack of judgement, integrity, governance and industry standards for public administration in failing to rectify identified mistakes and errors and to provide instruction or guidance to ICOP staff" (emphasis added). Professor Walters' counsel submit that that flies in the face of the suggestion that the factual findings in relation to maladministration were made in respect of a very low level finding based on a failure to follow up the 23 December 2015 memo.

Consideration

[86] The BDO Report is a confused and disjointed document. It makes observations and statements of findings which are not linked to particular factual findings and are, in some respects, ill-defined and ambiguous. In fairness, the Investigators were not lawyers and they were provided with ill-defined Terms of Reference. The Terms of Reference gave no

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[48] Counsel for the Investigators conceded that, notwithstanding the evidence of the Investigators and lack of cross-examination, the Court was not precluded from finding that the findings of maladministration were necessarily entwined with the findings of corrupt conduct.

assistance as to what was meant by the term maladministration, nor was the meaning addressed in the MAR.

[87] While I accept that the BDO Report must not be approached and analysed as if it was a technical, legal document, even adopting a broad-brush approach and looking at the Report as a whole, it does, in my view, reflect the fact that the Investigators have equated maladministration with corrupt conduct. That accords with the fact that the Investigators were asked to address "maladministration" in the context of it being referred to as a species of "corrupt conduct" in the Terms of Reference and the Instruments of Appointment. Consistent with that approach having been taken by the Investigators, the definition of maladministration they adopted included actions which were for an improper purpose or "otherwise wrong" and, further, the Report identified that maladministration involved conduct involving actions or inaction of a serious nature.[49]

(i) The definition adopted

[88] It is unclear why "maladministration" was referred to in the Terms of Reference. That has not been explained in the evidence of either Mr Drummond or Ms Neri. The purpose of the investigation was said in the Terms of Reference to be "to examine allegations identified by the CCC and … identify any systemic weaknesses or workplace culture deficiencies and make recommendations for system and culture improvements", but that does not shed any light upon the use of the term maladministration. It was not a term used by the CCC.

[89] While Professor Walters' counsel points to the fact that the term maladministration only appears to be defined in the *Public Interest Disclosure Act 2010* (Qld) ("**PIDA**"), that is of little relevance, insofar as there is nothing to suggest that it was the definition that was intended to be or should have been adopted by the Investigators.[50] The definition referred to in the Report is not the same as that contained in Schedule 4 of the PIDA, although there are some similarities between the definition adopted by the Investigators and the definition in the PIDA. The Investigators do not give any clarification of the origin of the definition in their affidavit evidence.

[90] The Investigators' adoption of the definition supports the argument of Professor Walters that the Investigators were looking at maladministration in the context of it being corrupt conduct, given the Terms of Reference, insofar as they adopted a definition of "maladministration" which extended to conduct which could be "corrupt conduct".

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49 BDO Report, [2.45].

50 Although the Terms of Reference refer to the *Public Interest Disclosure Act 2010* (Qld) as relevant legislation and the initial complaint was a public interest disclosure, it is not identified as the reference point for "maladministration". "Maladministration" is referred to in s 13 of the Act in the context of a person who is a public officer having information about the conduct of another person that, if provided, could be "maladministration that adversely affects a person's interests in a substantial and specific way", which does not appear to apply to the conduct the subject of the investigation in this case.

[91] A misunderstanding as to a statutory term is an error of law.[51] Thus, on the supposition that the Investigators had intended to adopt the definition contained in the PIDA, Professor Walters submits that there has been an error of law. He assumes that the Investigators intended to adopt the definition of the term under the PIDA but did so incorrectly and also adopted definitions of "unreasonable" and "otherwise wrong" not contained in the PIDA. However, the Investigators did not purport to adopt the statutory definition in the PIDA.

[92] Conversely, however, the Investigators did not adopt the ordinary meaning of the term which, if incorrect, would be an error of fact.[52] The ordinary meaning of maladministration is "inefficient or dishonest administration; mismanagement".[53]

[93] The Investigators do not appear to have adopted a definition of "maladministration" which used any industry or statutory meaning or even the ordinary meaning of maladministration.

[94] In choosing a definition of maladministration said to be derived from the Queensland Ombudsman and definitions of "unreasonable" and "otherwise wrong" deriving from unidentified sources, the Investigators chose definitions without any proper foundation or relevance to the investigation.

(ii) Did the Investigators err in misdirecting themselves as to the test for maladministration?

[95] An error of law can arise where there has been a misunderstanding or misapplication of a recognised principle of law or in the construction of words or phrases of a statute. It may also arise if there is no evidence to support a finding. Under s 20(2)(f) of the JRA, the error does not need to be one that is on the face of the record, nor a jurisdictional error.

[96] Misunderstanding and misapplying a definition may be an error of law.[54] In the present case, the Investigators purported to adopt a technical meaning based on a definition derived at least in part from the Ombudsman. The question of whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.[55] In the present case, the term maladministration was used in the Instruments of Appointment and the Terms of Reference, which under the HHBA dictated the scope of the investigation.[56]

[97] The definitions of "unreasonable" and "otherwise wrong" are also of uncertain origin and do not appear to adopt what may be characterised as the "ordinary meaning" of those terms. The definition of unreasonable refers to outcomes rather than establishing a standard by

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51 *Accused A v Callanan* [2009] 2 Qd R 112 at [59].

52 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389.

53 Oxford Dictionary of English, 3rd Edition, Oxford University Press, Current Online Version 2015.

54 *Woodard v Repatriation Commission* (2003) 131 FCR 473 at [127]; *Universal Magazines Pty Ltd v Comptroller-General of Customs* (1990) 21 ALD 502 at 509.

55 *Collector of Customs v Afga-Gevaert* (1996) 186 CLR 189 at 395; *City of Melbourne v Neppessen* [2019] VSC 84 at [72]-[73].

56 *Hospital and Health Boards Act 2011* (Qld), s 191.

which to test the conduct itself. However, the meaning of maladministration that was adopted purports to be a technical meaning, rather than an ordinary meaning. In that regard, the present case is analogous to the cases in which a technical meaning for a word in a statute is adopted, rather than its ordinary meaning, which is a question of law. In adopting such a definition the Investigators, in my view, have erred in law. Even if I am wrong in this regard, I would conclude that in adopting and applying such a definition to reach a conclusion that Professor Walters' actions were maladministration, the decision was legally unreasonable for reasons discussed below.

(iii) The link between "maladministration" and "corrupt conduct"

[98] The Investigators contend that notwithstanding the apparent connection between the findings of "maladministration" and "corrupt conduct" they were not, in fact, interlinked and what was labelled as maladministration was really a failure to follow up on whether staff were appropriately the subject of a claim.

[99] The failure by Professor Walters to follow up on the matters contained in the 23 December 2015 memo was referred to in [2.42(ii)] of the BDO Report, under the heading of "LVR/Governance", as well as [2.44(ii)], under the heading of "maladministration". Counsel for the Investigators contends that when the Report is considered as a whole, particularly having regard to the fact that there is no finding of intentional dishonesty, it is plain that the Report and the Investigators were engaged in a two-step process. The first step found that the failure to follow up on the 23 December 2015 memo was "maladministration"[57] and the second step went on to consider corrupt conduct.

[100] The failure to follow up on the 23 December 2015 memo does appear to have been the basis of the "act" and "omission" referred to in [2.48(i)] and [2.48(iii)]. Judicial review generally does not involve the Court engaging in analysis of a decision, however, given the submissions made by the parties some such analysis is necessary.

[101] While the Report made reference to Professor Walters' failure to follow up on the 23 December 2015 memo, there was no analysis of the demarcation of roles after the issuing of that memo or of the significance of a memo issued on 21 December 2015 which directed the State Manager to ensure that the LVRs claimed appropriately, other than to state "[t]his memo does not indicate a review period or any actions completed by Mr Rohan Corpus to resolve issues".[58] Both Mr Fairhurst and Mr Howard stated in their evidence that the expression in the 23 December 2015 memo, "we will work to ensure that both staff are described appropriately in reports", suggested Professor Walters had an ongoing role.[59] Further, the BDO Report seemingly assumed that the non-compliance with the funding requirements in lodging the LVRs post-audit was of the same form as the non-compliance that occurred pre-audit, although the evidence relied upon does not suggest that to be the case.

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57 Although counsel wanted to simply discard the term "maladministration" and identify it as a finding for failure to follow up.

58 BDO Report, [7.30(ii)].

59 Affidavit of A Fairhurst, sworn 17 May 2019, [35]; Affidavit of A Howard affirmed 17 May 2019, [30].

There was an absence of any analysis in that regard. Similarly, while the BDO Report suggested that Professor Walters allowed Subject Goodman and Subject Gorring to perform and misrepresent the roles of AHPRA-registered practitioners, there is no evidence to suggest he was aware they were claiming under the categories of nurses and health workers. Professor Walters was said to nonetheless be responsible because he "is responsible for ICOP".

[102] The Report simply did not address the fact that, on the basis of evidence which the Investigators accepted, the submission of the three incorrect LVRs that occurred prior to the audit had been identified as arising from a typographical error.[60] In contrast, Mr Goodman, who was responsible for submitting claims, attributed the incorrect claiming of services for a nurse and health worker following the audit to an incorrect understanding that they could claim under those categories and a wrong instruction.[61]

[103] The analysis in [2.48] of "the relevant acts or omissions" said to be maladministration, appear to be identified in the subparagraphs that follow. Subparagraphs (i)–(iv) proceeded to identify "acts" and "omissions" by reference to the framework of the definition of "maladministration", particularly having regard to [2.46] with respect to the element "unreasonable" and "otherwise wrong" in [2.47]. [2.48(ii)]. [2.48(iii)] identified what was said to be an "unreasonable act and omission", although not by specific reference to anything Professor Walters was said to have done or not done, notwithstanding that [2.44(vii)] stated that Professor Walters did not get directly involved in the issues concerning the misleading LVRs. However, one would infer that the reference to an omission was made in relation to Professor Walters failing to follow up on the LVRs in light of the 2015 audit, although that was not clearly articulated. Up to this point there is some support for the submission of the Investigators as to the nature of the findings labelled as maladministration. [2.48(iv)], however, goes further, stating that there appeared to have been a "distinct lack of judgement, integrity, governance and industry standards for public administration in failing to rectify identified mistakes and errors and provide instruction or guidance to ICOP staff". In so finding, it mirrored the language of the definition of "otherwise wrong" said to be relevant to "maladministration" in [2.45] and [2.47]. While the Investigators assert that the BDO Report's "finding as to the failure to follow up the 23 December 2015 memo" is really what the finding of "maladministration" was directed to, which was just a low level finding that did not involve any finding of improper conduct or misconduct, that is unsupported by the finding in [2.48(iv)].

[104] [2.48(iv)] went beyond finding a mere oversight to suggesting an intentional act which, given the reference to lack of integrity, suggested misconduct. To the extent a lack of integrity suggests dishonesty it is to a certain degree inconsistent with the positive finding in the Report that Professor Walters did not engage in dishonesty, although is consistent with the finding of corrupt conduct. The terms of the Report do not suggest that the finding was, however, unintended. The Investigators carried out an analysis which purported to identify

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60 BDO Report, [3.27(iii)] and [3.30].

61 BDO Report, [7.23(xi) – (xiii)], [3.34] and [7.31(v)]; compare to [7.30(v)(b)-(c)], [7.30(vi)(d)], [8.6(i)], [8.14(ii)-(iii)], and [8.23].

how the conduct engaged in satisfied the definition of "maladministration", including that it fell within the definition of "otherwise wrong".

[105] Professor Walters' contention that the finding of "maladministration" appears to be inextricably linked with the finding of corrupt conduct is also supported by the fact that the finding of "maladministration" in [2.52] was a determination "on the balance of probabilit[ies]". That is consistent with the Terms of Reference and specifically the requirement to identify any matter where there is sufficient evidence on the balance of probabilities of conduct which may be considered corrupt conduct, including maladministration.

[106] An analysis of the expanded reasoning contained in section 7 of the BDO Report does not lead to a different conclusion.

[107] The summary of evidence and the BDO observations in section 7 did identify the 2015 audit, the memo of 23 December 2015 and Professor Walters's failure to follow up the action to be taken to ensure that the LVR's were correctly lodged. [62] However, having made those observations, the Investigators, under the heading of "Maladministration", applied the definition of maladministration to conclude that there were "acts" and "omissions" which constituted maladministration. While I accept the analysis relied at least in part on the failure to ensure the LVRs were correctly claiming for funding under the Agreement after the 2015 audit, the analysis again went beyond that finding in making the substantive findings of maladministration, including as part of its reasoning that the conduct was corrupt conduct. That is, the substantive finding involved a characterisation of the conduct as being both maladministration and corrupt conduct, conflating the two.

[108] Counsel for the Investigators submit that the Court should construe [7.48(iv)] in light of the findings of the Report, particularly at [8.24], where the Investigators found there had been no intended dishonesty.[63] The difficulty with that contention is that [7.48(vi)], which identified conduct as corrupt conduct, was preceded by [7.48(iv)], which mirrored the terms of [2.48(iv)]. That involves characterising the conduct in question as an intentional act in the nature of misconduct. That view is further supported by the fact that, while [7.48(vi)] referred in detail to how the alleged maladministration was corrupt conduct, no separate finding of corrupt conduct was made, as was done in [2.53]. The substantive finding in [7.54] is the finding of maladministration, on the basis that the conduct was also corrupt conduct. The lack of a separate, substantive finding of corrupt conduct in section 7 supports the contention that the findings of "maladministration" and "corrupt conduct" were integrally linked, as does the use of the word "also" in [2.45].

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62 BDO Report, [7.31(ii)] and [7.33(ii)]

63 [8.24] refers to the most likely cause of the submissions of misleading LVRs being "ineffective policy and procedures (as opposed to intended dishonesty)". That is in contrast to the earlier finding in [2.63], which referred to the most likely reason not being intended dishonesty, but "maladministration". A failure to follow up the 23 December 2015 memo by Professor Walters could not be properly characterised as "ineffective policy and procedures".

[109] The link between the two is also demonstrated by the fact that the Investigators relied upon the failure by Professor Walters to follow up on the 23 December 2015 memo in contending that he had engaged in conduct that was said to have been a "breach of the trust placed in a person holding an appointment, either knowingly or recklessly".[64] Further support is also found in the fact that [7.48(vi)] was included as a subparagraph in the consideration of acts or omissions that are maladministration and the analysis of the matters meeting the definition of "corrupt conduct" did not identify conduct of Professor Walters separate from that identified in the context of maladministration.

