SUPREME COURT OF QUEENSLAND

CITATION:	*Wells v Carmody and Anor* [2014] QSC 59
PARTIES:	**DEAN MACMILLAN WELLS** (Applicant) v **TIMOTHY FRANCIS CARMODY SC (IN HIS CAPACITY AS THE COMMISSIONER IN THE COMMISSIONS OF INQUIRY ORDER (NO 1) 2012 AND THE COMMISSIONS OF INQUIRY AMENDMENT ORDER (NO 2) 2013)** (First Respondent) and **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (Second Respondent)
FILE NO/S:	6906 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2014 Applicant's supplementary submission on 27 February 2014
JUDGE:	Martin J
ORDER:	**Application dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – MEANING OF DECISION – REPORTS AND RECOMMENDATIONS – where the applicant was a cabinet minister at a time when cabinet determined that certain documents were to be destroyed – where the first respondent held a Commission of Inquiry and found that the actions of the cabinet were "honest but ill-advised" and "fell short of the relevant standard of appropriateness" – whether the first respondent's finding was a decision to which the *Judicial Review Act* 1991 applies

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – where the first respondent held a Commission of Inquiry and made adverse findings in respect of the applicant – where the first respondent had sought amendments to the terms of reference of the Inquiry in order to make investigations resulting in this adverse finding – where the first respondent had sought submissions, in the course of public hearings, on the weight to be accorded to the evidence of interested parties before him – whether the conduct of the first respondent gave rise to an apprehension of bias

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – HEARING – NOTICE TO PERSONS AFFECTED – where the first respondent held a Commission of Inquiry and made adverse findings in respect of the applicant –where the applicant was given notice that an adverse finding might be made, supplied with relevant evidence, and invited to make written submissions – where the applicant made written submissions in response to the first respondent's invitation – whether the conduct of the first respondent amounted to a breach of the hearing rule

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the first respondent held a Commission of Inquiry and made adverse findings in respect of the applicant – where the findings had a demonstrable basis in the evidence – whether the findings were so unreasonable that no reasonable decision maker could have made them

Administrative Decisions (Judicial Review) Act 1977 (Cth), s 3(3)
Commissions of Inquiry Act 1950
Judicial Review Act 1991, ss 4, 5(e), 6

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10
Annetts v McCann (1990) 170 CLR 596; [1990] HCA 57
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] EWCA Civ 1
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, [1990] HCA 33
Australian Securities Commission v Marlborough Gold Mines Ltd (1994) 177 CLR 485; [1993] HCA 15
Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576; [1994] FCA 1074
Duncan v Ipp (2013) 304 ALR 359; [2013] NSWCA 189
Eastman v Australian Capital Territory (2008) 227 FLR 279; [2008] ACTCA 8
Edelsten v Health Insurance Commission (1990) 27 FCR 56

Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7
Guss v Commissioner of Taxation (2006) 152 FCR 88; [2006] FCAFC 88
Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149; [1996] HCA 44
Minister for Immigration and Citizenship v Li (2013) 87 ALJR 618; [2013] HCA 18
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16
R v Brisbane City Council; ex parte Read [1986] 2 Qd R 22
SZQDZ v Minister for Immigration (2012) 200 FCR 207; [2012] FCAFC 26
Vakauta v Kelly (1989) 167 CLR 568; [1989] HCA 44

COUNSEL: D P O'Gorman SC and J Brasch for the applicant

W Sofronoff SG QC and A Pomerenke QC for the second respondent

SOLICITORS: Woods Prince Lawyers for the applicant

G R Cooper, Crown Solicitor for the second respondent

[1] In late 1989 a retired Magistrate, Mr Noel Heiner, was appointed to undertake an investigation of staff complaints at the John Oxley Youth Centre. There were eight terms of reference. None of them referred to the abuse of children. The inquiry was concerned, in a very broad way, with employment issues at the Centre. Mr Heiner conducted interviews with employees at the centre. The interviews were recorded and later transcribed.

[2] On 5 March 1990, the Queensland Cabinet effectively decided that the documents collected by Mr Heiner in his investigation ("the Heiner documents") should be destroyed. Mr Dean Wells was the Attorney-General and a member of Cabinet at that time.

[3] Since it was made more than 24 years ago, that decision has, in one way or another, been the subject of a number of investigations and has been the catalyst for many accusations of impropriety.

[4] The most recent consideration of the events surrounding that decision is contained in part of the Report of the Queensland Child Protection Commission of Inquiry.[1] The relevant part of the report is entitled "Report on Term of Reference 3(e)". In that report the Commissioner, Mr T F Carmody QC (as his Honour then was), made findings about whether the executive government failed to act "adequately or appropriately" in making that Cabinet decision.[2] Mr Wells seeks to have those findings reviewed pursuant to the *Judicial Review Act* 1991 ("JR Act").

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1 The entire report can be found at www.*childprotectioninquiry.qld.gov.au/publications*.

2 Mr Carmody, properly, took no part in these proceedings.

Background to the Commission of Inquiry

[5] Mr Carmody was appointed by the *Commissions of Inquiry Order (No 1)* 2012,[3] made under the *Commissions of Inquiry Act* 1950 in June 2012. He was appointed "to make full and careful inquiry in an open and independent manner" into Queensland's child protection system with respect to five matters set out in the Order. One of those matters, set out at paragraph 3(e), was, in its original formulation:

> "Reviewing the adequacy and appropriateness of any response of, and action taken by, government to allegations, including allegations of criminal conduct associated with government responses, into historic child sexual abuse in youth detention centres."

[6] In April 2013 that paragraph was amended by the *Commission of Inquiry Amendment Order (No 2)* 2013 to require the respondent to inquire with respect to:

> "3(e) Reviewing the adequacy or appropriateness of (including whether any criminal conduct was associated with) any response of, or action taken by it, the executive government between 1 January 1988 and 31 December 1990 in relation to:
>
> (a) allegations of child sexual abuse; and/or
>
> (b) industrial disputes;
>
> in youth detention centres, or like facilities."

[7] In a part of Mr Carmody's report ("the 3(e) Report"), entitled "The Remit", he refers to the original paragraph 3(e) and says, of the variation made to it, the following:

> "… As the evidence unfolded it became increasingly apparent that there was real doubt about whether any relevant action of, or response by the executive government to, 'historic child sexual abuse in youth detention centres' warranted investigation. Accordingly, after receiving submissions from the parties to this effect, I recommended to the Honourable the Attorney-General that consideration needed to be given to the possibility of an amendment to the Order in Council to achieve what I understood was the purpose of paragraph 3(e), namely, a review of relevant executive government responses and actions and whether they were connected to historic child sexual abuse or not."

[8] He went on:

> "I proceeded on the basis that the ambit of the task was controlled by the requirement to 'review' and interpreted my role as being to conduct a legally non-determinative inquiry which was not intended or expected to conclusively determine whether any individual had

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[3] See Schedule A to these Reasons.

> committed, or should be prosecuted for, any offence. Consequently, evidence was not gathered for the purposes of, or with a view to, criminal prosecution."

[9] Mr Carmody recognised the possible effects of any finding he might make in the following statement:

> "All I can properly do is provide an informed and considered legal opinion which does not have any direct legal significance or practical consequence for anyone except, of course, potential damage to reputation which is a protectable interest under the law."

[10] The Commissioner's finding on this issue was:

> "Even if it is properly characterised as the honest but ill-advised act of a newly-elected government Cabinet Decision number 162 of 1990 caused the destruction of public records which from a governance and public administration perspective fell short of the relevant standard of appropriateness; that is, 'fit and proper'. This is because apart from being *prima facie* unlawful it had the tendency and, whether intended or not, the practical effect of:
>
> - prejudicing or frustrating right to information rights and potential litigation interests, and
>
> - bringing executive government in Queensland into disrepute sparking an intractable public controversy for over 23 years."[4]

[11] Mr Wells seeks to review those findings on four grounds:

(a) That there was a reasonable apprehension of bias on the part of Mr Carmody.

(b) That there was a breach of the hearing rules, in that Mr Wells was not given a proper opportunity to make certain submissions .

(c) That there was an error of law in the Commissioner's interpretation of paragraph 3(e).

(d) That the challenged finding was so unreasonable that no reasonable person could have made it.

[12] Orders are sought that the findings be held to be invalid and declared to be void and of no effect.

Does the JR Act apply?

[13] Before considering the grounds of the application made by Mr Wells it is appropriate to consider the argument advanced on behalf of the Attorney-General that the finding the subject of the application is not "a decision to which [the JR] Act applies".

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[4] The 3(e) Report, p 8.

[14] So far as it is relevant, s 4 of the JR Act defines "a decision to which this Act applies" as:

> "A decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion)."

[15] This part of the JR Act is expressly designed to reflect the definition in the Commonwealth Act – the *Administrative Decisions (Judicial Review) Act* 1977. There was, for some time, some uncertainty about the meaning of the word "decision" but that was put to rest in *Australian Broadcasting Tribunal v Bond*[5] where Mason CJ stated:

> "… A reviewable 'decision' is one for which provision is made by or under a statute. That will generally, but not always, **entail a decision which is final or operative and determinative**, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment".[6] (emphasis added)

[16] *Griffith University v Tang*[7] is authority for the proposition that a decision is made under an enactment when two criteria are satisfied:

(a) first, the decision must be expressly or impliedly required or authorised by the enactment; and,

(b) 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.

[17] The correct approach to this issue was described in *Tang* in this way:

> "[79] The decision so required or authorised must be "of an administrative character". This element of the definition casts some light on the force to be given by the phrase "*under* an enactment". **What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved**?
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> [80] **The answer in general terms is the affecting of legal rights and obligations**. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins*, **does the decision in question derive from the enactment the capacity to affect legal rights and**

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5 (1990) 170 CLR 321.

6 Ibid at 337.

7 (2005) 221 CLR 99.

> **obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?**
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> …
>
> [89] **The determination of whether a decision is "made … under an enactment" involves two criteria: 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. A decision will only be "made … under an enactment" if both these criteria are met**. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter existing rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice." (citations omitted, emphasis added)

[18] The Attorney-General argued that the finding complained of did not "itself confer, alter or otherwise affect legal rights or obligations". There was no requirement that any finding or recommendation made by Mr Carmody be acted upon. It was open to the relevant Minister or Ministers to act on, or ignore, some or all of the report.