[110] In light of the approach adopted by the Investigators which I have discussed above, the contention that the Investigators made a factual finding based on the failure to follow up the 23 December 2015 memo, to which they then applied a label of maladministration separate from the definition of maladministration[65] they expressly adopted otherwise cannot be accepted. The analysis of the factual findings, including the failure to follow up on the December 2015 memo, was undertaken in the context of the definition of maladministration adopted by the Investigators and conflated with the conduct found to be corrupt conduct. The substantive finding of maladministration also being found to be corrupt conduct was consistent with the Terms of Reference. It was made on the balance of probabilities.

[111] While I note that the Investigators both gave evidence that the Report made it clear that maladministration consisted of a failure to act, without any suggestion that the failure to act was deliberate,[66] that is not consistent with the reasoning and findings in the BDO Report. The Court must determine what is revealed by the terms of the decision, not what the authors subjectively intended. That is not to question the honesty of what they believed they had done. Rather, the analysis must be based on the terms of the decision itself.[67]

[112] The submission by the Investigators that "maladministration" in fact referred to a range of conduct, from the very trivial to actions that could constitute corrupt conduct, would potentially be open if the Investigators had chosen to adopt the ordinary meaning of the term, but that was not the definition which they adopted or sought to apply. There is nothing to suggest that the Ombudsman's definition is an accepted, common meaning of the term or a technical meaning adopted in the context of public administration. The suggestion that the underlying finding based on the follow up of the memo of 23 December 2015 is the actual finding made, not the allegedly subsequent finding of "maladministration" based on the definition, requires an artificial exercise to be undertaken. That exercise is not supported by the terms of the Report and divorces what is said to be the ultimate finding from the definition adopted, as well as the process of reasoning seeking to apply that definition.

[113] In my view, there has been an error of law by the Investigators in deciding that Professor Walters was guilty of maladministration as a result of the conflation of maladministration and

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64 BDO Report, [7.48(vi)(c)].

65 Which counsel for BDO accepted was wrong: T2-33/1-6; T2-33/24-39.

66 Affidavit of A Fairhurst, sworn 17 May 2019, [15].

67 T2-19/26-35. Counsel for the Investigators conceded that the Court could make a finding based on the terms of the Report, notwithstanding that the Investigators were not cross-examined.

corrupt conduct and the misapplication of those terms, by which findings were made that were unsupported by evidence.

(iv) Denial of Procedural Fairness

[114] In the present case, the Investigators were asked to make substantive findings that were potentially adverse to those who were subject to the investigation, albeit that any action in relation to those findings was to be taken by either the CCC or Metro North. It is uncontentious that in such circumstances the rules of procedural fairness apply.[68] In *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*,[69] referred to with approval by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*,[70] the Full Federal Court stated that:

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

[115] Professor Walters complains that he should have been advised of the true nature of the allegation being made against him in terms of maladministration, as he could not have hoped to guess the standard or offence against which the Investigators were assessing his acts or omissions. Given that the definition of maladministration that was adopted could result in potential findings against Professor Walters including improper conduct, separate from the allegations of misappropriation or misuse of authority and failure of duties of which he was given notice, he should have been given notice of the maladministration issue so that he could respond. Such a finding had potentially adverse effects on his professional reputation and gave rise to potential disciplinary action.[71] While the Investigators contend that the failure to follow up on the 23 December 2015 memo was clearly a live issue in the circumstances, that was not sufficient to fairly give notice of the issue of maladministration.

[116] Mr Fairhurst stated in his affidavit that Professor Walters was afforded considerable opportunity to state his case in relation to the subject of maladministration, and had acknowledged in the final paragraphs of his statement that the investigation concerned, amongst other things, issues of maladministration and corrupt conduct, and that there was therefore no need to inform him that his conduct might amount to maladministration.[72] Professor Walters' statement did not in fact address those matters. Counsel for the Investigators correctly acknowledge that it was incorrect to say that Professor Walters had acknowledged the investigation concerned maladministration in the final paragraphs of his

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68 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576 and 578-9.

69 (1994) 49 FCR 576 at 590-591.

70 (2006) 228 CLR 152 at [32].

71 *Ivers v McCubbin & Ors* [2004] QSC 342 at [31].

72 Affidavit of A Fairhurst, sworn 17 May 2019, [48].

statement.[73] However, counsel submit that Professor Walters had addressed the 23 December 2015 memo in his statement. Similarly, Mr Fairhurst contended that their findings of maladministration "were based principally on the Applicant's own statements and not on any controversial extraneous material or allegedly flawed investigations".[74]

[117] The Investigators further considered they did not need to fully investigate matters such as the demarcation of roles and responsibilities because Professor Walters stated in the 23 December 2015 memo that "we will work to ensure that both staff are described appropriately in reports". On the Investigators' interpretation, that statement meant Professor Walters was going to undertake the task personally. That, however, assumes that Professor Walters was on notice that findings of maladministration may have been made arising out of his failure to follow up on whether actions had been implemented in respect of the LVRs after the 23 December 2015 memo.

[118] While Professor Walters did provide a detailed statement to BDO on 21 June 2018, the allegations he addressed were those which had been identified in the list of issues provided by BDO,[75] not matters pertaining to any issue of maladministration. That list of issues did not identify any issue with respect to the 23 December 2015 memo. To the extent that Professor Walters addressed the internal audit and referred to the 23 December 2015 memo and what followed thereafter, it was in the context of him providing a narrative of what had occurred in relation to ICOP's structure and allocation of responsibilities thereunder. He had directed Mr Corpus to ensure that "there was correct identification of staff in the performance of service and at(sic) the delivery of services in the listed locality reports."[76] He had also nominated the Business Manager to continue to oversee financial matters and Mr Williams agreed to such an arrangement,[77] such that it was not part of his role to review or supervise the lodging of LVRs.[78] While he was asked when interviewed by the Investigators whether he had followed up on whether Mr Corpus had implemented the matters outlined in the interview, he was not asked to respond to the suggestion that it was his responsibility to follow up on the memo and that his failure to do so could give rise to a finding of maladministration or corrupt conduct.

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73 T2-23/11-18.

74 Affidavit of A Fairhurst, sworn 17 May 2019, [50].

75 Affidavit of DL Walters, sworn 1 March 2019, Exh DLW-1, [290]–[364].

76 Affidavit of DL Walters, sworn 1 March 2019, Exh DLW-1, [106].

77 Affidavit of DL Walters, sworn 1 March 2019, [18]-[19], Exh DLW-1 [121]. Subparagraph (d) of the memo of 23 December 2015 stated "we recommend that the Business Manager continue to oversight all financial matters in relation to the ICOP program. It is correct to say that the Director of Cardiology who was not consulted, does have a range of responsibility and obligations and would rely on the Business Manager to verify and scrutinise all transactions individually": Affidavit of DL Walters, sworn 1 March 2019, Exh DLW-1 [108].

78 Professor Walters did not address any failure by him to follow up the 23 December 2015 memo, particularly by reference to the statement "we will work to ensure both staff are described appropriately in the reports".

[119] Given the potential for adverse findings to be made based on a finding of maladministration I consider there was a denial of procedural fairness by the Investigators in not giving Professor Walters proper notice that that was a live issue.

(v) Legal Unreasonableness

[120] Professor Walters also contends that the exercise of the power by the Investigators in making findings of maladministration was so unreasonable that no reasonable person could have so exercised the power.[79] The test for legal unreasonableness is a stringent one and rarely met. It is not met where the Court merely "disagrees with an evaluative decision or the weight attributed to a factor taken into account in the decision".[80] It has been generally applied to the exercise of a discretionary power.[81] Justice Bond in *Australia Pacific LNG Pty Limited & Ors v The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport*[82] recently examined the relevant principles, particularly having regard to the recent High Court decision of *Minister for Immigration and Border Protection v SZVFW*.[83] At [161]-[162], his Honour stated that:

> "It is clear now that, subject to one caveat, any summary of general principle in relation to this ground of judicial review should now start with the proposition that at general law judicial review on the grounds of legal unreasonableness is concerned with: (1) the rebuttable presumption that the valid exercise of administrative power is conditioned on the repository of the power exercising it within the bounds of legal reasonableness, and (2) the discernment of the ambit of those bounds in the particular case, having regard to the scope, purpose and objects of the statutory source of the power. The various ways in which Courts have expressed the circumstances in which it might be appropriate to conclude that the bounds have been exceeded (e.g. "manifestly unreasonable", "illogical", "irrational", or "lacks an evident and intelligible justification") do not confine the manner of discernment of the bounds in any particular case, but are examples of when the appropriate conclusion might have been drawn in different cases.
>
> The caveat of course is that at least in Queensland and the Commonwealth by statute, an administrative decision under an enactment must be exercised within the legal bounds created by the proposition that it must not be an exercise of a power that is so unreasonable that no reasonable person could so exercise the power. There is no reason to think that manner of determining the bounds of legal reasonableness was intended to codify the law. However, if the legal bounds

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79 *Judicial Review Act 1991* (Qld), s 20(2)(e), s 23(g).

80 *Francis v Crime and Corruption Commission* [2015] QCA 218 at [33].

81 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [63] and [66].

82 [2019] QSC 124 at [155]-[152].

83 (2018) 163 ALD 1.

so defined are exceeded in a particular case then the statutory ground of judicial review would be established." (footnotes omitted)

[121] In the present context, of the exercise of a power of investigation under the HHBA limited by the Instruments of Appointment where the Investigators were empowered to make determinative findings which could result in reputational damage or disciplinary proceedings, the statutory power is one which, it may be inferred, Parliament intended to be exercised reasonably.[84]

[122] Even if I had not found that the Investigators had made errors as I have found above in finding that Professor Walters' actions constituted maladministration, I would have found that the decision was legally unreasonable.

[123] The adoption and application of a definition of "maladministration" used by the Queensland Ombudsman and seemingly arbitrary definitions of "unreasonableness" and "otherwise wrong" so lacked any intelligible or evidential justification that it was not merely irrational, but lacked any reasonable basis, such that it was beyond the scope of authority conferred by the Instruments of Appointment. As set out above, the definition of "maladministration" that was adopted was not founded on its ordinary meaning, a statutory meaning or industry meaning, nor any legal authority. The adoption of a definition was in part apparently drawn from the Queensland Ombudsman. Any definition adopted by the Queensland Ombudsman, presumably for the purpose of carrying out the Ombudsman's role under legislation, was irrelevant to the investigation the investigators were required to carry out pursuant to the Terms of Reference.

[124] Further, in the application of the definition, there are a number of flaws which further support the fact that the decision lacked any intelligible or evidential justification, such that it was so unreasonable that a reasonable person could not so exercise the power:

(a) First, in applying the definition, Professor Walters was found to have, as a result of an omission to follow up on whether action had been taken under a memo, lacked judgement, integrity, governance and industry standards in failing to identify mistakes and errors and to provide instructions or guidance to ICOP staff, in circumstances where there was no finding of any dishonesty by Professor Walters to support a finding of a lack of integrity;

(b) The finding of "maladministration" further assumed that the mistakes that were not rectified and that caused the submission of incorrect LVRs post-2015 were the same mistakes as had been identified in the 2015 audit. As set out above, the errors identified in the audit that had resulted in the three incorrect LVRs being lodged were said to be typographical errors, an explanation which the Investigators accepted. The evidence does not suggest there was a continuation of any typographical errors post-2015 but rather that those who were responsible for lodging the LVRs, particularly Mr Goodman, believed that they could claim for work done by Mr Goodman and Ms Gorring as though it had been done by a nurse and healthcare worker. While the result of the mistakes may have been the same, namely, the submission of LVRs incorrectly

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[84] *Minister for Immigration and Border Protection v SZVFW* (2018) 163 ALD 1 at [80].

claiming for nursing and healthcare workers, however the reason for the error each had a different genesis. Based on that incorrect assumption the Investigators undertook no analysis or consideration of the demarcation of responsibilities or organisational structure post-2015 in determining Professor Walters' responsibility for the errors that had occurred. That assumption was unfounded.[85]

(c) The analysis of conduct said to be maladministration incorporated unjustified findings based on the same conduct said to amount to corrupt conduct by Professor Walters. In reality, the Investigators have sought to justify the findings of maladministration by separating the underlying factual basis from the findings of maladministration and corrupt conduct, which the Investigators proceeded to make without any intelligible or evident justification.

[125] Given that I have reached conclusions finding that a number of grounds of judicial review have been established, it is unnecessary to consider the further grounds of review raised by Professor Walters.

[126] I will consider the appropriate relief that should be granted below.

Case against the first and second respondents

[127] Following receipt of the draft Report on 8 August 2018 and the final Report on 17 August 2018 and the response of the CCC, Mr Drummond suspended Professor Walters under s 189 of the *Public Service Act 2008* (Qld). Professor Walters seeks to set that decision aside.

[128] The letter sent by Mr Drummond to Professor Walters on 24 September 2018 notifying him of the suspension referred to the BDO report having exonerated Professor Walters in relation to allegations of fraud and reprisal, but then stated:[86]

> "However, the report does make separate, serious adverse findings against you, including with respect to maladministration. The CCC has agreed with the findings."

[129] Having referred to parts of the CCC letter, the letter then stated:[87]

> "In light of the serious nature of the findings in the report and the concerns that this gives rise to, MNHHS will be addressing those matters with you in accordance with Queensland Health Discipline Policy E10.
>
> You will be given a full and fair opportunity to respond. I will be writing to you separately to provide particulars of MNHHS' concerns for you to respond to.
>
> You are not required to provide a response in relation [to the report] at this time.

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85 The only apparent evidence to support that proposition was the opinion of Mr Williams that the current issues in the submission of LVRs reflected the same issues as had been identified in the 2015 audit. Under the CCC guidelines, the Investigators should not have relied upon that opinion.

86 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9 at p 34.

87 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9 at p 35.

> In the meantime, I confirm that as the outcome of the investigation has been determined, consistent with my letter of 4 April 2018, your suspension under section 137 of the Public Service Act 2008 (the **Act**) has ended and for the reasons set out in this letter, I have determined to suspend your employment under section 189(1) of the Act.
>
> Section 189(1) of the Act provides the chief executive may suspend a public service employee from duty if the chief executive reasonably believes the employee is liable to discipline under a disciplinary law.
>
> While no decisions have been made by MNHHS in relation to your employment and the findings of the report, in light of the serious concerns raised by the report findings that MNHHS will need to address with you in accordance with Queensland Health Discipline Policy E10, I am satisfied that, subject to your response, you are liable to discipline in accordance with the Act and MNHHS' policies."

[130] Mr Drummond therefore decided pursuant to s 189(1) of the PSA to suspend the applicant on full pay and stated:[88]

> "Before making a decision to suspend you, I considered all alternative duties that may have been available for you to perform. I determined it would not be appropriate for you to perform alternative duties on the basis of your role and the nature of the concerns held by MNHHS."

[131] The letter attached the BDO Report. This was the first time Professor Walters was provided with the Report, despite earlier requests. It appears this occurred because the CCC had requested that it be provided with a copy of the Report before any action was taken and only provided its response to the Report on 21 September 2018. [89]

Legislative context

[132] Chapter 6 of the PSA provides for disciplinary action for public service employees.

[133] Section 187 outlines the grounds upon which the chief executive may discipline the relevant employee. It states:

> "(1) A public service employee's chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has—
>
> (a) performed the employee's duties carelessly, incompetently or inefficiently; or
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> (b) been guilty of misconduct; or
>
> (c) been absent from duty without approved leave and without reasonable excuse; or

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88 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9 at p 36.

89 Affidavit of JS Neri, affirmed 3 May 2019, Exh JSN-6.

(d) contravened, without reasonable excuse, a direction given to the employee as a public service employee by a responsible person; or

(e) used, without reasonable excuse, a substance to an extent that has adversely affected the competent performance of the employee's duties; or

(ea) contravened, without reasonable excuse, a requirement of the chief executive under section 179A(1) in relation to the employee's appointment, secondment or employment by, in response to the requirement—

(i) failing to disclose a serious disciplinary action; or

(ii) giving false or misleading information; or

(f) contravened, without reasonable excuse—

(i) a provision of this Act; or

(ii) a standard of conduct applying to the employee under an approved code of conduct under *the Public Sector Ethics Act 1994*; or

(iii) a standard of conduct, if any, applying to the employee under an approved standard of practice under the *Public Sector Ethics Act 1994*.

(2) A disciplinary ground arises when the act or omission constituting the ground is done or made.

(3) Also, a chief executive may discipline, on the same grounds mentioned in subsection (1)—

(a) a public service employee under section 187A; or

(b) a former public service employee under section 188A.

(4) In this section—

misconduct means—

(a) inappropriate or improper conduct in an official capacity; or

(b) inappropriate or improper conduct in a private capacity that reflects seriously and adversely on the public service.

Example of misconduct—

victimising another public service employee in the course of the other employee's employment in the public service

responsible person, for a direction, means a person with authority to give the direction, whether the authority derives from this Act or otherwise."

[134] Section 188 provides that the chief executive may take the disciplinary action that he or she considers reasonable in the circumstances. Examples of such action include termination of employment, reduction of classification level or a reprimand.

[135] Section 189 provides for suspension of a public service employee. Section 189 provides that:

> "(1) The chief executive may suspend a public service employee from duty if the chief executive reasonably believes the employee is liable to discipline under a disciplinary law.
>
> (2) However, before suspending the employee, the chief executive must consider all alternative duties that may be available for the employee to perform.
>
> (3) The chief executive may cancel the suspension at any time."

[136] Section 190 of the PSA provides:

> "(1) In disciplining a public service employee or former public service employee or suspending a public service employee, a chief executive must comply with this Act, any relevant directive of the commission chief executive, and the principles of natural justice.
>
> (2) However, natural justice is not required if the suspension is on normal remuneration."

Contentions of the Parties

[137] Professor Walters submits that, by reason of the statutory requirement to consider the Report before the power to take action under s 199(8) of the HHBA is enlivened, consideration of the Report is a condition precedent to the taking of any action, including disciplinary action. He therefore contends that the decision to suspend under s 189 PSA was made in consideration of the BDO report and that, if the Report is successfully challenged on judicial review grounds, Mr Drummond's decision must be necessarily impeached.

[138] Professor Walter's counsel further contend that Mr Drummond could not have formed a "reasonable belief" for the purposes of s 189 of the *Public Service Act 2008* (Qld) because:[90]

(a) First, if approached from the view that Mr Drummond did rely on the Report in reaching his decision, he could not reasonably have relied upon it, given that the Investigators had emphasised that they did not have legal qualifications and recommended that legal advice be sought to assist with the interpretation of legislation. It does not appear Mr Drummond sought such advice. Reliance on unqualified legal conclusions could not, Professor Walters contends, be characterised as reasonable. It is further contended that the letter from the CCC dated 21 September 2018 supporting Mr Drummond and Metro North continuing Metro North's proposal to instigate disciplinary proceedings against Professor Walters did not "rescue" the situation for Mr Drummond, as the findings of "maladministration" were said by the CCC to be outside the terms of the

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[90] Applicant's Outline of Argument, [103].

MAR, and thus to have nothing to do with the CCC. Further, the letter is said to have been "manifestly superficial" in that it mischaracterised the findings by referring to "systemic issues… identified in the internal audit report… dated 23 April 2015". It failed to take into account that there had only been three specific LVRs which were said to be incorrect; an explanation of those errors had been provided; and Mr Beilby and Mr Corpus provided an undertaking to address all of the issues which were referred to in the BDO Report. That must have been obvious to Mr Drummond, who is said to have been aware of the 2015 audit findings;

(b) Secondly, once the irregularity in the BDO Report is demonstrated, the Report should be treated as invalid insofar as Professor Walters' substantive rights are concerned from the date the Report was made. Therefore, the decision under s 189 of the PSA must be regarded as occurring without the benefit of the Report, such that there was no reasonable basis for the belief formed by Mr Drummond.

[139] Professor Walters further contends that:

(a) Mr Drummond failed to consider the mandatory requirement of whether Professor Walters could have carried out alternative duties, rather than being suspended.

(b) The term "maladministration" is not a term found in any "disciplinary law" and is not of itself be sufficient to enliven s 189 unless it can otherwise be fitted within the language of s 187(1) of the PSA, since it is outside the definition of "disciplinary law" contained in Schedule 4 of the PSA. He therefore contends any decision made in that situation would be made without jurisdiction.[91]

[140] Professor Walters further contends that if the Court finds that the BDO Report was in error, Mr Drummond's reliance on the Report should result in his decision being similarly impugned on the basis of error.

[141] It is also submitted on behalf of Professor Walters that Mr Drummond's decision to suspend Professor Walters and pursue disciplinary proceedings against him is reviewable on the grounds of a reasonable apprehension of bias, actual bias and/or conflict of interest. In short, that is said to arise from:

(a) The fact that the Business Manager, who Professor Walters contends was the proper officer responsible for the financial oversight of ICOP, ultimately answered to Mr Drummond and his office;

(b) The fact that there have been a number of disagreements between Professor Walters and Mr Drummond;

(c) The aggressive and accusatory tone of the correspondence delivered on behalf of Mr Drummond in response to suggestions that he step aside as a decision maker;

(d) The decision to suspend Professor Walters from clinical practice from April 2018 to the present, despite there never having been any suggestion of clinical incompetence;

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91 *Judicial Review Act 1991* (Qld), s 20(2)(c).

(e) The apparent decision by Mr Drummond to return the draft report to the Investigators shortly after 8 August 2018 seemingly because the report was not critical enough of the applicant, which intimately involves Mr Drummond in the finding which he then relied on to suspend Professor Walters.

[142] Professor Walters further raises complaint on the basis that a partner and director of BDO, Mr Curran, is on the Board of Metro North. He contends that relationship between Mr Curran and the Investigators, who were also employed by BDO, might be reasonably seen to give rise to a natural reluctance on the part of Mr Drummond to criticise the quality of work undertaken by the Investigators.

[143] It is contended that Professor Walters has not been suspended on "normal remuneration" because of the loss caused to him by lost loadings and fees for private practice or consulting work.[92] Professor Walters contends that the principles of natural justice are therefore not excluded by s 190(2) of the PSA.

[144] Professor Walters also contends that the decisions to suspend Professor Walters from all duties and commence disciplinary proceedings:

(a) Were made without evidentiary justification;[93]

(b) Constituted an improper exercise of power because:

(i) There was a failure to fully or properly consider ICOP's organisational structure and the applicant's role within the organisation;[94]

(ii) It was so unreasonable that no reasonable person could so exercise the power;[95] and/or

(iii) It constituted an error of law or was otherwise contrary to law.

[145] Metro North and Mr Drummond contend that Mr Drummond's decision to suspend Professor Walters under s 189 of the PSA is not affected by any error that may afflict the BDO Report, notwithstanding the concessions made by the Investigators in relation to the findings of "corrupt conduct", and regardless of whether this Court finds that a ground of judicial review is made out in relation to the findings of "maladministration". They contend that, pursuant to s 189 of the PSA, the requirement was for Mr Drummond to hold a reasonable belief that "the employee is liable to discipline under a disciplinary law". Such a belief could reasonably be held in respect of the decision to suspend on 24 September, notwithstanding any error in the BDO Report. Further, Mr Drummond and Metro North contend that the BDO Report was only a permissive consideration to which Mr Drummond could have regard and was not a mandatory one, nor was consideration of the Report a precondition to making the decision to

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92 Applicant's Outline of Argument, [195].

93 *Judicial Review Act* 1991 (Qld), s 20(2)(h).

94 *Judicial Review Act* 1991 (Qld), s 23(b).

95 *Judicial Review Act* 1991 (Qld), s 23(g).

suspend. Metro North and Mr Drummond contend that the power to suspend under s 189 of the PSA was independent of the powers being exercised under the HHBA in relation to the investigation.

[146] Mr Drummond contends that any claim of actual or apprehended bias is unsubstantiated.

No relief sought

[147] Professor Walters also makes several complaints concerning Mr Drummond and Metro North in respect of which no relief is sought.

[148] Professor Walters complains that, following the receipt of a show cause notice on 23 October 2018 seeking his submissions as to why he should not be disciplined for maladministration, he received only partial grants for an extension of time to respond. It is contended that these grants were inadequate and, despite the fact that only an incomplete copy of the Report was provided to him on 24 September 2018, some further annexures were not provided until 9 October 2018 and transcripts of interviews with witnesses were still being received by Professor Walters in the period from 5 November 2018 to 7 November 2018. No relief is sought in the draft Order annexed to the applicant's submissions in relation to this complaint. I will therefore not consider this matter further.

[149] Professor Walters also complains that by a letter of 5 November 2018, Mr Drummond refused to allow the applicant access to Ms Karen Leighton, who Professor Walters regards as a key witness. The solicitors for Metro North and Mr Drummond purported to remedy this by interviewing her themselves. Again, as no relief is sought in relation to this matter, I will not consider it further.

BDO Report - condition precedent or mandatory consideration?

[150] A threshold consideration for several of Professor Walters' complaints in respect of the suspension decision is whether the BDO Report was a condition precedent or mandatory consideration which Mr Drummond was required to take into account before taking disciplinary action under s 189 of the PSA. Mr Drummond and Metro North contend that the BDO Report was a permissive consideration, to which Mr Drummond could properly have regard, but not a mandatory consideration in the sense described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.[96]

[151] There may be a wide range of permissible considerations which a decision-maker may weigh or disregard without committing an error of law.[97] In *Lo v Chief Commissioner of State Revenue*,[98] Basten JA described the distinction between the two in the following way:[99]

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96 (1986) 162 CLR 24 at 39.

97 *A v Corruption and Crime Commissioner* [2013] WASCA 288 at [90].

98 (2013) 85 NSWLR 86 at [9]-[10], with whom Beazley P agreed.

99 *Lo v Chief Commissioner of State Revenue* (2013) 85 NSWLR 86 at [9]-[10].

> "The "something more" requires reference to the dual concepts of "relevant considerations" and "taking into account". The term "relevant considerations" is widely misunderstood: as used in leading authorities, such as *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J, it refers to a matter which the decision-maker is bound to take into account. The obligation may derive from the express terms of the power-conferring statute or may be implied from its subject matter, scope and purpose. A preferable term would be "mandatory consideration". Further, a matter traditionally described as an "irrelevant consideration" is one which is prohibited because, having regard to the subject matter, scope and purpose of the power being exercised, it can be seen to reflect an extraneous or improper purpose or to render the decision arbitrary or capricious. Between these two categories is usually a wide range of permissible considerations which the decision-maker may weigh or disregard without committing an error of law.
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> The next concept is that of "taking into account". It covers a spectrum of conduct. If a decision-maker who gives reasons for a decision makes no reference to a particular matter, it may be inferred that he or she disregarded it, either deliberately or through inadvertence. In either case, if it were a mandatory consideration, there would be an error of law. If, however, the matter is referred to there may still be a basis for review. In some cases, it is asserted that there has been a failure to give "proper, genuine and realistic consideration", to a particular matter. That is best understood as a complaint of failure "to give adequate weight to a relevant factor of great importance": see *Peko-Wallsend* at 41 per Mason J. The other side of this complaint is giving "excessive weight to a relevant factor of no great importance". Dealing with these circumstances, Mason J continued:
>
> > 'The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene MR in *Wednesbury Corporation*, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it.'"

[152] The HHBA required that the BDO Report be provided to Mr Drummond. It was provided to Mr Drummond, who then provided it to Professor Walters on 24 September 2018. The fact that the Report was relied upon for the purposes of instigating disciplinary action and suspending Professor Walters under s 189 of the PSA is evidenced by the correspondence on behalf of Metro North to the CCC, as well as the terms of the 24 September 2018 letter itself.