[19] The extent to which a report of this type may be reviewed or otherwise subjected to legal oversight was considered in *Ainsworth v Criminal Justice Commission*.[8] In that case a report had been prepared by the Criminal Justice Commission concerning the poker machine industry. It contained adverse comments about certain persons who were engaged in that industry. The report was tabled in Parliament without any notice having been given to the persons mentioned in the report of its existence or its contents. Relief by way of *mandamus* and *certiorari* was sought. The High Court held that *mandamus* was inappropriate as the CJC was under no statutory duty to investigate and report about the persons about whom the adverse recommendations were made. The court also held that *certiorari* did not lie because:

> "The **report made and delivered by the Commission has, of itself, no legal effect and carries no legal consequences**, whether direct or indirect."[9] (emphasis added)

[20] In *Ainsworth* the High Court did make declarations about the failure of the CJC to observe the requirements of procedural fairness.

[21] For the purposes of this analysis, reports by commissions or investigative bodies may be placed into one of two broad categories:

(a) those which must be taken into account by a decision maker, and

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8 (1992) 175 CLR 564.

9 Per Mason CJ, Dawson, Toohey and Gaudron JJ at 580-581.

(b) those which need not be taken into account.

[22] The consequence of being in one or the other category was referred to in *R v Brisbane City Council; ex parte Read*[10] where Thomas J said:

> "A line needs to be drawn between the "purely recommendatory" decisions and those which are regarded as having a sufficient effect upon the rights of an individual. In the former category there may fall Royal Commissions … and recommendations which are not conditions precedent to the making of a final decision **and which the final decision-making body may ignore**, …"[11] (citations omitted, emphasis added)

[23] This was referred to, with approval, by Brennan CJ, Gaudron and Gummow JJ in *Hot Holdings Pty Ltd v Creasy*[12]. They went on to confirm that:

> "A preliminary decision or recommendation, if it is one to which regard **must** be paid by the final decision-maker, will have the requisite legal effect upon rights to attract certiorari."[13] (emphasis added)

[24] The purview of the decision in *Griffith University v Tang* was considered by the Full Court of the Federal Court in *SZQDZ v Minister for Immigration*[14]. In that case, an Independent Merits Reviewer had made a recommendation about the validity of an application for a visa. The final decision was for the Minister to make and the Minister was not bound by anything in the reviewer's assessment or recommendation. One of the issues was whether the reviewer's recommendation was a "decision of an administrative character". The Full Court[15] said:

> "A reviewer's assessment and recommendation have no statutory or other legal force. **They came into existence because the Minister sought that information to inform his consideration of the exercise of his powers. The Minister was not bound to act on the assessment or recommendation; he did not even have to take them into account at any stage of his consideration, and he did not have to make a decision even if the recommendations had been favourable to the applicants.** A reviewer's assessment and recommendation cannot be characterised as "a decision of an administrative character made or proposed to be made … under [the] Act""[16]

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10 [1986] 2 Qd R 22.
11 Ibid at 41.
12 (1995-1996) 185 CLR 149 at 165.
13 Ibid.
14 (2012) 200 FCR 207.
15 Keane CJ, Rares and Perram JJ.
16 (2012) 200 FCR 207 at [39].

[25] The finding by Mr Carmody which is the subject of complaint has the same character as the decision of the reviewer in *SZQDZ v Minister for Immigration.* He was commissioned to:

(a) review the matters set out in paragraph 3 of Order (No. 1) as varied, and
(b) make recommendations about those matters.

[26] Mr Carmody was also charged, when making recommendations, with taking into account:

(a) the Interim Report of the Queensland Commission of Audit, and
(b) the fiscal position of the State, and
(c) that such recommendations should be affordable, deliverable and provide effective and efficient outcomes

[27] He was also required to make recommendations which included:

(a) any reforms to ensure that Queensland's child protection system achieves the best possible outcomes to protect children and support families;
(b) strategies to reduce the over-representation of Aboriginal and Torres Strait Islander children at all stages of the child protection system, particularly out-of-home care;
(c) any legislative reforms required; and
(d) any reforms to improve the current oversight, monitoring and complaints mechanisms of the child protection system.

[28] Mr O'Gorman SC took some comfort from the statement in paragraph 6 of the Order that: "In making recommendations the Commissioner will chart a new road map for Queensland's child protection system over the next decade." That is, with respect to the author of the Order, nothing more than aspirational. It does not amount to a commitment to act upon any recommendation.

[29] I was not directed to any statute or other document which would have required the Cabinet or a Minister or any public servant to:

(a) act on any finding or recommendation;
(b) take them into account at any stage of any consideration being given to the subject, or
(c) make a decision even if the recommendations were regarded as appropriate..

[30] Thus, it does not come within the ambit of decisions which may be reviewed.

[31] But, it was contended on behalf of Mr Wells that a different view should be taken because the finding prejudices his reputation. There is ample authority – *Ainsworth v CJC*[17] being one example – that natural justice must be afforded to those about

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17 (1992) 175 CLR 564.

whom a finding might be made which would be damaging to their reputation. For example, in *Annetts v McCann*[18] Brennan J said:

> "Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made."[19]

[32] It was contended for Mr Wells that there "is a logical inconsistency in applying *Tang* in such a way that it would automatically exclude an entire class of decisions … which are accepted by the High Court … as being subject to natural justice." I do not accept that there is such a "logical inconsistency". Whether or not a decision is one which can be the subject of judicial review is determined by its nature and effect. The mere fact that there are other decisions which, while they attract the requirements of natural justice, are not subject to statutory review, only demonstrates that the legislature intended to confine review to a particular class of decisions.

[33] The applicant advanced other grounds to support the availability of review under the JR Act, namely, that:

(a) The finding by Mr Carmody about the conduct of Cabinet ("inappropriate") comes within the scope of s 5(e) of the JR Act because it constituted "making a declaration, demand or requirement".

(b) The making of a report can, in the circumstances set out in s 6, be taken to be the making of a decision under the JR Act.

Does s 5(e) of the JR Act apply?

[34] Section 5 provides:

> "In this Act, a reference to the ***making of a decision*** includes a reference to—
>
> (a) making, suspending, revoking or refusing to make an order, award or determination; or
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; or
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; or
>
> (d) imposing a condition or restriction; or
>
> (e) making a declaration, demand or requirement; or
>
> (f) retaining, or refusing to deliver up, an article; or
>
> (g) doing or refusing to do anything else;
>
> and a reference to a ***failure to make a decision*** is to be construed accordingly."[20]

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18 (1990) 170 CLR 596 .

19 Ibid at 608.

20 Section 21 allows for the review of the making of decisions.

[35] The applicant submits that the finding that the conduct of Cabinet was "inappropriate" falls within s 5(e) because it constituted "making a declaration, demand or requirement". Clearly, it cannot be either a demand or a requirement. I am also satisfied that it does not amount to a declaration for the purposes of the Act. A finding of fact or a decision as to the propriety of a particular action may lead to a declaration, and such a declaration can have a legal effect on the subject of the declaration, e.g., a declaration that certain government business activity is a monopoly business activity[21] or the declaration of designated fossicking land.[22] The declaration envisaged in s 5 is a proclamation which has an identifiable and binding effect. In the same manner that a demand or requirement, if otherwise lawful, subjects the recipient to an obligation, a declaration will confer a right or impose a duty. The conclusion reached by Mr Carmody does not have any of those characteristics.

Does s 6 of the JR Act apply?

[36] Although the Application filed by Mr Wells sought to "review the finding of the respondent relating to Issue 3 in his '3(e) Report'" the grounds of the application can also apply, if otherwise available, to the making of a decision. Although no application has been made to amend the Application I am prepared to proceed on the basis that the review sought encompasses the making of a decision.[23]

[37] Section 5 of the JR Act provides an inclusive definition of the term "making a decision". That meaning is extended by s 6 which provides:

> "If provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision."

[38] Section 21 of the JR Act[24] provides for the review of "conduct relating to the making of a decision". It allows, for example, an application for review to be made on the ground that "a breach of the rules of natural justice has happened in … relation to the conduct". This is one of the grounds advanced by Mr Wells.

[39] A similar section appears in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("AD(JR) Act"):

> "3. Interpretation
>
> (3) Where provision is made by an enactment for the making of a report or recommendation before a decision is made <u>in the exercise of a power under that enactment or under another law</u>, the making of such a report or recommendation shall itself be

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21 *Queensland Competition Authority Act* 1997, s 19.

22 *Fossicking Act* 1994, s 42.

23 This argument was raised in written submissions in reply. No objection was advanced by the Attorney-General.

24 The complete section is in Schedule 2 to these reasons.

> deemed, for the purposes of this Act, to be the making of a decision."

[40] The difference between s 6 of the JR Act and s 3(3) of the AD(JR) Act is that the underlined words in s 3(3) of the AD(JR) Act do not appear in s 6 of the JR Act. That difference results, the Applicant contended, in a construction of s 6 of the JR Act which differs from the accepted construction of s 3(3).

[41] The ambit of s 3(3) was considered in *Edelsten v Health Insurance Commission*:[25]

> "In our opinion s 3(3) **applies where there is a provision in an enactment that a particular report or recommendation be made as a condition precedent to the making of a decision under that enactment or under another law**. The sub-section was considered by Mason CJ in *Bond* … but as an indication that the word 'decision' as used in the Judicial Review Act has a relatively limited field of operation. The Chief Justice's remarks did not touch the present question. We agree with the view expressed by Ellicott J in *Ross v Costigan* … that **s 3(3): 'contemplates a case where there is provision in an enactment for a specific report or recommendation as a condition precedent to the making of a decision under that enactment or some other**.'" [26] (emphasis added)

[42] A similar construction was arrived at in *Eastman v Australian Capital Territory*:[27]

> "… s 3(3) is concerned with reports leading to decisions made under enactments but extending to decisions made under regulations rules or by-laws. **It is tolerably clear that the subsection was intended to encompass reports leading to decisions of the type to which the ADJR Act generally applies. That is, decisions made under enactments. A necessary characteristic of such decisions is that the decision must itself confer, alter or otherwise affect legal rights or obligations, whether new or existing**: see *Griffith University v Tang* (2005) 221 CLR 99 at [89] per Gummow, Callinan and Heydon JJ. Such legal rights and duties must "owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement …"[28] (emphasis added)

[43] The applicant argues that this construction of s 3(3) of the AD(JR) Act should not be applied to s 6 of the JR Act because of the absence in s 6 of the extra words which are contained in s 3(3). It is contended that s 6 "merely requires that the report be required to be made *before* a decision is made."