[153] Ms Neri, an employee of Metro North, notified the CCC of Metro North's intention to commence disciplinary action in respect of Professor Walters' failure to rectify the issues identified during the ICOP audit which resulted in the ongoing inaccurate reporting and claiming of funds with CheckUp, if the CCC endorsed the action. Her letter to the CCC of 23 August 2018 specifically referred to the Investigators making a finding of maladministration

based on his inaction.[100] The follow up letter to the CCC of 29 August 2018 referred to [2.48] of the BDO Report in full. It stated that Mr Drummond had considered the findings outlined in the Report. The decision to take disciplinary action and to suspend under Part 2 of the PSA falls on the chief executive of a department who, in this case, is Mr Drummond.[101]

[154] On 21 September 2018 the CCC confirmed by letter that it supported the proposed action of Metro North in bringing disciplinary proceedings,[102] notwithstanding that none of the allegations that the CCC had initially required Metro North to investigate were found to be substantiated by BDO. On 24 September 2018, Professor Walters was notified by Mr Drummond that Metro North would be addressing the serious nature of the findings in the BDO Report in accordance with the Queensland Health Discipline Policy E10 and of his suspension under s 189 of the PSA.[103]

[155] Under s 45 of the HHBA, the chief executive is responsible for the employment of staff and conditions of employment. Other functions are given to the chief executive under the HHBA and other Acts. Under s 44F(2)(a) of the HHBA, the chief executive is obliged to act independently, impartially and fairly in making decisions about particular individuals.

[156] The investigation was undertaken and the Report was produced pursuant to the powers in the HHBA. Under the Terms of Reference, the Investigators were not to disclose information received in their capacity as Investigators, except to the extent necessary to perform their functions under or in relation to the HHBA, unless the disclosure was otherwise required or permitted by law.

[157] Pursuant to s 189 of the HHBA, the functions of a health service investigator are to "investigate and report on any matters relating to the management, administration or delivery of public sector health services, including employment matters". The terms of the HHBA therefore contemplate that the report which results from an investigation may be used for employment matters. In the present case, the Instrument of Appointment did not require the Investigators to specifically address employment matters. Part 9 of the HHBA provides Investigators with significant powers to carry out their role. Section 199(4) of the HHBA provides for an investigation report such as the BDO Report to be provided to the chief executive after an investigation into a "service". "Service" means a Hospital and Health Service,[104] which would include Metro North.

[158] Section 199(8) of the HHBA applies to a report provided to the chief executive after an investigation in the department or after an investigation in the Service.[105] Section 199(8) of

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100 Affidavit of JS Neri, affirmed 3 May 2019, Exh JSN-5.

101 Affidavit of SPC Drummond, affirmed 14 May 2019, [15], according to which he was delegated with the authority in accordance with the HHBA and other legislation, including the PSA.

102 Affidavit of JS Neri, affirmed 3 May 2019, Exh JSN-6.

103 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9.

104 *Hospital and Health Boards Act 2011* (Qld), Schedule 2.

105 *Hospital and Health Boards Act 2011* (Qld), s 199(7).

the HHBA then provides that, after considering the report, the chief executive or health service chief executive may take the action he or she considers appropriate in relation to the matters identified in the Report. That provision does not only apply to actions that may be taken under the HHBA.

[159] Chapter 6 of the PSA provides for disciplinary action for public service employees. There is no requirement under Chapter 6 and in particular, the exercise of the power to suspend for a report obtained under the HHBA to be considered prior to the decision being made. Any obligation to consider the findings of the BDO Report would therefore have to arise by implication or as a result of reading the HHBA and PSA together. In my view, although s 189 of the PSA does not prescribe that a report prepared under HBBA be considered, where such a report is produced and is to be relied upon to take disciplinary action, it must be considered by the decision-maker.

[160] When a report such as the BDO Report has been obtained, s 199(8) of the HHBA obliges the chief executive to consider the report before taking action that he or she considers appropriate in relation to the matters identified in the reports. The action which the chief executive considers appropriate is unconfined and not limited to action under the HHBA. The chief executive primarily acts under the HHBA, but provision is made for he or she to also be given functions under another Act which, in the present case, would appear to be Chapter 6 of the PSA. Similarly, Professor Walters was employed through exercise of the powers under the HHBA. The conditions of his employment extended to an "applied" public service law.[106] Properly construed, if the chief executive or health service wish to take action under a report provided to them under s 199(7) of the HHBA they are obliged to consider the Report first, and may then take action they consider appropriate, which would include action under powers contained in another Act. That would include disciplinary action under the PSA.

[161] As was stated by the High Court in *Hot Holdings Pty Ltd v Creasy,*[107] "[t]he form in which a decision-making structure is established may be likely to indicate the nature of the function exercised at each stage within that structure". Prior to Mr Drummond taking any action, he was, pursuant to s 199 of the HHBA, obliged to consider the BDO Report. While s 189 does not require a report to be prepared under the HHBA in order to bring disciplinary action, the HHBA and PSA must be read together where the chief executive is empowered by the HHBA to carry out functions under another Act, namely Chapter 6 of the PSA. If such a report is obtained, it must be considered by the chief executive before proceeding with any action and particularly disciplinary action. This conclusion draws some support from the decision of this Court in *Vega Vega v Hoyle & Ors.*[108] While not on all fours with the facts in the decision of *Vega Vega v Hoyle & Ors* , the position in the present case is similar insofar as A Lyons J concluded that consideration of the report in that case was an essential requirement to and had to be considered prior to any directive being made under s 199(5) HHBA.[109]It is

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106 *Hospital and Health Boards Act 2011* (Qld), s 66.

107 (1996) 185 CLR 149 at 159.

108 [2015] QSC 111.

109 *Vega Vega v Hoyle & Ors* [2015] QSC 111 at [120].

uncontentious that Mr Drummond took into account the BDO Report and the findings made in the Report.

[162] Further, I agree with the statement by Applegarth J in *Walters v Drummond & Ors*[110] that:

> "The fact that s 189(1) of the *Public Service Act* conferred a power to suspend simply serves to identify from where the first respondent derived a specific power to suspend. It does not alter the fact that he was empowered by s 199(8) to take that action and whatever other action he thought appropriate."

[163] In my view, prior to taking disciplinary action under s 189 of the PSA on the basis of matters in the Report, Mr Drummond was obliged to consider the Report.

[164] If examined from the point of view of whether the Report was a relevant consideration, I would reach the conclusion that it is implied in s 189 of the PSA that such a report must be considered. Given the interrelationship between the HHBA and Chapter 6 of the PSA and given the powers in the PSA itself, it is implied by the subject matter, scope and purpose of the PSA that the chief executive must comply with the provisions of other legislation such as the HHBA before it may rely on a report for the purposes of bringing disciplinary action. Section 189 requires a chief executive to reasonably believe that the employee is liable to discipline under a disciplinary law. On a proper construction of s 189, the chief executive must consider any report that contains substantive findings which form the basis for the chief executive's belief, particularly given that the exercise of the power may result in suspension.

[165] Whether the question is analysed from the interrelationship between the HHBA and PSA and reading the two Acts together or from determining whether the subject matter, scope and purpose of subject matter of Chapter 6 requires mandatory consideration of the terms of a report produced under other legislation which is to be relied upon in bringing disciplinary proceedings and suspending an employee but which the other legislation required the decision-maker to consider before taking action upon it, it was mandatory for Mr Drummond to consider the terms of the BDO Report before taking disciplinary action under s 189 of the PSA. It is not a permissive consideration as contended by Mr Drummond and Metro North, such that Mr Drummond could weigh or disregard it without committing an error of law. As a result, even if the chief executive held a reasonable belief, reliance on a report may still result in the decision being liable to be set aside through judicial review.

Did Mr Drummond rely on the findings of maladministration and corrupt conduct?

[166] Mr Drummond and Metro North contend that even if Mr Drummond was obliged to take into account the BDO Report, he did not take into account the finding with respect to corrupt conduct, at least in any material way, but rather relied on the underlying findings which underpinned the ultimate findings which were referred to as maladministration, as well as other matters, such as the CCC advice. Pursuant to s 189 of the PSA, Mr Drummond only had to hold a "reasonable belief" at the time he made the decision on 24 September 2018. Mr Drummond and Metro North contend that Mr Drummond held a reasonable belief that

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110 [2019] QSC 97 at [45].

Professor Walters would be liable to discipline under a disciplinary law, whatever the deficiencies in the BDO Report.[111]

[167] Professor Walters' counsel rejects the contention that Mr Drummond relied upon the underlying factual findings, rather than the substantive findings of maladministration and corrupt conduct. He submits this is evident from the letter of 24 September, which states "the report does make separate, serious adverse findings against you, including with respect to maladministration", which is consistent with the way maladministration was raised in the Terms of Reference[112] and Instruments of Appointment as a species of corrupt conduct and the fact the finding of maladministration was made as a substantive finding in the Report. It contends that the phrase "serious adverse findings" can only refer to the findings of corrupt conduct and maladministration. Similarly, the reference in the 24 September letter to the agreement of the CCC with the findings of maladministration arises out of the findings of the BDO Report and does not expand upon the considerations taken into account by Mr Drummond in any material way.

[168] Further, Professor Walters contends that the fact that Mr Drummond was relying on the adverse findings of "maladministration" and "corrupt conduct" in the Report is made clear by the following:[113]

> "In light of the serious nature of the findings in the report and the concerns that this gives rise to, MNHHS will be addressing those matters with you in accordance with Queensland Health Discipline Policy E10. …
>
> While no decisions have been made by MNHHS in relation to your employment and the findings of the report, in light of the serious concerns raised by the report findings that MNHHS will need to address with you in accordance with Queensland Health Discipline Policy E10, I am satisfied, subject to your response, you are liable to discipline in accordance with the Act and MNHHS policies." (emphasis added)

[169] Counsel for Professor Walters refers to the fact that the BDO Report explicitly states its "findings" insofar as they are adverse to Professor Walters in both the executive summary, as well as in the separate more expansive considerations set out in the Report in [2.52] – [2.54] and at [7.54] – [7.55]. He therefore contends that the reference to "findings" in the letter can only be construed as referring to the ultimate findings made.

[170] According to counsel for Mr Drummond and Metro North, the letter of 24 September 2018 shows that there has been active engagement with different parts of the CCC letter and BDO Report and that the whole letter when read in context refers to the role Professor Walters has had with respect to the management and oversight for ICOP and that he has, at least in relation to the underlying findings, failed to follow up matters and there have been LVR claims that have been incorrectly made which were described as systemic issues while he was

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111 *Ruddock v Taylor* (2005) 222 CLR 612 at [40].

112 Mr Drummond was responsible for authorising the Terms of Reference and signed them.

113 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9 at p 35.

holding that position of management with continued oversight of ICOP.[114] It was contended on behalf of Mr Drummond and Metro North[115] that the findings with respect to the failure to follow up of the Memo of 23 December 2015 were serious. They therefore submit that the findings that Professor Walters had failed to follow up the 23 December 2015 memo could be properly characterised as serious, and the reference to "serious adverse findings" was not linked to the ultimate findings of "maladministration" or "corrupt conduct".

[171] Mr Drummond in his affidavit has not given any evidence as to what he was referring to be "serious adverse findings", or the "serious concerns raised by the report findings" and what considerations he took into account.

[172] Counsel for Mr Drummond and Metro North submitted that at the stage of suspension, Mr Drummond did not need to identify the particulars of the disciplinary conduct for which he believed Professor Walters may be liable. In that regard they referred to the decision of *Dorante-Day v Marsden.*[116] The comment relied upon must, however, be seen in the context of that decision.

[173] Mullins J in *Dorante-Day v Marsden*,[117]considered in circumstances where the respondent in that case had identified serious allegations of inappropriate workplace behaviour, it could not be seriously suggested that conduct of the type was not amenable to discipline, at least under s 187 of the PSA. In those circumstances, the respondent was not bound to identify the particular disciplinary law referred to in s 189(1) PSA at the time of giving notice as long as he had formed the reasonable belief required under s 189(1) PSA. However, unlike the decision-maker in *Dorante-Day,* Mr Drummond has deposed as to the allegations he relied on as the basis for his reasonable belief.[118] In the present case, the Court can only make a determination by reference to the terms of the letter of 24 September 2018 itself.

[174] Counsel for Mr Drummond and Metro North particularly rely on the reference in the letter of 24 September 2015 to the CCC's views referring to the failure by Professor Walters "to adequately govern the administration and operation of ICOP in accordance with the Outreach Services Agreement between CheckUp and the MNHHS"[119] and the reference to "systemic issues" as evidence that Mr Drummond actively engaged with and took into account the underlying matters in the report of failure to follow up the 23 December 2015 memo, not just the specific findings of maladministration or corruption. Professor Walters points to the fact that the CCC commentary is only commenting on the BDO report, not making further findings and in any event, does not in fact accurately reflect the findings in the BDO Report, particularly in referring to "systemic" issues having been identified in the internal audit report

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114 T2-46.

115 This stands in contrast to the submission of BDO that there was no suggestion of any misconduct by Professor Walters.

116 [2019] QSC 125.

117 [2019] QSC 125 at [49].

118 *Dorante-Day v Marsden* [2019] QSC 125 at [3].

119 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9 at p 35.

of 23 April 2015 when there were only 3 LVRs that incorrectly claimed services, which Professor Walters was informed was due to a typographical error. He contends the references to the CCC's views, to the extent that they have any relevance at all, do not demonstrate an engagement in with the underlying findings as opposed to the findings of maladministration.

Consideration - Serious adverse findings

[175] Putting to one side the reference to "systemic issues", the CCC commentary referred to in Mr Drummond's letter of 24 September 2018 only comments on the findings in the BDO Report and explicitly endorses the proposed action of Metro North to commence disciplinary action against Professor Walters to address the findings of maladministration. The 24 September letter refers to the CCC's agreement with the findings of maladministration after it refers to the "serious adverse findings" made against Professor Walters. The 24 September letter then proceeds to refer to extracts from the CCC's advice. In my view, the letter's reference to the CCC commentary does not demonstrate that Mr Drummond's statement in respect of "serious adverse findings" was referring to the failure to follow up the 23 December 2015 memo, apart from "maladministration" and "corrupt conduct".

[176] The "findings" made are explicitly set out in the BDO report under the heading of "findings", albeit that other findings of fact were made as steps in the reasoning process. Paragraphs 2.52, 2.53 and 7.54 make clear, that "corrupt conduct" and "maladministration" were ultimate findings against Professor Walters, although in paragraph 7.54, the finding of maladministration relies on a reasoning process where "corrupt conduct" is considered as part of the reasoning process to reach the finding of maladministration. This identification of substantive findings in the BDO Report supports the fact that, the reference in the letter of 24 September to "the report does make separate, serious adverse findings against you <u>including</u> with respect to maladministration" (emphasis added) must on its proper construction include at least the finding of corrupt conduct and maladministration. I do not consider that phrase "serious adverse findings" referred to the failure to follow up on whether changes to the LVR process had been implemented following the 23 December 2015 memo, separate from the ultimate findings of "maladministration" and "corrupt conduct". That is evident from the terms of the letter itself and the terms of the BDO Report.