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25 (1990) 27 FCR 56.
26 Ibid at 70 per Northrop and Lockhart JJ.
27 (2008) 227 FLR 279.
28 Ibid at [15] per Moore and Stone JJ, Dowsett J agreeing.

Is there a difference between s 6 JR Act and s 3(3) AD(JR) Act?

[44] This is a question which must be determined because, if the sections have the same meaning, then I should apply the reasoning of the Full Court of the Federal Court in *Edelsten* and *Eastman.* Although the AD(JR) Act and the JR Act are not part of a uniform national scheme, it is clear that the JR Act is intended to echo the Commonwealth Act. In that circumstance, it is appropriate to comply with the statement in *Australian Securities Commission v Marlborough Gold Mines Ltd*:[29]

> "Although the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation such as the Law is a sufficiently important consideration to require that an intermediate appellate court - and all the more so a single judge - should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong."[30]

[45] At this point reference should be made to s 16 of the JR Act. It provides:

> "(1) If—
>
> (a) a provision of the *Administrative Decisions (Judicial Review) Act* 1977 (Cwlth) expresses an idea in particular words; and
>
> (b) a provision of this Act appears to express the same idea in different words because of different legislative drafting practice;
>
> the ideas must not be taken to be different merely because different words are used."

[46] That requires consideration of the reasons, if any, for the omission of the words in s 3(3) of the AD(JR) Act. Was it because of differences in legislative drafting practice? It appears not. The difference in the words used is explained in the Electoral and Administrative Review Commission "Report on Judicial Review of Administrative Decisions and Actions" of December 1990. This is the report which led to the enactment of the JR Act. In Chapter 13 of the Report, under the heading "Variations to the ADJR Model Not Explained Elsewhere" the following appears:

> "13.16 …
>
> - section 3(3) of the ADJR Act has been varied by the omission of the words *"in the exercise of a power under that enactment or under another law"* in the equivalent clause 3(3) of the draft Bill. This accords with a recommendation made by the ARC in its Report No. 32 (at paras 172-174). The Commission agrees with the ARC that the words omitted placed an unnecessary restriction on the scope of subsection 3(3) in that reports or recommendations made pursuant to a statutory provision were not reviewable if they were prepared for the purposes of a decision that would be made other than pursuant to a statutory power;"

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29 (1994) 177 CLR 485.

30 Ibid at 492. See also *Body Corporate Strata Plan No 4303 v Albion Insurance Co Pty Ltd* [1982] VR 699 at 705; *CDK & Ors v AMA* [2009] QSC 190 at [119].

[47] In the Administrative Review Council's Report No. 32 the following is said in support of amending s 3(3) by removing the words which do not appear in s 6 of the JR Act:

> "173. Occasionally, a statute may provide for the making of a pre-decisional report or recommendation but the decision itself is one made not under statute but under a non-statutory scheme. An example may be seen in the *Employment, Education and Training Act 1988*. Section 27 of that Act confers on the Australian Research Council the function of making recommendations to the Minister with respect to grants, etc, for research schemes. However, the Minister's power to make grants is not provided for in the Act. It appears from the way that research grants have been administered in the past (Department of Employment, Education and Training, *Annual Report 1987-88*, pp 103-5) that moneys for grants will be the subject of an appropriation made by the Parliament and the Minister will make the grants in the exercise of executive power."

[48] It appears, then, that one of the purposes of s 6 is to attach to reports which can lead to a decision made under non-statutory schemes. So, s 6 JR Act is wider in its application than s 3(3) AD(JR) Act.

Was provision made by an enactment for the making of a report?

[49] That is not, however, the final answer. In order that the making of a report is caught by this section, there must be a "provision" which is **made** by an enactment for the making of a report **before** a decision is made. I was not directed to any statute which applies to the making of the report in the sense used in s 6 JR Act.

[50] The term "enactment", though, is defined in s 3 of the JR Act to mean "an Act or statutory instrument". The latter term is defined by the *Acts Interpretation Act* 1954 to have the meaning given by the *Statutory Instruments Act* 1992. That Act defines "statutory instrument" as follows:

> "(1) A statutory instrument is an instrument that satisfies subsections (2) and (3).
>
> (2) The instrument must be made under—
>
> (a) an Act; or
>
> (b) another statutory instrument; or
>
> (c) power conferred by an Act or statutory instrument and also under power conferred otherwise by law.
>
> Example of paragraph (c)—
> an instrument made partly under an express or implied statutory power and partly under the Royal Prerogative
>
> (3) The instrument must be of 1 of the following types—
>
> • a regulation
> • an order in council
> • a rule
> • a local law
> • a by-law
> • an ordinance
> • a subordinate local law

> • a statute
> • a proclamation
> • a notification of a public nature
> • a standard of a public nature
> • a guideline of a public nature
> • another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity.
> …"

[51] The report by Mr Carmody was made pursuant to a commission of inquiry issued by the Governor in Council.[31] The Order in Council is in Schedule 1 to these reasons. Thus, subsection (3) of the definition of "statutory instrument" is satisfied.

[52] Subsection (2) is satisfied because:

(a) The Order in Council both refers to and relies upon the *Commissions of Inquiry Act* for the powers to be exercised. Thus the Order in Council is made under that Act.

(b) The Order in Council must also rely on the executive function, i.e., a "power conferred otherwise by law". (Notwithstanding the statement in the Order in Council that "UNDER the provisions of the *Commissions of Inquiry Act 1950* the Governor in Council hereby appoints …" the source of the appointment is not legislative. It is an executive function.[32] The *Commissions of Inquiry Act* 1950 does not provide for the creation of a commission of inquiry. Rather, it sets out certain powers which the holder of the commission has and may exercise.)

[53] It follows, then, that the Order in Council is an "enactment" for the purposes of s 6. But, the Order in Council does not refer to any decision which might follow from the Commissioner's report. At most there is the aspirational statement I have referred to above. It certainly does not require that any decision be made.

[54] Thus, the making of the report was not the "making of a decision" for the purposes of s 6 JR Act.

Can the "making of the report" be reviewed?

[55] Even if the making of the report did come within s 5(e) or s 6 it would not assist the applicant.

[56] The provisions of the JR Act which deal with review – ss 20, 21 and 22 – only operate with respect to:

(a) Decisions to which the Act applies.

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31 Queensland Government Gazette, 29 June 2012.

32 *McGinness v A-G(Vic)* (1940) 63 CLR 73; *Lockwood v The Commonwealth* (1954) 90 CLR 177.

(b) The making of decisions to which the Act applies.
(c) The failure to make a decision to which the Act applies.

[57] While s 5(e) and s 6 give an extended definition of "making of a decision", those words must still relate, for the purposes of review, to a decision to which the Act applies. That much is clear from the words of ss 20, 21 and 22. A similar conclusion was reached by Greenwood J in *Guss v Commissioner of Taxation*.[33] I respectfully agree with what his Honour said when considering the general effect of s 3(2)[34] of the AD(JR) Act:

> "[97] However, s 3(2) has the effect that a reference to the making of a decision *includes* a reference to the seven classes of subject matter. **Section 3(2) does not bring each class of conduct within the scope of a "decision" unless engaging in the nominated subject matter also involves an operative determination of a matter in issue derived from an engaged process of reasoning.** The act falling within s 3(2) must be the emanation of a deliberative process of the kind described at paragraphs [75] and [82] reflecting the characteristics identified by his Honour the Chief Justice in *Australian Broadcasting Tribunal v Bond* (supra). His Honour, at 336, gave consideration to the characterisation of the subject matter in s 3(2) and relied upon that characterisation as indicative of the meaning of "decision" in its primary sense. **The extended inclusive reference to the making of a decision does not have the effect that an act relied upon as presumptive evidence of the decision can be relied upon as a decision for the purpose of the ADJR Act notwithstanding that the act within s 3(2) fails to exhibit the essential features of a decision in the primary sense of the term.** In other words, if the act relied upon is not an operative determination of a matter of substance emanating from a deliberative process of reasoning, sophisticated or unsophisticated, there is no decision for the purposes of the ADJR Act.
>
> [98] If, however, it is, then the act within s 3(2) is *the* decision.
>
> [99] As to the extended definition, Mason CJ said this in *Australian Broadcasting Tribunal v Bond* (supra) at 336 in considering the essential elements of a "decision":
>
> > "Secondly, **the examples of a decision listed in the extended definition contained in s 3(2) are also indicative of a decision having the character or quality of finality**, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute … "

[58] For the reasons set out above concerning the nature of the finding complained of, the extended definition in s 6 does not work to bring the decision within the purview of the JR Act. It follows, then, that the application must be dismissed.

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33 (2006) 152 FCR 88.
34 The cognate provision in the JR Act is s 5.

[59] Should I be mistaken as to the applicability of the JR Act I will consider the other arguments advanced for Mr Wells.

The apprehended bias ground

[60] The first ground advanced was formulated in this way:

> "A breach of the rules of natural justice happened in relation to the making of the decision under review in that there was a breach of the rule against bias:
>
> Particulars
>
> (a) The respondent initiated an amendment to the Commissions of Inquiry Order (No 1) 2012 to enable him to review the subject matter of the decision under review;
>
> (b) An amendment was subsequently made to the Commissions of Inquiry Order (No 1) 2012 as suggested by the respondent;
>
> (c) The respondent then made findings in relation to that amendment;
>
> (d) Such behaviour on the part of the respondent meant that a fair-minded, properly informed member of the public might reasonably apprehend that the respondent might not have brought an impartial mind [to] the making of those findings."

[61] In the applicant's written submissions, and in the arguments advanced on his behalf at the hearing, a significantly wider case than that which had been particularised was advanced. In addition to the grounds set out above the applicant reformulated his case. The applicant submitted that the respondent's conduct in concluding issue 3 (and issue 2) was tainted by an apprehension of bias because, among other things:

(a) the respondent pre-determined an issue, namely the weight to be given to the evidence of the former Ministers, including the applicant; and

(b) there were a number of minor matters which, together with the other issues, indicated apprehended bias.