[177] While Mr Drummond refers to the CCC agreeing with the findings of maladministration rather than corrupt conduct, that does not demonstrate that Mr Drummond has confined his consideration to maladministration separately from corrupt conduct, given the use of the term "including" referred to above, and the fact that maladministration was found to also be corrupt conduct in [2.53] and, conversely, corrupt conduct was integral to the finding of maladministration in [7.54].

[178] Further support for the fact the finding of corrupt conduct was also relied upon by Mr Drummond is found in the letter of 23 October 2018 from Mr Drummond to Professor Walters. While Mr Drummond and Metro North contended that letter was irrelevant, I do not accept that to be the case.

[179] The letter of 24 September refers to particulars of Metro North's concerns being provided in a separate letter. It further states that Mr Drummond considers that Professor Walters will be liable to discipline "in light of the serious concerns raised by the report findings", subject to his

response.[120] Professor Walters contends that what was meant by serious adverse findings is informed by the letter sent to him by Mr Drummond on 23 October 2018, which provides particulars of the allegations said to found the "disciplinary action". Paragraphs 2 and 3 of that letter stated that:[121]

> "As you are aware, Metro North Hospital and Health Service (MNHHS) has been considering adverse findings made against you by BDO Pty Ltd in their investigation report dated 17 August 2018, a copy of which was provided with my letter of 24 September 2018.
>
> As set out in the report, and as reflected in the extracts from the letter from the Crime and Corruption Commission provided in my letter of 24 September 2018, these findings include findings against you of maladministration."

[180] The letter stated that Metro North was concerned Professor Walters' conduct was misconduct or conduct in contravention of the *Public Sector Ethics Act 1994* (Qld), for the reasons set out in the letter.[122]

[181] Page 7 of the letter extracts the matters BDO were said to have relied upon in finding that Professor Walters' actions were maladministration on the balance of probabilities. Subparagraph (a) refers to the definition adopted by the Queensland Ombudsman, while subparagraph (b) refers to maladministration also meeting the criteria of corrupt conduct. Subparagraph (d) sets out the findings at [2.48] of the BDO Report. While the letter refers to the 23 December 2015 memo and Professor Walters' failure to follow it up, that is in the context of setting out various matters leading to the findings of "maladministration".

[182] The letter refers to the conduct outlined in the letter being misconduct. The letter further states that:

> "As a result, if substantiated, MNHHS is concerned that by engaging in the above conduct, you have engaged in misconduct and breached the Code of Conduct, specifically that your conduct demonstrates that you have not:
>
> a) demonstrated commit (sic) to the highest ethical standards and are committed to honest, fair and respectful engagement with the community…"

[183] In the context of the letter as a whole, that statement is consistent with misconduct being "maladministration" and "corrupt conduct".

[184] I do not accept the submission of Metro North and Mr Drummond that the letter of 23 October 2018 cannot inform the meaning of the words "serious adverse findings" in the letter of 24 September 2018 because it was prepared after the time of the decision at the stage of formulating particulars of Mr Drummond and Metro North's concerns giving rise to potential

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120 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9 at p 35.

121 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-12 at p 141.

122 *Public Service Act 2008* (Qld), s 187(1)(b) and (f).

disciplinary action. While that it is true, Mr Drummond had copies of the draft and final versions of the Report since 8 and 17 August 2018 respectively, and correspondence prior to the letter of 24 September 2018 had referred to proposed disciplinary action on the basis of the findings of maladministration. Further, the provision of those particulars was foreshadowed in the letter of 24 September 2018. While I accept that the letter of 23 October 2018 is the result of an exercise extracting the detail relied upon as particulars, its content is consistent with Mr Drummond having relied on the findings of maladministration and corrupt findings as the "serious adverse findings".

[185] Mr Drummond has also deposed to the fact that he received the draft Report of 8 August 2018.[123] That was consistent with the requirement in the Terms of Reference that the report be provided to the chief executive in order for him to be satisfied that it had addressed the Terms of Reference. In that regard, the findings with respect to corrupt conduct appeared at [7.48] and [7.46] in both the draft and final forms of the Report. In the final Report, a reference was added making the following observation in respect of s 15(1)(b) of the *Crime and Corruption Act 2001* (Qld):

> "The misuse [sic], misleading information submitted to CheckUp on the LVRs, resulted in public funding being paid/misused for a purpose not agreed to by the Commonwealth. As noted, ICOP is the key responsibility of Subject Walters, a person holding an appointment."

[186] While those findings are findings made by BDO, it is evident that following the BDO Report being sent in draft for review by Mr Drummond, they were not challenged, but remained in the Report and were in fact slightly strengthened. In terms of the maladministration referred to in [2.48] of the draft as well as the final Report, "(iv)" was added to the final Report in very different terms to those contained in the draft, namely:

> "There appears to be a distinct lack of judgement, integrity, governance and industry standards for public administration in failing to rectify identified mistakes…"

[187] In all of the circumstances, I find that Mr Drummond's reference to "serious adverse findings" in the letter of 24 September 2019 does materially rely on the findings of maladministration and corrupt conduct in the BDO Report.

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[123] Affidavit of SPC Drummond, affirmed 14 May 2019, [40].

Reasonable Belief

[188] Section 189 of the PSA requires the chief executive to hold a reasonable belief that the person in question is liable to discipline under a disciplinary law. If, as Professor Walters' counsel contends, the belief of Mr Drummond cannot be characterised as "reasonable" there would be no enlivening of the power under s 189, such that the decision thereunder would be without jurisdiction. Alternatively, it is contended that the decision is reviewable for legal unreasonableness. In reality, if the court finds that Mr Drummond held a reasonable belief, the ground of legal unreasonableness will not succeed.

[189] It is uncontentious that when considering the question of whether a decision-maker had a reasonable belief, one looks at the position of the decision-maker at the time the decision was made. However, Professor Walters contends that if the Court finds that the findings in the BDO Report should be set aside from the date the decision was made, and that those findings were relied upon by Mr Drummond, that necessarily means that Mr Drummond had no reasonable basis for his belief. Mr Drummond and Metro North contend that does not follow and rely on two authorities as to how that question is to be approached.

[190] In the case of *Ruddock v Taylor,*[124] the person concerned had successfully brought an action in the District Court of New South Wales claiming damages for false imprisonment after his visa was twice cancelled by the Minister concerned and he was detained as a result. Both of those cancellation decisions had been quashed by the High Court. Under s 189(1) of the *Migration Act 1958* (Cth), a person could be detained if an officer reasonably suspected that the person was an unlawful non-citizen. It was contended that the quashing of the cancellation decision rendered the relevant officer's belief or suspicion that the respondent was an unlawful non-citizen unreasonable. In particular, it was contended that a belief or suspicion could not be reasonable if it was based on a mistake of law, even if the mistake was not apparent at the time the belief or suspicion was formed and was only identified after detention commenced.

[191] The High Court rejected that argument. In construing s 189 of the *Migration Act 1958* (Cth), the majority found that "what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against <u>what was known or reasonably capable of being known at the relevant time" (emphasis added)</u>.[125] At the time that detention was effected, the relevant case law required the conclusion that the respondent's visa could be lawfully cancelled. What had been, at the time, reasonable grounds for effecting the respondent's detention would not retrospectively cease to be reasonable from the time the Court made its orders overruling the decision.[126] In the Court's view, it did not matter whether the mistake was one of law or fact.[127] The High Court found that the officer responsible for the detention of the respondent reasonably suspected that the person was an unlawful non-citizen. The relevant officer had given evidence that when he was provided with the decision

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124 (2005) 222 CLR 612.

125 *Ruddock v Taylor* (2005) 222 CLR 612 at [40], per Gleeson CJ, Gummow , Hayne and Heydon JJ.

126 At [40].

127 At [41].

of the Minister to cancel the visa, he checked whether the person held any other visa. Upon finding that the person did not, the officer concerned detained the respondent. The High Court held that in those circumstances, the suspicion of the officer was a reasonable one and the person was lawfully detained. Upon the quashing of the decision to cancel the visa, the person had been released from detention, so the question of the effect of any error on the continued detention was not considered.

[192] In *Australian Education Union v General Manager of Fair Work Australia*,[128] the High Court referred to the nature of *certiorari* and the fact that the issue of *certiorari* quashes only the legal consequences of a decision, not an historical fact.[129] Thus, Mr Drummond and Metro North contend that even if the Court makes orders setting aside the findings of the BDO Report, that would not affect the fact that at the time the suspension decision was made, the BDO Report was in existence, nor the factual matters within it. The fact the BDO Report may be quashed or set aside does not have the automatic effect that the decision to suspend must be quashed or set aside.

[193] Counsel for Mr Drummond and Metro North emphasise that even if a decision in respect of maladministration or corrupt conduct were quashed or set aside from the date when they were made, the effect would only be to deprive those steps of consequences in law, rather than to treat them as if they never happened as a matter of historical fact.[130]

[194] I accept that the submission of Mr Drummond and Metro North accords with the authorities and the mere fact that the findings in the Report are set aside does not mean that Mr Drummond necessarily did not hold a reasonable belief.

Was there a reasonable belief?

[195] Section 189 deals with a "reasonable belief", as opposed to a reasonable suspicion. In *George v Rockett*,[131] the plurality discussed the distinction between "suspicion" and "belief". The High Court considered that:[132]

> "…objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof".

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128 (2019) 246 CLR 117 at [46] and [113].

129 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [46], per French CJ, Crennan and Kiefel JJ and at [113], per Heydon.

130 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [46], per French CJ, Crennan and Kiefel JJ and at [113], per Heydon J.

131 (1990) 170 CLR 104 at 116.

132 At 116.

Where a provision requires the decision-maker to be satisfied of a matter or hold a belief, as opposed to the existence of an objective fact, it may be difficult to show that the decision-maker has erred in reaching his or her decision or that the decision could not reasonably have been reached.[133] The decision is not, however, one that is unexaminable.[134]

[196] In the present case, the reasonable belief that was required to be held was that Professor Walters was liable to discipline under a "disciplinary law". The grounds of discipline are set out in s 187 of the PSA.

[197] "Disciplinary law" is broadly defined in Schedule 4 to mean:

> "a) this Act; or
>
> b) a disciplinary provision of an industrial instrument; or
>
> c) a law prescribed under a regulation".

[198] The question is whether it can be said that Mr Drummond's belief that Professor Walters was liable to discipline under the PSA was a reasonable one, given the matters contained in the BDO Report and the CCC's apparent endorsement of findings made therein, and having regard to the range of matters that could give rise to disciplinary action under s 187.

[199] The Court is able to review the objective existence of the criteria for "reasonable belief" in determining whether the decision was within jurisdiction.[135] It is not for the Court to substitute its opinion or belief for that of the decision-maker. However, for the exercise of the power to be lawful, the decision-maker must have held that belief and the facts and circumstances known to the person must have constituted objectively reasonable grounds for the belief.[136]

[200] To determine whether the matters raised by Professor Walters render Mr Drummond's belief unreasonable, the Court must consider[137] whether Mr Drummond could reasonably have known that the Investigators' conclusions that Professor Walters' actions were maladministration and he had engaged in corrupt conduct within the meaning of s 15 of the *Crime and Corruption Act 2001* (Qld) were infected by error or that there was no evidential basis for those conclusions.

[201] Professor Walters does not contend that Mr Drummond should have ascertained that the Investigators' findings were made in error himself. His contention is rather that, without seeking legal advice, Mr Drummond could not reasonably have relied on the findings, as they

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133 *Buck v Bavone* (1975) 135 CLR 110 at 118 – 119.

134 *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 at 360; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 73 ALD 1 at [54].

135 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133], referring to *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 and 342, per Latham CJ.

136 *Prior v Mole* (2017) 261 CLR 265 at [4].

137 Adopting the approach of the majority in *Ruddock v Taylor* (2005) 222 CLR 612.

involved interpretation of legislation. It is surprising that Mr Drummond was not alerted to the fact that the findings of corrupt conduct, at least, were fundamentally flawed, particularly given that he had had the final Report since mid-August of 2018 and appeared to have had the assistance of lawyers. However, while Mr Drummond had the opportunity to review the BDO Report, including in draft, there is nothing to suggest that either Mr Drummond or his lawyers had engaged in a process of detailed analysis of the BDO Report by 24 September 2018. The process of detailed analysis was one that reasonably would not be undertaken until the process of providing particulars had been undertaken. Further, the fact that the CCC did not raise any issue with respect to the findings of "maladministration" notwithstanding that as part of the reasoning the conduct was considered to be corrupt conduct supports the fact that, at least superficially, the findings were not obviously flawed. While suspending an employee is a significant matter, the failure to obtain legal advice prior to relying on the substantive findings of an investigative process at that preliminary stage of the disciplinary process could not, of itself, lead to the conclusion that the belief that Professor Walters was liable to discipline was not a reasonable one, having regard to the relatively low evidential threshold that needed to be met. I do not consider that Mr Drummond's belief was not reasonable due to his failure to obtain legal advice prior to suspending Professor Walters.

[202] Mr Drummond submits that the letter of 24 September 2018 also shows that the following matters, which appear to be matters extracted from the CCC letter, also formed the basis for his reasonable belief:

(a) That Professor Walters was ultimately responsible for the failure of ICOP's management to rectify the systemic issues;

(b) The systemic issues were identified in the 23 April 2015 internal audit report;

(c) There was a failure to adequately govern the administration and operation of ICOP in accordance with the relevant agreement, which resulted in incorrectly claimed reimbursements between 2015 and 2017.

[203] Based on the above, counsel for Mr Drummond and Metro North contended that the belief was reasonable as it relied on more than just the findings of maladministration or corrupt conduct. Counsel quite properly accepted that she could not submit those findings had not been considered at all.[138]

[204] There were in fact a number of errors in the summation of the effect of the BDO findings that the CCC relied upon by Mr Drummond:

(a) First, as submitted on behalf of Professor Walters, the 2015 internal audit report did not identify systemic issues, but only that there had been three incorrectly submitted LVRs. The State Manager, Mr Corpus, had explained to Professor Walters that those incorrect submissions had occurred due to a typographical error, not any systemic issue.[139] On any view, three incorrect LVRs could not be considered to reveal a "systemic" problem.