Applicable principles

[62] The test to be applied in determining whether a decision-maker is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question the decision-maker is required to determine.[35]

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35 *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427 at [31].

[63] The application of the test to determine the existence of apprehended bias is to be performed in two steps. First, there must be identified what it is that is said might lead a decision-maker to decide a case other than on its legal and factual merits. The second step requires an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[36] Mr O'Gorman SC emphasised that the case he wished to make was not based on one particular incident but upon a consideration of a number of matters which, he said, satisfied the test for concluding that apprehended bias had been established.

[64] One of the matters upon which Mr O'Gorman relied was the submission that the respondent had pre-determined an issue, that issue being the weight to be given to the evidence of, among other witnesses, the applicant. In these circumstances, pre-judgment means having a closed mind, that is, not being open to persuasion irrespective of the evidence or arguments advanced.[37]

[65] When it is submitted that apprehended bias can be confirmed after examination of a number of disparate matters it is important to bear in mind that:

> "Decision-makers, ... sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. **The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion.** ...
>
> ... **The state of mind described as bias in the form of pre-judgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented**. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion."[38] (emphasis added)

[66] As part of the case advanced concerns some instances of exchanges between Mr Carmody and counsel appearing, it is important that it also be borne in mind that the requirements of procedural fairness are:

> "... not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public at the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it."[39]

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36 *Ebner v Official Trustee* (2000) 205 CLR 337 at [8].

37 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at [100].

38 *Minister for Immigration and Multi-Cultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [71]- [72].

39 *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 CLR 546 at 553-554.

[67] Consistent with the above is the acceptance that during hearings a decision-maker may formulate tentative views or propositions for the purpose of testing them. As a general rule, anything that a decision-maker says in the course of argument will be merely tentative and exploratory. This, of course, is only a general rule.

[68] Before turning to the particular incidents in this case, it is important to recall what it is that a fair minded observer is assumed to know.

[69] A fair minded observer:

(a) will have an appreciation of the aspects, in a general sense, of the framework within which the decision-maker acts;[40]

(b) will understand that the investigation being undertaken is essentially inquisitorial[41]; and

(c) will understand that a decision-maker engaged in this form of inquiry will from time to time form preliminary views which may be a part of the determination of the future conduct of the investigation.[42]

Was there pre-judgment?

[70] Mr O'Gorman took me to a number of excerpts from the transcript of proceedings. The first is set out below. Mr Copley QC was one of the counsel assisting. The following exchange took place on day 28 of the hearing:

> "MR COPLEY: You've heard evidence from the three cabinet ministers as to where they understood the focus was, and it's very apparent that there wasn't even among those three ministers, if there evidence is accepted - - -
>
> COMMISSIONER: That's right.
>
> MR COPLEY: - - - a meeting of minds between even those three as to what cabinet's purpose was.
>
> COMMISSIONER: That's right, and that's the difficulty here, because ordinarily an inquirer wouldn't listen to a person with a vested interest in telling him or her why they did something, because - - -
>
> MR COPLEY: Why would you posit that? You're going to be listening here to people making submissions with a vested interest.
>
> COMMISSIONER: Yes, but as witnesses, when it's their conduct that's under examination, their explanation for their conduct

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40 *Duncan v Ipp* (2013) 304 ALR 359, [2013] NSWCA 189.

41 *Carruthers v Connelly* [1998] 1 Qd R 339.

42 *Duncan v Ipp* at [155].

ordinarily wouldn't be – not in a commission of inquiry, wouldn't be part of the determinative information, would it?

MR COPLEY: Well, my submission to you is that a court receives evidence all the time from witnesses.

COMMMISSIONER: Yes.

MR COPLEY: Some witnesses have an interest in the outcome of a proceeding, but that's a matter that can be taken into account, presumably – I'll confine myself to a civil trial. That's a matter that can be taken into account.

COMMISSIONER: Yes. It's part of the evidence.

MR COPLEY: The court doesn't start form the assumption, 'I will not believe that witness because he has an interest in the outcome of this action'.

COMMISSIONER: No.

MR COPLEY: The court doesn't put his evidence into an inferior capacity.

COMMISSIONER: No, I'm not talking about credibility, I'm talking about whether in reviewing or inquiring into something the person whose conduct you're inquiring into is relevant to the objective assessment of the quality of the conduct.

MR COPLEY: Well, an objective assessment can sometimes only be informed by asking the person who acted why they acted and what they acted on.

COMMISSIONER: Yes, and if we could always rely on people telling you the truth that would be the best way of finding out.

MR COPLEY: If would be, but you don't start with the assumption, or presumption, that because those people are the people whose conduct is being inquired into that, 'They may not be telling me the truth'.

COMMISSIONER: Yes. No, I know that.

MR COPLEY: You assess them on their merits.

COMMISSIONER: No, I'm asking do I assess it at all.

MR COPLEY: What do you mean?

> COMMMISSIONER: Well, I'm being asked to review whether there's any criminal conduct associated with a response by the executive government.
>
> MR COPLEY: Yes.
>
> COMMISSIONER: That involves making judgments about conduct, its purposes and its effect.
>
> MR COPLEY: Forming opinions.
>
> COMMISSIONER: Forming opinions about it.
>
> MR COPLEY: Forming opinions about conduct.
>
> COMMISSIONER: Yes, and then disclosing the opinion of – reporting on the opinion I've formed.
>
> MR COPLEY: Yes.
>
> COMMISSIONER: Do I form that opinion, is that opinion formed, by what somebody tells me about why they did something – or, sorry, why executive government did something when they're only one of a number that constitute executive government?
>
> MR COPLEY: Yes. Unless you find a reason for not accepting that person's evidence that evidence must assist in informing you. It's relevant evidence."

[71] The second piece of transcript referred to by Mr O'Gorman was on the same day. It is a statement by Mr Carmody:

> "If I call someone to give evidence and ask them what they believe, they will tell me something. It will either incriminate them or exonerate them or they can't remember. The first one can't be used in evidence against them in a court of law. The other two are irrelevant because one will be self-serving. It's not irrelevant but it's inadmissible unless they want to give evidence in their own defence and to do that you have got to have at least a show-cause situation by the evidence that you have got in your possession."

[72] Mr O'Gorman submitted that the effect of the comments made by Mr Carmody which are set out above was that there was nothing that Mr Wells could say or do that would have played a part in the decision to be made by the respondent, that is, the determination of whether or not the Cabinet had acted inappropriately.

[73] The exchange between Mr Carmody and Mr Copley is an example of the interplay which can often occur in court hearings and in commissions of inquiry where the decision-maker explores an issue with counsel. Mr Carmody was testing the extent to which he might rely upon evidence given by persons who were intimately

involved with the particular issue under consideration. All he was doing was investigating the process that he might undertake. In any event, this matter is of no moment. The submission that it is part of the evidence which goes to demonstrate apprehended bias is substantially weakened in circumstances where the Commissioner, in the course of his reasoning in his report, adverted to the evidence given, in particular, by Mr Wells and, in doing so, accepted part of it and did not accept some other parts.

Amendment of the terms of reference

[74] The second major ground upon which the applicant relies for his assertion of apprehended bias concerns Mr Carmody's role in the change made to paragraph 3(e) of the Order in Council. The change which was made put in place a term of reference which was unlike the balance of the Order in Council in that it did not necessarily relate to issues of child sexual abuse.

[75] The applicant does not suggest that the mere seeking of an amendment to the terms of reference indicates bias. But, it is submitted, the conduct of an inquiry in seeking such an amendment may furnish multiple indications of bias. It was argued that the apprehended bias was demonstrated by Mr Carmody seeking the amendment to enable him to arrive at a finding as to whether the Cabinet, which dealt with the Heiner material, breached the provisions of the *Criminal Code* by permitting the destruction of that material even though that subject matter had nothing to do with child abuse or child protection. Further, it was submitted that an objective assessment of the respondent's conduct would lead to a conclusion that he was anxious to examine the particular series of events, and that that conduct would lead an informed and reasonable observer to the view that Mr Carmody had not brought an impartial mind to the issue because he was actively prepared to do what he thought was the government's and Mr Lindeberg's bidding.

[76] In order to assess the worth of these assertions it is necessary to consider some of the events which occurred in chronological order. They were, in summary, as follows:

(a) When the public hearings commenced leave to appear was granted to the Crown in right of the State of Queensland and to Mr Kevin Lindeberg.

(b) Mr Lindeberg had been making allegations about the conduct of the Cabinet with respect to the Heiner documents since December 1990. He has made allegations about the legality of that conduct at various times since 1990. He has alleged that the conduct amounted to, amongst other things, an obstruction of justice, interference with the right to a fair trial, abuse of office, and misleading Parliament.

(c) When the hearings commenced on 1 November 2012 senior counsel assisting the Commission informed Mr Carmody that the hearings would commence with about 90 witnesses who were employed or associated with the John Oxley Youth Centre in late l989 or early 1990 but that witnesses in connection with Mr Heiner's inquiry would not be called until 2013.

(d) On 13 December 2012 discussion took place in the hearing about the ambit of paragraph 3(e) and how the hearings might unfold. It was submitted for Mr Lindeberg that paragraph 3(e) encompassed "criminal conduct associated with government responses" and that the ordering of the destruction of the Heiner documents constituted criminal conduct.

(e) The issue of whether the information that was destroyed had any association with historic child sexual abuse in a detention centre was then explored. Mr Lindeberg's representative said that the information had that character whereas Mr Hanger QC (for the Crown) submitted that the overwhelming evidence at this point was that the documents shredded did not relate to, and the Heiner inquiry did not relate to, child sexual abuse.

(f) In response the Commissioner said:

> "The problem with that is that I have been appointed to make full and careful inquiry in an open and independent manner in respect of 3(e) and even though the evidence I have heard so far – and bear in mind to me it's an unfolding narrative. It may all point in one direction, but I don't know what the future holds. ... I don't think I can decide the issue on two thirds or three quarters of the trend."

(g) The issue arose again on 19 February 2013. Mr Carmody asked whether Mr Lindeberg was urging "that the members of Mr Goss' Cabinet should be called". Mr Lindeberg said that he was. Mr Hanger QC said that this was unnecessary. The Commissioner said:

> "I must say I'm in a state of uncertainty about it. I don't want to have any unnecessary witness in the witness box answering questions about things that happened a long time ago. On the other hand I don't want to leave the state of the evidence incomplete having come this far and I certainly don't want to give anybody grounds for grievance or for believing that we left a stone unturned."

(h) Shortly after making these remarks the Commissioner said this:

> "The question is: if I was to draw an adverse inference from that based on evidence, aren't those Cabinet Ministers entitled – I am not saying I would, but the fact that it is open to me to do that – doesn't that give them a legitimate interest in being heard?"

(i) Later that same day, the following exchange occurred between Mr Carmody and Mr Copley SC (one of the counsel assisting):

> "COMMISSIONER: ... I also see in reviewing the adequacy and appropriateness of Cabinet's response as to whether or not that was criminal conduct may require the members of Cabinet be asked or answer that allegation personally.

MR COPLEY: Well, my submission to you is that to know what Cabinet decided and why Cabinet decided it ...

COMMISSIONER: I must ask Cabinet musn't I?

MR COPLEY: Well no, my submission is that you know from Exhibit 181. But if you're contemplating draw[ing] an inference adverse to the members of the Cabinet, then that raises another issue about whether witnesses need to be called to have that put to them for them to comment ...

COMMISSIONER: ... procedural fairness question.

MR COPLEY: Yes.

COMMISSIONER: I'm not that far advanced yet. Where I'm at is: have I fully and carefully inquired into Mr Lindeberg's allegation of criminal conduct if I pull up stumps without having heard from Cabinet?

MR COPLEY: Well, I submit that you have because you have the reason Cabinet did it; you have the knowledge Cabinet had when did it; and you know that Cabinet did that despite knowing ….

(j) There was then some discussion about the meaning of the term "knowledge" and the following was said by the Commissioner:

"COMMISSIONER: Do I need to know that to discharge my remit the Order in Council to make full and careful inquiry in an open and independent manner? I tell you what, I'm not going to conclude it. I'm going to get everyone to make some written submissions to me on it. I want to think about it and I don't want to act in haste and I don't want to make a ruling now. It isn't fully considered and I do want to hear some carefully presented arguments on it.

I'll tell you what I would like addressed: that is what people contend term of reference 3E means or should be interpreted to mean; whether there's sufficient evidence of historic child sexual abuse in youth detention centres within the meaning of 3E that makes reviewing the adequacy and appropriateness of the Cabinet decision to destroy the documents reviewable under the term of reference; and whether in reviewing the adequacy and appropriateness of Cabinet's response – that is, the decision to destroy the documents – can be done fully and carefully within the requirements of an Order in Council without hearing from members of Cabinet who made that decision directly."

(k) The parties made written submissions on the questions identified by the Commissioner on 1 March 2013 and the issue was then again considered at length when the hearing resumed on 14 March 2013. At that hearing senior counsel assisting and other persons represented at the hearing submitted that, in the absence of a nexus between an action of government and an allegation of child sexual abuse, the Commission should not proceed any further. Mr Lindeberg submitted that:

> "In the course of this inquiry evidence of a serious prima facie crime has come to your attention which we submit that you are not in a position to ignore and we would submit that that matter ought to be a referral back to the government for a separate inquiry."

(l) The following exchange then took place:

> "COMMISSIONER: Okay, you'd better tell me what that crime is.
>
> MR LINDEBERG: The crime is the destruction of documents required to judicial proceedings going to potentially – under 129 of the Criminal Code, potentially going to 132, of a conspiracy to defeat justice.
>
> COMMISSIONER: Whether Heiner had any connection with historic child sexual abuse at a youth detention centre or not. Is that right?
>
> MR LINDEBERG: That's right."

(m) Later that day, in an exchange with Mr Keim SC,[43] the following took place:

> "MR KEIM: ... I wanted to say one thing further with regard to something that you said, Commissioner, and that is that one doesn't treat the words as legislation. That may be true, but you do treat them as if they were part of a legal document. So it's really no different to construing perhaps a contract or whatever, you're still restricted by the words which have been used and the intention of the executive government is its intention as exhibited in the words used.
>
> COMMISSIONER: If I sent [said] something different to that then I was wrong. I accept that that's exactly what I have to do. I have to fight [find] the purpose, implied or express, it in the words, not in my own words.
>
> MR KEIM: Yes.

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43 Mr Keim SC appeared for one of the witnesses.

COMMISSIONER: I understand that.

MR KEIM: And in terms of seeking a broader remit by seeking further terms of reference, you're in no different situation, in our submission, than any other ordinary citizen. You may be the first among equals of ordinary citizens - - -

COMMISSIONER: No, no, I accept that, too.

MR KEIM. Yes.

COMMISSIONER: Look the way I see terms of reference are they're my instructions.

MR KEIM: Yes.

COMMISSIONER: And I have to comply with them.

MR KEIM: Yes.

COMMISSIONER: And if I misinterpret them either to fall short of what was required or overreach beyond what was required, I've done the wrong thing.

MR KEIM: Yes.

COMMISSIONER: I don't want to do either of those things.

MR KEIM: Yes.

COMMISSIONER: That's the whole point of this discussion, I want to make sure that I find the proper purpose or the intended purpose of the executive government; that I fulfil that purpose based on the evidence and the submissions that I hear; and I don't fall too short nor go too far."

[77] On 18 March 2013 Mr Carmody wrote a letter to the Attorney-General. In that letter he referred to the Commissions of Inquiry Order (No 1) 2012 and to paragraph 3(e) of that order. The following then appears in the letter:

> "Senior counsel assisting and some of the parties with authority to appear contend that the incorporation of the words 'into historic child sexual abuse in youth detention centres' in 3(e) is a jurisdictional pre-condition to the making of any findings about 'government responses'.
>
> The practical effect of this, so those parties say, is to prevent me from continuing to hear evidence, or make findings about related facts or circumstances, unless I am able to confidently conclude that there was 'historic child sexual abuse'."

[78] Mr Carmody then referred to the fact that there had been written submissions and oral arguments on the matter and went on to say:

> "I am yet to form a definitive view or make a decisive ruling on these submissions.
>
> However, as I read and understand it, the purpose of term of reference 3(e) is to allow me to examine allegations of child sexual abuse (believed to arise from or be associated with an industrial dispute at the John Oxley Youth Centre in 1989) and any related action by or response of executive government in 1990.
>
> ...
>
> To date the Commission has heard from 135 witnesses and admitted 348 exhibits relating to term of reference 3(e).
>
> However, I do not believe that it is prudent to continue to consider matters that might be said or expected to fall within 3(e) without putting the question of the Commission's jurisdiction beyond doubt.
>
> One of the parties with authority to appear has submitted that I ought, in resolving construction and jurisdictional concerns, seek clarification of the language in term of reference 3(e) to make it clear that I am to examine (and make any findings about) those matters clearly within the current wording of 3(e), as well as any other matters that have been the subject of evidence but which may not be unambiguously linked to allegations of 'historic child sexual abuse'.
>
> To this end, I request that you recommend to Her Excellency the Governor a recasting or refinement of the Commissions of Inquiry Order (No 1) 2012, so that term of reference 3(e) reads:
>
> > '... to make full and careful inquiry in an open and independent manner of Queensland's child protection system, with respect to:
> >
> > (e) reviewing the adequacy and appropriateness of any response of, and action taken by, the executive government between 1 January 1988 and 30 December 1990 in relation to allegations (including any allegations of criminal conduct) associated with:
> >
> > (i) child sexual abuse in youth detention centres, or like facilities; and/or
> >
> > (ii) investigations or inquiries into industrial disputes in youth detention centres, or like facilities.'
>
> Expressing 3(e) in this way would allow me to fully consider the totality of the subject matter that appears to lie at the heart of 3(e) and to make relevant findings of fact without fear of the Inquiry being thought to be 'off course'."

[79] On 25 March 2013 Ms Julia Duffy (the Executive Director and Official Solicitor for the Inquiry) wrote to Ms Natalie Parker (Acting Director, Strategic Policy, Department of Justice and Attorney-General) in the following terms:

> "The Commissioner has considered the draft amendment to the Order in Council.
>
> Commissioner Carmody has reflected carefully on the precise wording of term of reference 3(e). The Commissioner has formed the view that clause 3(e) should be further refined, to read:
>
> (e) Reviewing the adequacy or appropriateness of (including whether any criminal conduct was associated with) any response of, or action taken by, the executive government between 1 January 1988 and 31 December 1990 in relation to:
>
> (i) allegations of child sexual abuse, and/or
>
> (ii) industrial disputes
>
> in youth detention centres, or like facilities."

[80] When considering the import of the matters referred to above I bear in mind that the case advanced for Mr Wells was that apprehended bias could be found when all the circumstances were considered. It was not suggested that any of the matters advanced, on their own, would be sufficient; rather, it was the cumulative effect of all the matters relied upon by Mr Wells.

[81] The request by the Commissioner for an amendment to the terms of reference was, on its own, not capable of supporting a conclusion that the Commissioner had closed his mind as to the outcome of the issue. When considering this issue, in the whole list of matters, it must also be borne in mind that after paragraph 3(e) was amended the following occurred:

(a) The Commissioner issued a summons to Mr Wells requiring him to attend to give evidence;
(b) Evidence was taken from Mr Wells at the public hearings;
(c) After the evidence had been heard on this topic the Commissioner wrote to Mr Wells and alerted him to the possibility of adverse findings, provided a copy of the evidence upon which those adverse findings were being considered and invited Mr Wells to make submissions in respect of those adverse findings.