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138 T2-47/27-35.

139 BDO Report, [3.27(iii)] and [3.30]. That was accepted by the Investigators: see Affidavit of A Fairhurst, sworn 17 May 2019, [33]-[34].

Nor, in fact, was the cause of the incorrect LVRs the same before and after 2015. As discussed above, the evidence of Mr Goodman, who was responsible for lodging the LVRs in the post-2015 period, was that the incorrect submission of LVRs continued because of the employees' misunderstanding that the services performed by Ms Gorring and Mr Goodman could be claimed as services of a healthcare worker and a nurse.[140] The Investigators' reasoning in the BDO Report however assumed that incorrect LVRs continued to be lodged post-2015 they had been incorrectly lodged pre-2015.

(b) Further, there was no evidence that Professor Walters was responsible for the administration of ICOP in accordance with the Agreement, insofar as there was no evidence that Professor Walters administered the Agreement.[141] However, the Investigators extrapolated from Professor Walters' duties and involvement in issues in relation to ICOP that he was responsible for all aspects of ICOP, including administration in accordance with the Agreement.[142] The latter conclusion was based on an assumption that Metro North could not be directly responsible for all contracts they administered and, as such, responsibility would be delegated to an official. There was, however, no evidence that such responsibility had been delegated to Professor Walters. The conclusion seems to have been based on his statement in an email to Mr Williams that he had established and sponsored the ICOP program, as well as his involvement from time to time in the "day to day" operations of ICOP.[143] According to Mr Fairhurst, the expression of Professor Walters in the 23 December 2015 email to Mr Williams, "[w]e will work to ensure that both staff are described appropriately in reports", suggested he had an ongoing role.[144] That does not provide any evidential foundation for a conclusion Professor Walters was responsible for the administration of the Agreement.

[205] Professor Walters' criticism that the CCC's description of the problems in 2015 as "systemic" is unfounded is a well-made one. Similarly, there are serious questions in relation to the suggestion that there was a failure by Professor Walters to "adequately govern the administration and operation of ICOP".[145] However, the matters referred to by the CCC and any deficiencies in the BDO Report required an analysis of the BDO Report. I cannot conclude Mr Drummond would have known these matters as a result of his roles at Metro North at the relevant times or could reasonably have known them. While upon proper analysis, the CCC's comments are of little weight and the matter is finely balanced, I cannot conclude Mr Drummond should have been alive to those matters at the time the suspension decision was

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140 BDO Report, [7.11(xii)]; [7.19(vi) – (viii)]; [8.23(v)-(vi)].

141 Affidavit of DL Walters, sworn 1 March 2019, p 40, [198] (Statement provided to BDO on 21 June 2018), which was not contradicted by the first respondent.

142 BDO Report, [7.48(v)].

143 Affidavit of A Fairhurst, sworn 17 May 2019, [45].

144 Affidavit of A Fairhurst, sworn 17 May 2019, [33] and [35].

145 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9 at p 35.

made and could not reasonably rely upon them in the circumstances existing at the time. For the same reasons, I also cannot conclude the decision is legally unreasonable.

[206] Counsel for Mr Drummond and Metro North submit that the question of whether there is a sufficient basis for a reasonable belief to be held is one for the chief executive and falls within his decisional freedom, and upon which reasonable minds may differ, unless there is an underlying error. They further contend that the decision is not one which could be said to lack evident and intelligible justification, such that it was a decision that was so unreasonable that no decision-maker could have made the decision or held the belief.

[207] The unreasonableness ground does not sanction a review of the merits of a decision and is not made out merely if the court "disagrees with an evaluative decision or with the weight attributed to a factor taken into account in the decision".[146] It involves an assessment of whether the decision was lawful, having regard to the scope, purpose and subject matter of the statutory source of power.[147] It may be established where the decision lacks an "evident and intelligible justification".[148] The test is a stringent one and not satisfied where a decision only appears to be irrational.[149] The ground of legal unreasonableness was recently considered by the High Court in *Minister for Immigration and Border Protection v SZVFW.*[150] Nettle and Gordon JJ described the ground in the following way:[151]

> "The task of the court, where it has been alleged that a decision is legally unreasonable, is to ask whether the exercise of power by the decision-maker was beyond power because it was legally unreasonable.
>
> That task requires the court to assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision and, thus, assess whether the decision was lawful, having regard to the scope, purpose and objects of the statutory source of the power." (footnotes omitted)

[208] In the present case, there is no doubt that the Parliament intended for the power under s 189 to be exercised by the chief executive reasonably. The 24 September letter connotes that Mr Drummond was aware of the scope and purpose of the statutory power in making the decision. The question is whether he failed to exercise that power reasonably in forming the belief that Professor Walters was liable to discipline under a disciplinary law on the basis of and in reliance on the CCC findings and the Investigators' findings. Given that this was the first stage of disciplinary action and, on the face of the Report, findings of maladministration were made after an investigation with which the CCC expressed agreement, Mr Drummond's belief

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146 *Francis v Crime and Corruption Commission* [2015] QCA 218 at [33].

147 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [26].

148 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76].

149 *Minister for Immigration and Border Protection v SZVFW* (2018) 163 ALD 1 at [10], per Kiefel CJ.

150 (2018) 163 ALD 1.

151 (2018) 163 ALD 1 at [78]-[84].

that Professor Walters was so liable was not legally unreasonable, albeit upon analysis, the findings of BDO relied upon and the comments of the CCC were flawed.

[209] In reaching this conclusion, I am conscious of the fact that a stringent test is imposed in respect of the ground of legal unreasonableness and that, while a "reasonable belief" must be supported by objective circumstances, what is required is less than proof and the belief can be founded on slender evidence. I am also conscious of the fact that the power under s 189 is exercised at the outset of the disciplinary process, which may be before a full consideration of the issues and evidence involved. The letter set out the matters upon which Mr Drummond relied in forming a reasonable belief and, at least superficially, provided an evident and intelligible justification for that belief. Further, the terms of the letter support the fact that he considered those matters within the statutory framework of s 189. The BDO Report, supported by the CCC's comments, could reasonably support the belief that Professor Walters was liable to discipline under a disciplinary law at the preliminary stage at which the decision was made. I do not find that the belief was not reasonable or that the ground of legal unreasonableness is made out.

No breach of disciplinary law

[210] Professor Walters points to the fact that, even if there is a finding of "maladministration", it is not a term found in any disciplinary law. Thus it would not be of itself sufficient to enliven s 189 and must be otherwise fitted within the language of s 187(1) of the PSA. While it appears to be true that "maladministration" is not a term found in any disciplinary law, the way it has been defined in the BDO Report could result in it being characterised as "misconduct", which is one of the disciplinary grounds identified in s 187(1). I do not accept Professor Walters' submission in this respect.

Alternative Duties

[211] Professor Walters further complains that Mr Drummond failed to consider all alternative duties that may have been available for Professor Walters to perform and accordingly did not take into account a mandatory consideration under s 189. In the letter of 24 September 2018, Mr Drummond stated he had considered all alternative duties and determined "it would not be appropriate for you to perform alternative duties on the basis of your role and the nature of the concerns held by MNHHS".[152] That suggests that there were alternative duties available for Professor Walters to perform but Mr Drummond formed the view that it was not appropriate for Professor Walters to perform them, given the findings in the report. Mr Drummond did not depose in his affidavit to what he considered as the alternative duties available or the nature of those duties.

[212] Professor Walters contends that given his role was overwhelmingly a clinical one, Mr Drummond could not have considered all the alternative duties available. That is supported by the fact that Professor Walters had previously been seconded to the Royal Brisbane and

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[152] Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9 at p 36; Cf *Dorante-Day v Marsden* [2019] QSC 125 at [40], where the decision maker deposed as to the fact that there were no alternative duties available.

Women's Hospital as an Interim Executive Director from October 2014 to February or March 2015. It is further supported by the fact that it is uncontentious that Professor Walters' role in terms of the administration of ICOP was a minor one compared to the clinical duties as Director of Cardiology at TPCH. Counsel for Mr Drummond and Metro North submit that the reference to "all alternative duties" really meant "comparable alternative duties"[153] and, given the seniority of Professor Walters' position, and the fact that he had an administrative role in relation to ICOP as well as his clinical role, such roles were limited. Counsel further submit that the available duties had to be considered in light of the concerns held by Metro North, although those concerns were not identified.

[213] "Alternative" is a word that carries its ordinary meaning which, in this context, would be "of or relating to practices that offer a substitute for the conventional ones".[154] On the proper construction of s 189, comparability of the alternative duties to the ones presently being carried out by the employee would be relevant. However, the term "alternative" does not suggest the potential duties to be considered need to be the same. The basis of the conduct that underlies the belief that the person is liable to discipline would be relevant in the consideration of whether any alternative duties were "available" to be performed by the person. Consideration would need to be given to whether the potentially offending conduct affects the majority of the duties carried out in that role or only a small proportion.

[214] I am unable, on the basis of the terms of the letter and without cross-examination, to conclude that Mr Drummond had not considered the availability of alternative duties in light of the concerns arising from the "serious adverse findings" in the BDO Report. As I have found above, those findings included findings of "maladministration" or "corrupt conduct", which suggested serious impropriety on behalf of Professor Walters, which could give rise to a concern about his ability to carry out any role. I would have found otherwise had I concluded that the reference to "serious adverse findings" was only directed to Professor Walters' failure to follow up on the implementation of the steps contemplated in the 23 December 2015 memo. In those circumstances, given the limited administrative role carried out by Professor Walters, I would have determined that on the proper construction of s 189 "alternative duties" required consideration to be given to clinical roles, rather than only clinical and administrative roles, as the concerns held could not extend to his carrying out a clinical role.

Actual bias, apprehended bias or conflict of interest

[215] Professor Walters has relied on a number of different bases individually and cumulatively in support of the contention that a fair minded observer would reasonably apprehend that Mr Drummond would not bring an impartial or unprejudiced mind to the decision to suspend Professor Walters. However, while Professor Walters' concerns are understandable, a number of the concerns are borne out of his perception that Mr Drummond was privy to various events or things said which, in light of the evidence given by Mr Drummond, Dr Rosengren and Dr Whiting, is unsupported by the evidence.

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153 T2-47/15.

154 *Complete Oxford Dictionary* (2011), Oxford University Press.

[216] While the application suggests actual bias is alleged, Professor Walters' submissions appear to ultimately be framed in terms of a reasonable apprehension of bias. There was no cross-examination of Mr Drummond suggesting actual bias, although he was on notice it was an issue from the originating application. While counsel for Professor Walters contended that cross-examination was not called for, given Mr Drummond's evidence that he had no recollection of a number of events, the absence of cross-examination makes it difficult for the Court to determine the matter, particularly as to actual bias.

[217] Mr Drummond deposed to approaching all matters independently, impartially and with a fair mind in his role as chief executive of Metro North.[155] That accords with his statutory obligation under the HHBA.

[218] A case of actual bias requires cogent evidence that the decision-maker was in fact biased, such that he or she prejudged the matter so as to be unable or unwilling to decide it impartially.[156] The applicant carries a heavy onus to establish actual bias on the part of a decision-maker.[157] The evidence in the present matter does not establish actual bias on Mr Drummond's part. Based on the analysis below, I also do not consider that the evidence is sufficient to support the allegation of apprehended bias and it therefore cannot meet the more demanding standard required for actual bias.

[219] As to apprehended bias, the issue "is not whether the decision maker is in fact biased, but whether a fair minded observer might reasonably apprehend that the decision maker might not bring an impartial or unprejudiced mind to bear on the task".[158]

[220] A two stage test is required to be undertaken in determining whether there is a reasonable apprehension of bias. It first requires the identification of what it is said might lead to a decision-maker deciding a case other than on its legal and factual merits.[159] That may, for example, be a pecuniary or personal interest. Secondly, it "requires the articulation of a logical connection between that interest and the feared deviation from the course of deciding the case on its merits".[160] That test has been applied not only in the context of those carrying out judicial roles, but also to other kinds of decision-makers.[161]

[221] The High Court in *Isbester* noted that the application of the principles respecting apprehension of bias "may be said to generally depend upon the nature of the decision and its statutory

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155 Affidavit of SPC Drummond, affirmed 14 May 2019, [17].

156 *Chen v Monash University* (2016) 244 FCR 424 at [146], referring to *Gamaethige v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 424 at [79], per Stone J.

157 *South Western Sydney Area Health Services v Edmonds* [2007] NSWCA 16 at [97].

158 *Keating v Morris & Ors* [2005] QSC 243 at 37.

159 *Isbester v Knox City Council* (2015) 225 CLR 135 at [21], referring to *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8].

160 *Isbester v Knox City Council* (2015) 225 CLR 135 at [21].

161 *Isbester v Knox City Council* (2015) 225 CLR 135 at [22].

context, what is involved in the making of the decision and the identity of the decision maker".[162] The Court further noted that "the hypothetical fair minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made, as well as to have knowledge of the circumstances leading to the decision".[163] The High Court in *Isbester* also identified that where "an interest is identified as one which points to a conflict of interest, the connection between that interest and the possibility of deviation from proper decision is obvious".[164]

[222] According to the submissions of Professor Walters, ICOP's true organisational structure and lines of reporting ultimately led to Mr Drummond and his office via the business manager. He contends that there is therefore a reasonable perception that Mr Drummond had a personal interest in laying blame at the feet of Professor Walters, rather than finding that responsibility for financial affairs lay with persons under his own supervision. The true organisation chart relied upon by Professor Walters provided that the business manager would report to the executive director of TPCH, who subsequently reported to Mr Drummond.[165] Given that the business manager was immediately answerable to the executive director of TPCH, the fact that the executive director was ultimately answerable to Mr Drummond would not create an interest sufficient to have led Mr Drummond to decide matters other than on the legal and factual merits. Nor does the connection between the business manager and Mr Drummond, via the executive director of TPCH, establish a logical link between that purported interest and the feared deviation from deciding disciplinary matters according to their merit. The suspension of Professor Walters was based on a reasonable belief only and would not avoid the potential for Mr Drummond to ultimately be found responsible for overseeing the business manager who may have been proved to be primarily responsible for the submission of the LVRs. A fair-minded and reasonably well-informed observer would not conclude that Mr Drummond might not approach the matter with an open and impartial mind on the basis of ICOP's true organisational structure.