[82] In *Duncan v Ipp*[44] the New South Wales Court of Appeal considered a decision in which the primary judge had refused to make orders restraining Mr Ipp (the Commissioner of the New South Wales Independent Commission Against Corruption) from further presiding over a particular investigation. The investigation concerned the awarding of an exploration licence in respect of an area known as Mount Penny. After the inquiry had been announced a series of communications

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44 See above.

took place between Mr Ipp, the solicitor for ICAC, the Premier of New South Wales and others regarding the effect of the inquiry on the approval process. The Commissioner provided both verbal and written advice that evidence adduced before ICAC could be taken into account in the approval process. During the inquiry conducted by the Commission there was correspondence between the Commissioner, the Director-General and the Premier which in summary, concerned the extension of the scope of the inquiry. I respectfully agree with the remarks made by Barrett JA (who agreed with the reasons of Bathurst CJ) in his brief consideration of these issues:

> "[217] I agree. **The inquiry upon which the Commission is engaged is not some form of legal proceeding in which the State and elements of the executive are pitted against persons summoned for examination or the interests that those persons represent. The process is quite different. In the course of an inquiry, hypotheses are formed and subjected to continuous assessment.** As evidence accumulates, suspicions and inferences are tested and refined. Some are confirmed, others are not**. Hypotheses are likewise re-evaluated and re-shaped as the process continues. A series of possibilities may be considered and discarded during the course of a particular inquiry.**
>
> [218] Given that context, the Commissioner's action in communicating as he did with the Minister for Planning was not such as to engender in the mind of a reasonable fair-minded observer an apprehension of predisposition towards any particular outcome of the Commission's inquiry. It was (and would have been seen to be) a step taken legitimately in the public interest to acquaint the Minister with the fact that future findings on matters under consideration by the Commission might be relevant to the exercise of the minister's statutory functions. The Commissioner flagged no more than a possibility indicated by the then state of the inquiry's evolution.
>
> [219] Likewise, **a reasonable fair-minded observer would not have inferred any such predisposition from the Commissioner's solicitation from the Premier of a request to extend the scope of the inquiry in a way that the Commissioner could himself have achieved in any event**. The extension was no doubt made so that developing possibilities might be brought within the terms of reference. Whatever may have been the motivation for seeking the request, the desire of the Commissioner to have in advance some measure of government support or political cover for a course that he proposed taking did not imply anything but an open and inquiring mind in relation to the expanded subject matter of the investigation." (emphasis added)

[83] The actions of the Commissioner came about after a substantial amount of evidence had been taken and heard on matters relating to the John Oxley Youth Centre and there was a divergence among those appearing at the Inquiry as to the proper interpretation of what occurred and its relationship to the terms of reference. This

request by Mr Carmody falls within the description given by Barrett JA in *Duncan v Ipp*:[45]

> "The extension was no doubt made so that developing possibilities might be brought within the terms of reference."

Other matters relied upon under this heading

[84] In the written submissions for Mr Wells there are a number of what might be regarded as minor matters which are used as illustrations "that the respondent was tainted by bias in his approach to issue 3". Those matters included the treatment that Mr Carmody afforded Mr Lindeberg. On this point the applicant relies upon statements made by Mr Carmody when considering an application made by Mr Lindeberg that Mr Carmody recuse himself. The comments he made should be regarded as relating to the *bona fides* of that application and nothing more.

[85] The next point relied upon was a reference by the Commissioner when considering the interpretation of paragraph 3(e) where he said:

> "Unless the only way I can interpret 3E is as you and Mr Keim suggest, then – it would have to be the only way and I would have to have found that there's no possible earthly conceivable way that I can interpret them to allow me to proceed to take further evidence on or hear submissions about and make findings about the shredding itself because Heiner started out as the Shreddergate affair. It had nothing to do with child sexual abuse."

[86] Mr O'Gorman says that by referring to "Shreddergate" the Commissioner was drawing an analogy between the Cabinet of which the applicant was a member and the administration of President Richard Nixon which was found to have engaged in illegal activity. I do not accept that that can be evidence of bias either alone or in combination with other matters. The use of the suffix "gate" is one which has become increasingly popular and used, particularly in the popular media, for all sorts of matters.[46]

[87] The matters relied upon by the applicant under this heading all occurred before Mr Carmody called for submissions from Mr Wells. It was not suggested that the call was insincere or a concoction. Given that Mr Carmody accepted part of Mr Wells' submissions that would have been a difficult conclusion to support.

[88] None of the matters referred to, either alone or in combination with all or any of the other matters can properly be said to give rise to an apprehension of bias.

Did Mr Wells waive his right to complain of bias?

[89] The Attorney-General also submitted that the matters relied upon by Mr Wells were matters which ought to have prompted him to make a submission at the time that Mr

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45 (2013) 304 ALR 359 at [219].

46 For example, Iran Contra-Gate, Camilla-Gate, Iguana-Gate and so on.

Carmody should disqualify himself. The failure to do so, it was contended, meant that Mr Wells had waived his entitlement to complain of bias.

[90] A litigant who is fully aware of the circumstances from which a conclusion of apprehended bias might be drawn can be regarded as having waived the right to object if that right is not exercised expeditiously. In *Vakauta v Kelly*, the High Court observed that:

> "Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment."[47]

[91] It is also well-established that a person who alleges apprehended bias may not become aware of all the matters which would justify such an allegation until judgment. For example, in *Vakauta*, Brennan, Deane and Gaudron JJ accepted that, although the judge had made statements during the trial about his preconceived views of a particular witness, they were effectively revived by similar statements in the reserved judgment.

> "The appellant's failure to object to the comments made in the course of the trial cannot, in our view, properly be seen as a waiver of any right to complain if comments made about Dr. Lawson in the judgment itself would, in the context of those earlier comments, have the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer."[48]

[92] The claim advanced by Mr Wells is based in large part on matters which did not become known to him until publication of the report on paragraph 3(e). A person in Mr Wells' position is not required to attend, or have others attend for him, every day of a hearing in order that he might protect himself against an assertion that he had waived the right to claim bias. Some of the matters relied upon in this hearing occurred after Mr Wells had given evidence and had been excused. Some of the matters, as appear from the reasons above, only became apparent when the report was delivered.

[93] In those circumstances, it cannot be said that Mr Wells has waived his rights in respect of bias.

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47 *Vakauta v Kelly* (1989) 167 CLR 568 at 572.

48 Ibid at 573.

Denial of procedural fairness

[94] In a letter sent by Mr Carmody to Mr Wells on 8 May 2013 the applicant was informed that there was a realistic possibility that Mr Carmody would come to the view that the Cabinet decision with respect to the Heiner documents "... was inappropriate in the sense of being contrary to the then existing standards reasonably expected of executive government in making public administration related decisions".

[95] Mr Carmody invited Mr Wells to make submissions on the issue including the meaning that he, Mr Carmody, should ascribe to the term "appropriate". Mr Wells made those submissions and, in doing so, adopted the submissions of counsel assisting with respect to the proper meaning of "inappropriateness".

[96] It is argued by the applicant that Mr Carmody declined to indicate to Mr Wells the evidence which, it was alleged, supported the adverse findings. Thus, it is argued, Mr Wells was denied the opportunity to make submissions about that matter.

[97] The chronology which is relevant to this part of the applicant's case is as follows:

(a) On 10 April 2013 Mr Wells was provided with a summons to attend the hearings of the Commission and give evidence.

(b) On 23 April 2013 Mr Wells attended and gave evidence and provided two statements of his evidence.

(c) In those statements Mr Wells dealt, in some detail, with the relevant events and used titles such as:

(i) "The 'destruction of evidence' allegation";

(ii) "Why Cabinet had no intent relating to a possible judicial processing"; and

(iii) "Why Cabinet believed the documents were not needed in any judicial process."

(d) On 23 April 2013 Mr Wells was the subject of lengthy examination and cross-examination about the destruction of the Heiner documents.

[98] Mr Wells' examination concluded with a number of questions from Mr Carmody. Mr Sofronoff QC referred me to the following:

> "COMMISSIONER: ... I have been directed to inquire into not just the legality of the decision but its appropriateness as well. Did you want to make any comment about that? I mean, is your position the same in respect of appropriateness as it is in respect of the allegations of criminal conduct, that is, there was nothing on foot. You had legal advice that you accepted that technically there was no legal impediment to the destruction and therefore it was not only legal but also appropriate? ... We believed implicitly that there was no legal reason why we shouldn't do it because the Crown Solicitor told us that and also at the time we had no intent to avoid any judicial proceeding or to remove evidence. The direction of Cabinet's decision was actually sent in the first Cabinet meeting before we were told – before Cabinet was told of an interest post the Heiner inquiry itself in the document.

> If it was asserted to you, leaving aside the question of the legality, the legal impediment instruction, it was otherwise inappropriate for you to do it, would you say, 'No, it was perfectly appropriate'? - - - I would say whether it was a suboptimal thing to do or not I don't know. No now how the CJC operates, I suppose – you know, if you press me on the point of what is the optimal thing to have done in the circumstances, I suppose I would say now that we know how the CJC operated and things that it could do it would have been wise to seek advice as to some way that we could hang onto this without disclosing it for a little while until we could just give it to them and say, 'This is your territory now.' That would have been better but we didn't think of that because the CJC was so new. We were just in the process of – it was the Fitzgerald process we called it. We were implementing the recommendations of the Fitzgerald report the Electoral and Administrative Review Commission and the CJC, and it was all new.
>
> So you think looking in hindsight that there was something that you could have done that was more appropriate but this was still legal, what you did, destroying documents? - - - In the light of the information that we had I don't know – I don't know that we could have done anything else, but if we now knew about how the institution of the CJC – if we had then known how the institution of the CJC was going to work, we would have understood that it was the ideal body to deal with the particular kind of issue, but we didn't know that back then because the world was different then. We had not changed it by introducing EARC and CJC."

[99] In the letter sent on 8 May 2013 from Mr Carmody to Mr Wells the following appears:

> "I am yet to form a final view about whether relevant executive government responses or actions were adequate, appropriate or criminal in nature.
>
> However, the principles of natural justice require me to listen fairly to relevant evidence and any rational argument against a possible adverse finding that an interested party wishes to put.
>
> Accordingly, I advise that having regard to the information Cabinet had on 5 March 1990, including Exhibits 151, 168, 181 and some or all of 151A and 180 there is a risk of a finding that the decision to enable destruction of the Heiner documents offended against ss 129, 132 and/or 140 of the *Criminal Code* and that such a finding might reflect unfavourably on your own conduct. Copies of these exhibits are attached.
>
> In addition or alternatively, there is a realistic possibility that I will come to the view that Cabinet's decision was inappropriate in the sense of being contrary to the then existing standards reasonably expected of executive government in making public administration decisions.
>
> You may wish to address me about the contextual meaning of 'appropriate' in 3(e), the correct standard to be applied in the circumstances and whether the consensus decision by Cabinet on 5 March 1990 to hand the Heiner documents over to the State Archivist for destruction met that standard.

> I have determined that procedural fairness rules will be satisfied by giving you the opportunity to make written submissions on the issues I have mentioned without being given an oral hearing."

[100] Mr Wells replied to that letter by providing a written submission and a further statement.

[101] The ambit of the requirement to give notice of a possible adverse finding was considered in *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd*:[49]

> "It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material: *Dixon v Commonwealth* … . However, as Lord Diplock said in *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* … :
>
> > " … **the rules of natural justice do not require the decisionmaker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision**. If that were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished."
>
> A person likely to be affected by an administrative decision to which requirements of procedural fairness apply can support his or her case by appropriate information but cannot complain if it is not accepted. On the other hand, if information on some factor personal to that person is obtained from some other source and is likely to have an effect upon the outcome, he or she should be given the opportunity of dealing with it: *Kioa v West* … . Within the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case: *Sinnathamby v Minister for Immigration and Ethnic Affairs* … . In *Ansett Transport Industries Ltd v Minister for Aviation* … , Lockhart J expressly agreed with the observations of Fox J in *Sinnathamby* on this point. See also *Geroudis v Minister for Immigration, Local Government and Ethnic Affairs* … and *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* … .
>
> The general propositions set out above may be subject to qualifications in particular cases. Two such qualifications were enunciated by Jenkinson J in *Somaghi* … :
>
> > 1. **The subject of a decision is entitled to have his or her mind directed to the critical issues or factors**

[49] (1994) 49 FCR 576.

> **on which the decision is likely to turn in order to have an opportunity of dealing with it**: *Kioa v West* … ; *Sinnathamby* … ; *Broussard v Minister for Immigration and Ethnic Affairs* … .
>
> 2. **The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material**: *Minister of Immigration and Ethnic Affairs v Kumar* … ; *Kioa v West* … .

His Honour observed that those qualifications may be no more than an application of the general requirement of procedural fairness in particular cases. As Gummow J there said (at 359):

> " … in a particular case, **fairness may require the applicant to have the opportunity to deal with matters adverse to the applicant's interests which the decision-maker proposes to take into account, even if the source of concern by the decision-maker is not information or material provided by the third party, but what is seen to be the conduct of the applicant in question**."

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question. … ."[50] (citations omitted, emphasis added)

[102] The Commissioner had foreshadowed a possible adverse finding and what its terms might be. He forewarned Mr Wells of the evidence upon which he might rely if he made that finding. He provided Mr Wells with copies of the relevant exhibits to which he had referred. Mr Carmody directed Mr Wells "to the critical issues or factors on which the decision [was] likely to turn in order to have an opportunity of dealing with it". Mr Wells took advantage of that offer and made submissions.

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50 Ibid at 590-591.

[103] Assuming, for the purposes of considering this argument, that Mr Wells was not aware of what might be said against him or the basis upon which it might be said, no evidence was given as to what further submission might have been made.

[104] The "warning" and the detail provided was sufficient. The hearing rule was not offended.

Interpretation of the phrase "adequacy or appropriateness"

[105] The third ground relied upon by the applicant is that Mr Carmody erred in law in his interpretation of the phrase "adequacy or appropriateness" as it appears in *Commissions of Inquiry Amendment Order (No 2)* 2013.

[106] The manner in which Mr Carmody proposed to proceed with respect to the construction of those terms is set out in his report. The approach he took is well explained in his report and the reasons he gave for finding the actions of Cabinet were inappropriate are set out as follows:

> "Mr Wells was concerned about keeping evidence of misconduct and unsubstantiated defamatory material on its own employees as 'improper' and 'rather odious' and was afraid that accidental disclosure or compelled production either under proposed freedom of information laws or in a court proceeding could make the government liable for criminal defamation, but neither of these reasons are convincing reasons favouring destruction.
>
> I doubt that the contents of the Heiner documents were any more 'odious' than what is routinely held on record in departmental custody and it is hard to see how mere retention could constitute a criminal offence based on the act of publication. Mr Wells says that Cabinet understood that unless a decision were made quickly the government would end up having to release or publish defamatory material if access was permitted, for example by subpoena or third party discovery in a pending action. Even if they were genuine concerns, I would be surprised if they were shared by anybody else in the Cabinet room and it does not mean that litigation was not also anticipated and a factor that contributed to the decision to destroy.
>
> …
>
> In my opinion, even though I think there is sufficiently cogent evidence to be left to a jury to consider whether the executive government committed a section 129 offence, a conviction could quite easily be reversed on appeal as a miscarriage of justice because the competing inferences of fact that could properly be drawn might be regarded as so finely balanced as to be equally consistent with both guilt and innocence, and therefore give rise to a reasonable doubt that defendants were entitled to.
>
> To avoid the likelihood of this ultimate outcome, the evidence would have to be viewed as strong enough to positively exclude the inference that the Heiner documents were not shredded to ensure that they were not available

if later required for use as evidence in a judicial proceeding, but for some other reason.

Adequacy and appropriateness
The word 'adequacy' in paragraph 3(e) denotes 'sufficiency' and is quantitative. It asks – was what was done all that reasonably could have been done? 'Appropriateness', by contrast, is essentially qualitative and concerned with propriety more than sufficiency. It asks – was what was done what reasonably should have been done?

The most pertinent question for me to answer, therefore, is whether the actions of the Premier and Cabinet in reaching Decision No. 162 of 1990 and handing over the Heiner documents for destruction were 'appropriate' rather than 'adequate'.

Cabinet's conduct should not be characterised as deficient unless it clearly fell short of what I think a reasonable Minister would have done at the time in the same circumstances.

Applying contemporary standards or current codes of conduct retrospectively or in hindsight would clearly be unfair.

O'Gorman SC for Mr Wells submits that if I reached the conclusion that there are grounds on which I can:

> …plausibly report that government acted inappropriately, natural justice procedural fairness requires that the grounds on which it is proposed to make such a report and the facts and circumstances on which such a report would rely should be disclosed to Mr. Wells whose reputation could be injured by such a report' or I would fail to give him a 'full and fair' hearing.

I disagree. The standard of appropriateness being applied is no higher than the ordinary meaning of the word implies. Mr Wells appeared at the public hearing and has made a comprehensive submission with notice of the matters in issue before the Inquiry. I am reasonably satisfied that the requirements of fairness in the context of 3(e) have been fully met.

Resolution of this issue requires striking a balance between relevant considerations so as to arrive at a fit and proper outcome within the ordinary meaning of the term.

What was 'appropriate', having regard to the circumstances in which the Premier and Cabinet made Decision No. 162 of 1990, has to be judged in the context of the community expectations of ethical public administration, as well as the acceptable principles for good, open and transparent government in 1990. This test, I think, properly reflects the importance and standing of the executive government in a liberal democracy, as well as the level of public trust and confidence reposed in the integrity, objectivity, impartiality and competence of Ministers of State.

No doubt Cabinet had a duty to act in a way that bears close public scrutiny; that is, in an exemplary and model way. However, due allowance has to be given for the fallibility and frailty of all human institutions and the fact that what is 'right' and what is 'wrong' in discretionary public decision making can be a highly contestable matter.

Burns QC and Ms Rosengren argue:

> …it cannot be said that (Cabinet) acted other than appropriately and in accordance with the standard to be reasonably expected of members of the executive.

It is further submitted that the decision in question:

> …was arrived at cautiously over the course of three Cabinet meetings and on the advice of the relevant department, as well as, the Crown Solicitor and State Archivist. Cabinet was entitled to rely on that advice, as well as, the recommendation of the responsible Minister. In all of the circumstances they acted appropriately and in accordance with the standard to be reasonably expected of members of the executive.

The question posed for me to answer by 3(e) is not whether Cabinet acted strictly in accordance with the law (as they, rightly or wrongly, were told it was or honestly understood it to be) but whether the executive government acted appropriately; that is, concerned with the broader concept of propriety, rather than mere legality. The obligation is not simply to observe the letter of the law but its spirit and purpose as well. While the executive government was perfectly entitled to choose to consider and decide whether or not to destroy potentially defamatory departmental records, it was hardly a matter of high public policy or priority. It is even more difficult for me to see why Cabinet was even grappling with such a machinery issue.

It is more difficult again to see how it was 'appropriate' for the Cabinet to take action that was intended, was likely, or had the practical effect of denying an aggrieved public servant the right of access to official records he or she had under public service regulations, or depriving that or another person of discoverable or admissible documents in any potential legal proceedings.

Furthermore, the John Oxley Youth Centre employees already had the protection of indemnity against legal costs as a matter of standard government policy. They did not need (and were not entitled to) the additional benefit of arguably the 'best' evidence against them being prematurely and secretly destroyed by their employer and litigation insurer.

In my opinion, the appropriate standard of conduct expected of the Premier and Ministers in a serving Cabinet, in 1990, was not to have public records destroyed in the circumstances, in the way, or for any of the reasons as the Heiner documents supposedly were.

Even if it is properly characterised as the honest but ill-advised act of a newly-elected government, Cabinet Decision 162 of 1990 caused the

> destruction of public records which from a governance and public administration perspective fell short of the relevant standard of appropriateness; that is, 'fit and proper'.
>
> This is because, in my view, apart from being prima facie unlawful, it had the tendency and practical effect (whether intended or expected) of prejudicing or frustrating employee access rights and litigation interests and bringing executive government in Queensland into disrepute and intractable public controversy for 23 years."

[107] The argument advanced for Mr Wells did not criticise the definition of appropriateness which was expressed by Mr Carmody in his report but, based on some of the words used in the excerpt above, contended that Mr Carmody had either not applied the definition he set out or had in some other way erred. In particular, reference was made to the words "sparking an intractable public controversy for over 23 years". The Commissioner erred in taking that particular point into account. It is an application of impermissible hindsight. Whether or not an act of government sparked an intractable public controversy was not something which could have been relevant to the exercise of power and its appropriateness at the relevant time. More to the point, though, the argument advanced on behalf of Mr Wells under this heading related not to the proper definition of "appropriateness" but an argument that Mr Carmody could not have reasonably come to the conclusion he did if that definition was used.

[108] The applicant did not establish that the Commissioner made any error in his interpretation of the term "appropriateness". He gave it its ordinary English meaning, i.e., to be proper or fitting.

Was the decision so unreasonable that no reasonable person could make such a finding?

[109] The final ground advanced was that no reasonable person could have made such a finding. Further, it was argued that the decision was irrational, illogical and not based on findings or inferences supported by logical grounds. The latter ground relied upon the reasons in *Minister for Immigration and Citizenship v SZMDS*.[51] The applicant framed his case in terms of ss 20, 2(e) and 23(g) of the *JR Act*. This is often referred to as *Wednesbury* unreasonableness which comes from the familiar passage from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[52] referring to:

> "... a conclusion so unreasonable that no reasonable [decision-maker] could ever have come to it."