[223] Professor Walters then asserts that the animosity that existed between Mr Drummond and himself as a result of criticisms Professor Walters publicly made of Mr Drummond, particularly concerning his management of Metro North, was such that a reasonable observer might reasonably apprehend that Mr Drummond could not bring an open and impartial mind to the disciplinary considerations involving Professor Walters. He contends that there is a close logical connection between Mr Drummond's role as decision-maker and the personal history, in that a decision to blame Professor Walters for maladministration may be seen to render Professor Walters' previous criticisms of the first respondent implausible and unjustified.

[224] The evidence relied upon in this regard is the personal history between Professor Walters and Mr Drummond. However, the belief that there is such personal animosity between the two, and that it was shared by Mr Drummond, is largely based on Professor Walters' assumption

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162 *Isbester v Knox City Council* (2015) 225 CLR 135 at [23].

163 *Isbester v Knox City Council* (2015) 225 CLR 135 at [23].

164 *Isbester v Knox City Council* (2015) 225 CLR 135 at [49].

165 Affidavit of S Hughes, sworn 20 December 2018, Exh SH-1 at p 79.

that criticisms he made of Mr Drummond and particularly of his management to Dr Rosengren and Dr Whiting were relayed to Mr Drummond. Both Dr Rosengren and Dr Whiting have given evidence.[166] Dr Rosengren stated that he did not relay Professor Walters' comments or concerns to Mr Drummond.[167] Dr Whiting has no recollection of informing Mr Drummond about any criticisms Professor Walters made of him to her.[168] Mr Drummond's evidence is also that he does not recall such matters being raised.[169]

[225] Professor Walters also alleges that his public disagreements with Mr Drummond about funding provides another reason for the animus between Mr Drummond and himself. In particular, he refers to discussions with Mr Drummond about budgetary matters, when Mr Drummond, as chief operations officer, chaired the Metro North Operations and Management meetings, and Professor Walters was seeking to expand cardiac services at Redcliffe and Caboolture Hospitals.[170] He also contends that discussions that he had with Mr Williams in which he expressed concerns about TPCH's budgetary position and the cardiology's position, and particularly about a lack of funding, were matters that he reasonably expected Mr Williams would have passed on to Mr Drummond.[171]

[226] Mr Williams has not given evidence. While accepting Professor Walters' uncontradicted evidence about his interaction with Mr Williams about the budget, Mr Drummond has given evidence that his involvement in the budgeting process was not at a departmental level, but rather at a hospital level, and that allocation to departments is within the responsibility of the relevant executive director.[172] He stated he did not say to Mr Williams that he would not provide funds to clear the cardiology program's budget overrun in November 2017, but said that he would have said Metro North would not cover TPCH's $10 million budget shortfall.[173] Mr Drummond agreed he did have direct interaction with Professor Walters in relation to a proposal for the Redcliffe and Caboolture Hospitals. In that regard, he stated that there had been multiple proposals and Professor Walters did not have the support of the executive directors of the Caboolture or Redcliffe Hospitals. The approval of proposals was a decision of the panel, not Mr Drummond's decision alone.[174]

[227] Mr Drummond has not taken issue with Professor Walters' evidence of discussions that took place at the Medical Advisory Committee in March 2018 after he says that he was directed by

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166 Affidavit of DJ Rosengren, affirmed 9 May 2019; Affidavit of ES Whiting, affirmed 10 May 2019.

167 Affidavit of DJ Rosengren, affirmed 9 May 2019, [35].

168 Affidavit of ES Whiting, affirmed 10 May 2019, [29].

169 Affidavit of SPC Drummond, affirmed 14 May 2019, [62]-[65].

170 Affidavit of DL Walters, sworn 1 March 2019, [116]-[120].

171 Affidavit of DL Walters, sworn 1 March 2019, [131]-[132].

172 Affidavit of SPC Drummond, affirmed 14 May 2019, [74]-[45].

173 Affidavit of SPC Drummond, affirmed 14 May 2019, [77].

174 Affidavit of SPC Drummond, affirmed 14 May 2019, [71]-[72].

Mr Williams to slow clinical activity and send staff on holiday.[175] Professor Walters' evidence was that he challenged the quality of business and financial management services and data that was being relied upon in a meeting with some 23 other attendees. Professor Walters described the interaction becoming heated with Mr Drummond seeking to place the responsibility for budget issues on clinicians, while Professor Walters contended it was because money was being diverted to other projects. I therefore accept that those discussions occurred. However, while Professor Walters took issue with Mr Drummond's approach, a fair-minded observer would not consider the discussion to be more than a robust exchange in the context of the management of a large budget. It was not sufficient to create an interest which could result in Mr Drummond deviating from making a decision on the merits or reasonable apprehension that Mr Drummond might not bring an impartial mind to bear on the decision to suspend.

[228] Professor Walters further relies on his reaction to Mr Whelan's appointment. Professor Walters disagreed with the appointment of Mr Whelan in 2017 to carry out a review of the clinical stream structure, which was commissioned by Dr Rosengren. He expressed his views to Dr Rosengren and Dr Whiting that the appointment was inappropriate, given Mr Whelan had previously held Mr Drummond's role, stating that he did not have anything to say to Mr Whelan in the review. He stated that he declined to reapply for the role of executive director of Metro North's Heart and Lung Stream as a result of the appointment, amongst other things.[176]

[229] Dr Whiting accepted that Professor Walters did not reapply for the role of executive director of Metro North's Heart and Lung stream in September 2019 after Mr Whelan's appointment and that Professor Walters had stated that he did not support Mr Whelan's appointment and sent emails outlining his position. She did not recall relaying Professor Walters' comments to Mr Drummond, other than saying he did not wish to participate in the review.[177] She also stated that while Professor Walters had been critical of Mr Drummond's appointment, she did not recall relaying his views to Mr Drummond.[178]

[230] Dr Rosengren also stated that he did not report Professor Walters' comment or concerns regarding Mr Whelan to Mr Drummond.[179] He denied that he directed Professor Walters to participate in the review, although he did inform him he was expected to participate.

[231] Mr Drummond stated he was told Professor Walters was refusing to participate in the review. He stated he indicated to Dr Rosengren that the approach to be taken was a matter for Dr Rosengren to consider.[180] Mr Drummond stated he was not responsible for Mr Whelan being appointed, nor did he have any significant involvement in the review. While Professor

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175 Affidavit of DL Walters, sworn 1 March 2019, [137]-[153].

176 Affidavit of SPC Drummond, affirmed 14 May 2019, [111].

177 Affidavit of ES Whiting, affirmed 10 May 2019, [29].

178 Affidavit of ES Whiting, affirmed 10 May 2019, [34].

179 Affidavit of DJ Rosengren, affirmed 9 May 2019, [35].

180 Affidavit of SPC Drummond, affirmed 14 May 2019, [62].

Walters' criticisms of Mr Drummond, if they had been relayed, may have created a perception that Mr Drummond might not have brought an impartial mind to the suspension decision, the evidence does not substantiate that Mr Drummond was aware of those criticisms.

[232] As to the medical imaging department restructure and directorate review, Professor Walters states his forthright and public support for TPCH's Medical Imaging Department and its director provides a further reason for Mr Drummond to have been biased against him.[181] None of his evidence involved direct interaction with Mr Drummond in relation to the matter. His perception is based on a belief that his views would have been relayed to Mr Drummond by Dr Whiting and Dr Rosengren. Mr Drummond has stated that he was not aware of Professor Walters' involvement in terms of his communications with John Cosgrove or the memorandum to Ms Cridland and Mr Williams dated 29 January 2019. He further stated that he was not informed of any comments that Professor Walters may have made at medical advisory committee meetings of 27 July 2016 and 28 February 2018, nor was he given any updates by Dr Rosengren identifying the individuals who provided feedback.[182]

[233] On the basis of the evidence as it stands and in the absence of any cross-examination of Mr Drummond or Dr Rosengren, I cannot conclude on the balance of probabilities that Mr Drummond was aware of the comments made by Professor Walters. Dr Rosengren states that he did not relay the matters alleged. I am not satisfied that Mr Drummond was in fact made aware of any of the matters that Professor Walters has raised, so as to give rise to animus on the part of Mr Drummond sufficient for me to conclude there was a possibility Mr Drummond would not decide disciplinary matters on their merits. Accordingly, I cannot conclude that those matters found any basis upon which I could conclude there was a reasonable apprehension of bias.

[234] Similarly, I cannot conclude that the concerns that Professor Walters expressed to Mr Williams about after hours care and emergency care were relayed to Mr Drummond. Mr Drummond stated that those matters would not usually be raised with him and he was not aware that Professor Walters had expressed such concerns.[183]

[235] I therefore conclude that while there may be personal history between Professor Walters and Mr Drummond, there is scant evidence that the views expressed by Professor Walters criticising management, including Mr Drummond, were relayed to Mr Drummond. The evidence of the interactions between them does not reflect more than two strong-minded individuals who held senior positions and were not aligned in their views. That evidence is not sufficient to show a level of animus that a fair-minded lay observer might reasonably apprehend might cause Mr Drummond to not bring an impartial mind to the disciplinary considerations involving Professor Walters.

[236] Professor Walters also complains about the aggressive and accusatory correspondence delivered on behalf of Mr Drummond in response to suggestions that he stand aside as

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181 Affidavit of DL Walters, sworn 1 March 2019, [154].

182 Affidavit of SPC Drummond, affirmed 14 May 2019, [85]-[90].

183 Affidavit of SPC Drummond, affirmed 14 May 2019, [85].

decision-maker.[184] I do consider the responses of the solicitors in that correspondence were in some instances heavy-handed and inappropriately accused Professor Walters of attempting to interfere with the process, including the process before the CCC. However, the evidence of the correspondence does not demonstrate that Mr Drummond held personal animosity towards Professor Walters, such that a reasonable observer may consider that he would not be able to bring an impartial mind to the decision-making in relation to the suspension, as opposed to a mere overreaction to allegations impugning Mr Drummond's personal and professional reputation.

[237] Professor Walters also contends that the decision to suspend him rather than confining him to clinical practice, despite there having been no aspersions cast upon his clinical competence, suggests bias on the part of Mr Drummond. Given the nature of the allegations raised by the CCC, the suspension pursuant to s 137 of the PSA is not such that one could infer it was the result of bias by Mr Drummond. There is no doubt good reason for Professor Walters to question the decision to suspend him from all duties, given his significant expertise and clinical experience**.** While, there is a basis for Professor Walters to feel aggrieved as to the decision to fully suspend him pursuant to s 189, given the findings in the BDO Report, albeit now found to have been affected by error, I do not consider the decision evidences actual bias nor that a fair minded observe would conclude that the harshness of the decision may have been the result of Mr Drummond failing to bring an impartial mind to the decision.

[238] The fact that Mr Drummond made the suspension decision after receiving the BDO Report in draft, and after having the opportunity to review and provide his input into it before it was issued as a final report by BDO, does give rise to some concerns about the objectivity of his decision-making. The Terms of Reference stated that the Report was to be provided to him for his review prior to its finalisation, to ensure that the Terms of Reference had been complied with. That condition was not otherwise imposed by the HHBA, nor did the CCC make any such direction. However, under the HHBA, Mr Drummond was the appointor empowered to appoint a person as a health service investigator to undertake an investigation.[185]

[239] The findings against Professor Walter were more definitively stated in the final Report than in the draft Report. [186] The fact that Mr Drummond's review of the BDO Report did not result in the findings of corrupt conduct or maladministration being revisited, and their subsequent strengthening after the review in the final report, may suggest a personal interest in defending the findings in the BDO Report. That interest may then logically be connected to a feared deviation by Mr Drummond from properly deciding on the merits whether there was a basis for a reasonable belief that Professor Walters was liable to discipline, as opposed to him merely adopting the findings in the Report. However, as the chief executive of Metro North who was responsible for the appointment of the Investigators under the HHBA, his review of

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184 Applicant's Outline of Argument, [186(c)]. The applicant refers to letters sent by Clayton Utz on the first respondent's behalf, dated 7 August 2018, 17 August 2018, 19 September 2018, and 9 November 2018.

185 *Hospital and Health Boards Act 2011* (Qld), s 190(2).

186 As to which see the schedule comparing the draft report to the final report attached to the Applicant's Outline of Argument. Mr Drummond had not made the complaints against Dr Walters, nor had he been the investigator.

the draft BDO Report to ensure compliance with the Terms of Reference was consistent with his role.[187] The statutory framework also provided for Mr Drummond to be responsible for disciplinary action. It was the Investigators, not Mr Drummond, who were ultimately responsible for the Report produced. Mr Drummond's role was not akin to that of an investigator or prosecutor.[188]

[240] There is no evidence before me as to Mr Drummond's role in the content of the final report other than the fact he reviewed the draft report. Nor does the letter of 24 September 2018 suggest he blindly followed the terms of the BDO Report, given the preliminary stage of the disciplinary action at the time the decision was made. While the letter does state that Mr Drummond was "satisfied that, subject to your response, you are liable to discipline", the relevant paragraph was preceded by a paragraph stating the test for suspension based on reasonable belief.[189] These factors, particularly when considered in light of the decision to suspend, may raise some unease or disquiet, but that is insufficient to satisfy the test for apprehended bias.[190] I do not consider that Mr Drummond's involvement in the review of the Report is sufficient to determine that a fair-minded and reasonably well-informed observer might apprehend that Mr Drummond might lack impartiality in deciding whether to suspend Professor Walters.

[241] Professor Walters also raises the prospect that the membership of Mr Curran, a partner of BDO, on the board of Metro North might reasonably be seen to give rise to a natural reluctance on the part of Mr Drummond to criticise the quality of the work undertaken by the Investigators. That may well create an issue if that decision was made by Metro North on the basis of the BDO Report if Mr Curran was part of the decision-making process. However, the fact that Mr Curran is one of a number of members of the Board to which Professor Walters was answerable does not constitute an interest sufficient to lead Mr Drummond to make disciplinary decisions in relation to Professor Walters other than in accordance with the legal and factual merits of the matter. A reasonable observer would know that Mr Drummond was answerable to the Board of Metro North of which Mr Curran is a member, but would also know that Mr Drummond has a statutory role of making disciplinary decisions in relation to individuals and a contractual role as chief executive which he must fulfil. Further, the Board had no role in the decision to suspend, such that there is no logical connection between any alleged interest and the decision. The PSA requires Mr Drummond to have been reasonably satisfied to the standard prescribed before any decision was made, not to simply follow the findings in the BDO report. A fair-minded and reasonable observer would not conclude that Mr Drummond would not approach the matter with an open mind, as he was statutorily required to, due to Mr Curran's presence on the Board.