[110] In the applicant's written submissions a number of the findings made by Mr Carmody are recited. They include that the members of Cabinet:

(a) acted on the independent advice of the Crown Solicitor and the State Archivist;

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51 (2010) 240 CLR 611 at [58], [78], [131] and [135].

52 [1948] 1 KB 223 at 234.

(b) apparently believed that there was no legal impediment to destroying the documents;
(c) acted in good faith based on reasonable Crown Law advice.

[111] It was submitted then, that Mr Carmody, having decided that:
(a) the members of Cabinet had acted in good faith,
(b) on the basis of independent legal advice,
(c) where that advice was not plainly wrong
the findings relevant to this issue were rendered unreasonable in the *Wednesbury* sense in that it was difficult to find "the rationality required by the rules of reason [as] an essential element of lawfulness and decision-making".[53]

[112] The approach that a court should take in considering matters of this nature was discussed by the plurality in *Minister for Immigration v Li*.[54] Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification. But, this analysis cannot be used as a cloak to hide what is, in truth, a merits review. A brief article, *"The revitalisation of Wednesbury unreasonableness – The decision in Minister for Immigration and Citizenship and Li"*,[55] provides a helpful consideration of the High Court's reasons in that case:

> "As indicated above, the first important point from the High Court decision in *Li* is its indication that *Wednesbury* unreasonableness "lives on" independently alongside the contemporary emergence of the "irrationality" variant. The second important point is the manner in which the decision revitalises *Wednesbury* unreasonableness as a fundamental common law presumption of statutory interpretation. The High Court traced the origins of the doctrine, commencing with the decision from which its name is taken before proceeding through subsequent decisions, particularly its own.
>
> As the High Court stated, the nature and scope of *Wednesbury* unreasonableness in Australia is explained by reference to the assumption that the legislature intends statutory discretionary powers to be exercised "reasonably" in the sense that reasonableness is a condition of the exercise of a discretionary power. Under a heading in his judgement titled "Reasonableness as a statutory implication", Gageler J explained that what he referred to as the "statutory implication principle" defined the nature and scope of Wednesbury unreasonableness in Australia.
>
> Referring to one of the standard bearers of statutory interpretation – the High Court decision in *Project Blue Sky Inc v Australian Broadcasting Authority* … , the plurality stated that **the legal standard of unreasonableness is to be considered by reference to the subject matter scope and purpose of the statute conferring the discretionary power in question. In other words, the starting point in determining whether the exercise of a statutory discretionary power is unreasonable in the *Wednesbury* sense requires a close examination of the statute in which the discretionary power resides in order to glean the purpose for its existence**." (citations omitted, emphasis added)

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53 *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 at [26].
54 Ibid at [65]-[76]
55 (2013) 33 Qld Lawyer 168

[113] Many of the powers afforded Mr Carmody are found in the *Commissions of Inquiry Act*. But, the conclusion which is complained of is not with respect to a statutory discretionary power, it is a finding made pursuant to the duty to report and make recommendations. In any event, whatever the source of the power to make his report, justification for the conclusion made by Commissioner Carmody can be found in his report where he sets out matters relating to the evidence contained in a number of exhibits.

[114] The basis for the decision of the Commissioner on this point was summarised in the argument of Mr Sofronoff QC in the following way:

> "... There was nothing irrational about the conclusion that it was inappropriate to have the documents destroyed in circumstances where:
>
> (a) the documents were departmental records.
>
> (b) access to those records was actually being sought by citizens at the time of the decision, one of whom who had foreshadowed commencing proceedings.
>
> (c) access to those records might obviously be sought by others in the future.
>
> (d) nevertheless, the members of Cabinet decided to destroy the records forever denying access to them."

[115] A substantial part of the applicant's submissions on this point was based upon the independent advice given to Cabinet that the steps they proposed were lawful. While a relevant consideration, it is not correct to equate lawfulness with appropriateness. It may be lawful for someone to do an act, but it may well be inappropriate.

[116] The decision made by the Commissioner can be seen to have a basis in the evidence. It was open to the Commissioner to make the decision he made. But, as Mr Sofronoff QC said in his submissions, "Some might reach a different view". It is not the province of a court on an application such as this to impose its own view of the evidence as a matter of mere preference, thereby displacing a conclusion that was reasonably open to the primary decision-maker. To do so would be to trespass upon that which is denied the Court under the *JR Act*, that is, a review of a decision on its substantive merits.

Conclusion

[117] For the reasons given above the findings the subject of the application are not able to be reviewed under the *JR Act* and, if they were so available, then no grounds have been established.

[118] The application is dismissed.

[119] I will hear the parties on costs.

SCHEDULE 1

COMMISSIONS OF INQUIRY ORDER (NO. 1) 2012

Short title

1. This Order in Council may be cited as the *Commissions of Inquiry Order (No. 1) 2012.*

Commencement

2. This Order in Council commences on 1 July 2012.

Appointment of Commission

3. UNDER the provisions of the *Commissions of Inquiry Act 1950* the Governor in Council hereby appoints the Honourable Timothy Francis Carmody SC, from 1 July 2012, to make full and careful inquiry in an open and independent manner of Queensland's child protection system, with respect to:

a) reviewing the progress of implementation of the recommendations of the *Commission of Inquiry into Abuse of Children in Queensland Institutions* (the Forde Inquiry) and *Protecting Children: An Inquiry into Abuse of Children in Foster Care* (Crime and Misconduct Commission Inquiry);

b) reviewing Queensland legislation about the protection of children, including the *Child Protection Act 1999* and relevant parts of the *Commission for Children and Young People and Child Guardian Act 2000* ;

c) reviewing the effectiveness of Queensland's current child protection system in the following areas:

i. whether the current use of available resources across the child protection system is adequate and whether resources could be used more efficiently;

ii. the current Queensland government response to children and families in the child protection system including the appropriateness of the level of, and support for, front line staffing;

iii. tertiary child protection interventions, case management, service standards, decision making frameworks and child protection court and tribunal processes; and

iv. the transition of children through, and exiting the child protection system;

d) reviewing the effectiveness of the monitoring, investigation, oversight and complaint mechanisms for the child protection system and identification of ways to improve oversight of and public confidence in the child protection system; and

e) reviewing the adequacy and appropriateness of any response of, and action taken by, government to allegations, including any allegations of criminal conduct associated with government responses, into historic

4. EXCEPT that the inquiry is not to have regard to the following matters:

a) Recommendation 39 of the Forde Inquiry;

b) any matter that is currently the subject of a judicial proceeding, or a proceeding before an administrative tribunal or commission (including, but not limited to, a tribunal or commission established under Commonwealth law), or is, as of the date of these terms of reference, the subject of police, coronial, misconduct or disciplinary investigation or disciplinary action;

c) the appropriateness or adequacy of:

i. any settlement to a claim arising from any event or omission; or

ii. the rights to damages or compensation by any individual or group arising from any event or omission, or any decision made by any court,

tribunal or commission in relation to a matter that was previously the subject of a judicial proceeding, or a proceeding before a tribunal or commission; or

iii. any Queensland Government redress scheme including its scope, eligibility criteria, claims and/or payments of any kind made to any individual or group arising from any event or omission; for any past event that, as of the date of these terms of reference, is settled, compromised or resolved by the State of Queensland or any of its agencies or instrumentalities; and

d) the operation generally of youth detention centres (other than those matters relating to historic child sexual abuse in youth detention centres identified at paragraph 3(e) of these terms of reference), including but not limited to the progress of implementation of Recommendations 5 to 15 (inclusive) of the Forde Inquiry relating to the operation of youth detention centres.

Commission to report

5. AND directs that the Commissioner make full and faithful report and recommendations on the aforesaid subject matter of inquiry, and transmit the same to the Honourable the Premier by 30 April 2013.

Commission to make recommendations

6. IN making recommendations the Commissioner will chart a new road map for Queensland's child protection system over the next decade. The recommendations should take into consideration the Interim Report of the Queensland Commission of Audit and the fiscal position of the State, and should be affordable, deliverable and provide effective and efficient outcomes. The recommendations should include:

a) any reforms to ensure that Queensland's child protection system achieves the best possible outcomes to protect children and support families;

b) strategies to reduce the over-representation of Aboriginal and Torres Strait Islander children at all stages of the child protection system, particularly out-of-home care;

c) any legislative reforms required; and

d) any reforms to improve the current oversight, monitoring and complaints mechanisms of the child protection system.

Application of Act

7. THE provisions of the *Commissions of Inquiry Act 1950* shall be applicable for the purposes of this inquiry except for section 19C – Authority to use listening devices.

Conduct of Inquiry

8. THE Commissioner may hold public and private hearings in such a manner and in such locations as may be necessary and convenient.

ENDNOTES

1. Made by the Governor in Council on 28 June 2012.
2. Notified in the Gazette on 29 June 2012.
3. Not required to be laid before the Legislative Assembly.
4. The administering agency is the Department of Justice and Attorney-General.

SCHEDULE 2

21 Application for review of conduct related to making of decision

(1) If a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies (whether by the person engaging in the conduct or by another person), a person who is aggrieved by the conduct may apply to the court for a statutory order of review in relation to the conduct.

(2) The application may be made on any 1 or more of the following grounds—

(a) that a breach of the rules of natural justice has happened, is happening, or is likely to happen, in relation to the conduct;

(b) that procedures that are required by law to be observed in relation to the conduct have not been, are not being, or are likely not to be, observed;

(c) that the person proposing to make the decision does not have jurisdiction to make the proposed decision;

(d) that the enactment under which the decision is proposed to be made does not authorise the making of the proposed decision;

(e) that the making of the proposed decision would be an improper exercise of the power conferred by the enactment under which the decision is proposed to be made;

(f) that an error of law—

(i) has been, is being, or is likely to be, committed in the course of the conduct; or

(ii) is likely to be committed in the making of the proposed decision;

(g) that fraud has taken place, is taking place, or is likely to take place, in the course of the conduct;

(h) that there is no evidence or other material to justify the making of the proposed decision;

(i) that the making of the proposed decision would be otherwise contrary to law.

(3) This section applies only to conduct engaged in, or proposed to be engaged in, after the commencement of this Act.