[242] I do not find that this ground has been made out.

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187 See *Greenwood v Winsor* [2008] QCA 415 at [70]. Although, in that case, Ms Winsor had a delegated role under the relevant Act.

188 Cf the council officer in *Isbester v Knox City Council* (2015) 225 CLR 135.

189 Affidavit of SPC Drummond, affirmed 14 May 2019, Exh SPCD-9.

190 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

Effect of reliance on BDO Report

[243] Professor Walters submits that if the findings of maladministration and corrupt conduct are found to be affected by error on the basis of one of the judicial grounds raised, the decision of Mr Drummond made in reliance on those findings in the Report must also be set aside.

[244] While I have determined that the suspension decision cannot be impugned on the basis that Mr Drummond did not hold a reasonable belief, there is still a question of whether the decision is liable to be set aside. This is because I have found that Mr Drummond did have to consider the BDO Report and did rely on the findings of maladministration and corrupt conduct in determining to suspend Professor Walters, such that they were material to the exercise of his power.

[245] Professor Walters argues that any error in the BDO Report or failure on the part of the Investigators to take into account a relevant consideration should be imputed to Mr Drummond, so as to justify the conclusion that Mr Drummond was in error or failed to take into account a relevant consideration. As set out above, Mr Drummond and Metro North contend that the Report was a permissive consideration, not one that he was bound to take into account. For the reasons above, I have rejected that contention.

[246] In *Sean Investments Pty Ltd v MacKellar*,[191] Dean J observed at 371:

> "In a case where the Minister simply adopts the report and recommendation of the Committee as his own, the result will not be that the decision becomes, for practical purposes, immune from review under the provisions of the Administrative Decisions (Judicial Review) Act 1977. In such a case, the Minister, in simply adopting the report and recommendations of the Committee, will ordinarily also adopt any errors of law, including taking into account irrelevant considerations and failing to take into account relevant considerations, which might vitiate the Committee's report and recommendations with the consequence that the Minister's own decision can be attacked on the relevant ground under s 5 of that Act. Where the Minister does not adopt as his own the whole of the report and recommendations of the Committee but adopts a particular conclusion which the Committee reached, a similar position will obtain as regards any errors of law which might have the effect of vitiating the relevant conclusion." (emphasis added)

[247] In *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2),*[192] Buchanan J analysed passages from *Peko-Wallsend* and *Sean Investments*, and at [95] stated:

> "The consequence of the approach which these passages exemplify is that a minister is not obliged to attempt personal detailed analysis of matters which, in some cases, may require a high level of expertise, as they did in the present case. He is entitled to rely upon the advice and analysis of officers of his department.

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191 (1981) 38 ALR 363.

192 (2008) 251 ALR 80 at [95].

> That is so whether expressly permitted by statute or not. In the present case the minister was also expressly directed to take into account, amongst other things, the assessment report prepared by the Department. However, when a minister relies upon advice, as he is entitled to do, and the advice is materially inadequate or misleading, any such failing may introduce legal error into the minister's decision. Whether it does so will depend upon the significance of the error or omission in the advice tendered."

[248] In *Australia Pacific LNG Pty Limited & Ors v The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport*,[193] Bond J applied the above authorities in considering the question of whether taking into account irrelevant considerations could be imputed to the Minister, so as to justify the conclusion that the Minister took into account an irrelevant consideration.

[249] I have drawn the inference that Mr Drummond did rely on the findings of maladministration, which included a finding of corrupt conduct, in referring to the "serious adverse findings" in the BDO Report and in the exercise of his power to suspend Professor Walters.

[250] Counsel for Mr Drummond and Metro North, however, contend that the decision could stand on other bases given the letter of 24 September 2018 shows Mr Drummond did not simply rely on the Report with no engagement with its content. As was stated by Mason J in *Peko-Wallsend*, a relevant consideration or irrelevant consideration may be so insignificant that it could not have materially affected a decision, such that the Court would not be justified in setting the decision aside.[194] Or, to frame it in a different way, the question is whether the error materially contributed to the decision such that, but for the error, the decision would or might have been different.[195]

[251] As I have found, the "serious adverse findings" referred to in the letter of 24 September 2018 relied on the findings of "maladministration" which included "corrupt conduct". I consider that those findings were material to the decision. The CCC was stated to have agreed with the findings of "maladministration". Its comments were made on the basis of the findings in the BDO Report, not on any separate or additional basis. The excerpts from the CCC's advice in the 24 September 2018 letter were its summation of the findings of "maladministration" in the BDO Report and do not have the effect of diluting the reliance on the findings of "maladministration".

[252] In my view, reliance on the findings of "maladministration" was material to the decision of Mr Drummond. This is supported by the terms of the letter of 24 September 2018. Mr Drummond has provided no evidence which explains the effect of the findings of maladministration, or any other matters he considered, on his decision to suspend Professor Walters. I am not persuaded to draw an inference that that the impugned findings were so

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193 [2019] QSC 124.

194 (1986) 162 CLR 24 at 40.

195 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353, per Mason CJ and 384, per Toohey and Gaudron JJ.

insignificant that they had no effect on the suspension decision and that the Court would be justified in not setting aside the decision.

[253] Having materially relied upon the findings in the BDO Report which I have found are affected by error on the basis of the judicial review grounds addressed above, Mr Drummond's decision to suspend Professor Walters is materially affected by the same error.

Failure to consider organisational structure of ICOP

[254] Professor Walters also raises as a ground for judicial review that Mr Drummond failed to fully or properly consider ICOP's structure and the applicant's role within that organisational structure. Given that I have found the suspension decision is liable to be set aside and the argument that there was a failure to consider the organisational structure has not been articulated separately from the criticism made of the BDO Report, and is framed as a criticism of the weight that was attached to the consideration, which is not a proper basis for the ground of review, it is unnecessary for me to consider this ground further.

Conclusion

[255] Based upon the above analysis, my conclusions are:

(a) That part of the decision of the Investigators which consisted of findings that the actions of Professor Walters were, on the balance of probabilities, maladministration, are liable to be set aside on the following bases:

(i) The decision involved an error of law in the adoption and application of the definition of maladministration;

(ii) The decision involved an error of law insofar as the investigators conflated maladministration and corrupt conduct;

(iii) Alternatively, there was no evidence or other material to justify the findings of maladministration and corrupt conduct;

(iv) Alternatively, the decision to suspend Professor Walters was so unreasonable that no reasonable person could so exercise the power;

(v) There was a denial of natural justice insofar as Professor Walters was not given adequate notice of the issue of maladministration;

(b) The decision to suspend Professor Walters is not liable to be set aside on the basis of an improper exercise of power, reasonable apprehension of bias and/or conflict of interest or legal unreasonableness.

(c) The decision to suspend Professor Walters is liable to be set aside on the basis that Mr Drummond was bound to consider the terms of the BDO Report in making the decision to suspend Professor Walters. The decision materially relied on the findings of maladministration and corrupt conduct and is affected by the same errors which I have found affected the findings of maladministration and which were conceded by the Investigators to have affected the findings of "corrupt conduct".

Appropriate Relief

[256] Professor Walters seeks orders that paragraphs [2.43]-[2.55], [2.63] and [7.44]-[7.55] be quashed and struck from the Report and the decision to suspend him with effect from 24 September 2018 be quashed. In particular, he submits that the relief should leave in place those parts of the Report that answered the CCC's MAR, which addressed not only the matters that were to be investigated in relation to Professor Walters, but also other individuals, and were exculpatory of all concerned. No issue is raised with any of the findings other than the findings in relation to which Professor Walters seeks relief.

[257] Counsel for the Investigators propose that, given their concessions in respect of the finding of corrupt conduct, declarations be made in relation to that finding.

[258] Section 30 of the JRA provides the Court with wide powers in determining the appropriate orders to make. Section 30(1) permits the Court to quash or set aside a decision or part of a decision as confers upon it the power to make declaratory orders. The High Court in *Park Oh*

Ho and Others v The Minister of State for Immigration and Ethnic Affairs[196] stated that the legislative purpose of s 16(1)(c) and s 16(1)(d) of the *Administrative Decisions (Judicial Review) Act 1997* (Cth)[197] was:

> "…to allow flexibility in the framing of orders so that the issues properly raised in the review proceedings can be disposed of in a way which will achieve what is 'necessary to do justice between the parties'…and which will avoid unnecessary re-litigation between the parties of those issues."

[259] I have found that the Investigators made an error of law and denied procedural fairness to Professor Walters in making the findings of maladministration. The Investigators conceded that the findings of corrupt conduct involved an error of law and denial of procedural fairness. Section 16(1) of the JRA contemplates a decision being set aside in whole or in part. It is appropriate to set aside those parts of the decision from the date they were made, as the grounds of error of law and lack of procedural fairness, at least, are jurisdictional errors,[198] which generally result in the decision or relevant part thereof being regarded as a nullity.[199]

[260] In the present case, the Investigators made a number of findings, including findings which not only affect Professor Walters but which also affect the interests of third parties, namely, other employees under investigation. The impugned findings, however, are only made in relation to Professor Walters and are separate, independent findings.

[261] Given that the BDO Report dealt with a number of allegations which extended to other parties, including those that were referred for investigation by the CCC, and the findings as to maladministration and corrupt conduct are separate findings which were only directed against Professor Walters, it is appropriate that only those parts of the Report be the subject of relief. As both the findings of maladministration and of corrupt conduct are afflicted by legal error, it is appropriate that they be quashed so as to have no effect from 17 August 2018. I can see no basis upon which I can order that they be struck from the Report. Given that I have found the definition of maladministration adopted by the Investigators was an error of law, it is appropriate that the findings in [2.43]-[2.48], [2.52]-[2.53], and [7.44]-[7.48] and [7.54] be quashed, and that part of the decision which made findings of maladministration and corrupt conduct by Professor Walters on the balance of probabilities be set aside from the date the decision was made, namely, 24 August 2018.

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196 (1989) 167 CLR 637 at 644-45, per Mason CJ, Deane, Gaudron, Toohey and McHugh JJ.

197 Which are in substantively the same terms as s 30(1)(c) and (d) of the JRA.

198 See M Arsonon, M Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability,* 6th Ed (2016: Thomson Reuters) at [1.140], which provides a catalogue of jurisdictional errors based on *Craig v South Australia* (1995) 184 CLR 163 and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

199 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615, per Gaudron and Gummow JJ; Cf *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care and Another* (2003) 145 FCR 1 at 16.

[262] Paragraphs 2.54 and 7.55 of the Report find that "Subject Walters is responsible for ICOP and therefore has allowed Subject Goodman and Subject Gorring to perform roles and misrepresent roles of AHPRA registered practitioners", and that "by doing so these ICOP staff have, on the balance of probabilities, breached the National Law- *Health Practitioner Regulation National Law 2009*". That finding involves a decision without any evident or intelligible justification, given that Professor Walters was not the supervisor of those staff and no facts have been found which support a finding that Professor Walters so allowed those staff to perform and misrepresent their roles. Indeed, the Investigators rely on Professor Walters' failure to follow up the December 2015 memo. Mr Corpus, the state manager, was the supervisor of Mr Goodman and Ms Gorring. There was no finding by the Investigators that Professor Walters was their supervisor and the Investigators accepted that Professor Walters was not directly involved in the issues concerning the misleading LVRs. However, no specific judicial review ground has been raised in this regard and therefore I will not make any specific order in relation to those paragraphs.

[263] Metro North and Mr Drummond also contend that, even if the Court reaches the conclusion that Mr Drummond's decision to suspend Professor Walters was materially affected by error, the Court should not set aside the suspension decision, on the basis that doing so would be futile because Professor Walters was suspended pursuant to s 137 of the PSA. That provision allows the chief executive to suspend a public service officer if he or she reasonably believes that the proper and efficient management of the department might be prejudiced if the person in question is not suspended. While setting aside the decision of 24 September 2018 may still not result in Professor Walters being able to return to work, suspension under s 189 impugns a person's reputation, insofar as it is based on a reasonable belief that the person is liable to discipline, albeit that no finding to that effect is necessarily made prior to the suspension. The letter of 24 September 2018 is not in equivocal terms. In the letter of 24 September, Mr Drummond stated that:

> *"*…in light of the serious concerns raised by the report findings that MNHHS will need to address with you in accordance with Queensland Health Discipline Policy E10. I am satisfied that, subject to your response, you are liable to discipline in accordance with the Act and MNHHS' policies*".*

Given the potentially prejudicial effect of the suspension pursuant to s 189 on Professor Walters' reputation, I do not accept that it is futile to set the decision aside and that "no useful result could ensue".[200]

[264] Counsel for Metro North and Mr Drummond submitted that if the Court determines that it is appropriate to make orders in relation to the BDO Report, it should allow the chief executive the opportunity to consider the order made and to consider whether the power under s 189(3) of the PSA might be exercised to cancel the suspension decision, before the Court considers making any order regarding the suspension decision. Given that I have found that Mr Drummond materially relied on the impugned findings in the BDO Report, it is not appropriate to adopt that course. However, in light of the fact that the suspension decision is

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[200] *Waratah Coal Pty Ltd v Nicholls* [2013] QSC 68 at [98], referring to *R v Commonwealth Court of Conciliation Arbitration ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

liable to be set aside as a result of Mr Drummond's reliance on the BDO Report which was affected by errors, and not on the basis that Mr Drummond could not have been satisfied of the preconditions in s 189 of the PSA, the order setting aside his decision should only have effect from the date of the order.

[265] I will hear the parties as to the appropriate order for costs and give liberty to apply for any further order required to be made as a result of these reasons.

Orders

[266] I order that:

(1) The findings contained in paragraphs 2.43-2.49, 2.52 -2.53, 2.63, 7.44-7.48 and 7.54 of the BDO Report are set aside with effect from 17 August 2018;

(2) The decision of Mr Drummond to suspend Professor Walters on 24 September 2018 is set aside from the date of this order;

(3) The parties provide submissions as to costs and any further relief that they contend is required at a time to be fixed.