SUPREME COURT OF QUEENSLAND

CITATION:	*Walters v Drummond & Ors* [2019] QSC 97
PARTIES:	**DARREN LESTER WALTERS** (applicant) **v** **SHAUN DRUMMOND, HEALTH SERVICE CHIEF EXECUTIVE PURSUANT TO THE HOSPITAL & HEALTH BOARDS ACT 2011 (QLD)** (first respondent) and **METRO NORTH HOSPITAL & HEALTH SERVICE** (second respondent) and **ANDREW HOWARD, INVESTIGATOR PURSUANT TO S.190 OF THE HOSPITAL & HEALTH BOARDS ACT 2011 (QLD)** (third respondent) and **ADAM FAIRHURST, INVESTIGATOR PURSUANT TO S.190 OF THE HOSPITAL & HEALTH BAORDS ACT 2011 (QLD)** (fourth respondent) and ~~**MARITA CORBETT, INVESTIGATOR PURSUANT TO S.190 OF THE HOSPITAL & HEALTH BAORDS ACT 2011 (QLD)**~~ (fifth respondent)
FILE NO:	14221 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	12 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2019
JUDGE:	Applegarth J
ORDER:	**1. The time for filing the application for a statutory order for review be extended to 21 December 2018.** **2. The applications filed on 11 March 2019 pursuant to s 48 of the *Judicial Review Act* 1991 to dismiss the proceeding be dismissed.**

3. **The respondents pay the applicant's costs of and incidental to the applications filed 11 March 2019 to be assessed on the standard basis.**

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 the subject of an investigation under the *Hospital and Health Boards Act* 2011 (Qld) – where adverse findings were made against the applicant in the investigation report – where the applicant argues that the report was an essential precondition to the first respondent taking action against him – whether the report constitutes a decision under an enactment for the purposes of the *Judicial Review Act* 1991 (Qld)

Hospital & Health Boards Act 2011 (Qld) s 199(1), s 199(8)
Judicial Review Act 1991 (Qld) s 4, s 6, s 26(1)(b), s 48, pt 3, pt 5
Public Service Act 2008 (Qld) s 187(1), s 189(1)
Uniform Civil Procedure Rules 1999 (Qld) r 577

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, cited

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, cited

BHP Coal Pty Ltd v Treasurer and Minister for Trade and Investment [2017] QSC 326, cited

Dunstan v Orr (2008) 217 FCR 559; [2008] FCA 31, considered
Edelsten v Health Insurance Commission (1990) 27 FCR 56, cited
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, cited

Hoffman v Queensland Local Government Superannuation Board [1994] 1 Qd R 369, cited

Kuku Djungan Aboriginal Corporation v Christensen [1993] 2 Qd R 663, cited

Vega Vega v Hoyle & Ors [2015] QSC 111, considered

Waratah Coal Pty Ltd v Nicholls [2013] QSC 68, cited

Wells v Carmody & Anor [2014] QSC 59, cited

COUNSEL: J E Murdoch QC and S T Farrell for the applicant
A L Wheatley for the first and second respondents
R P S Jackson QC and P C Williams for the third, fourth and fifth respondents

SOLICITORS:	Franklin Athanasellis Cullen for the applicant Clayton Utz for the first and second respondents McInnes Wilson Lawyers for the third, fourth and fifth respondents

[1] The applicant seeks judicial review of a report prepared by the third and fourth respondents ("the BDO Report") and decisions of the first respondent on behalf of the second respondent, including a decision dated 24 September 2018 to suspend him from duty. The hearing is set down for three days in June. The respondents separately apply to have the proceeding dismissed pursuant to s 48 of the *Judicial Review Act* 1991 (Qld) ("*JRA*"). Their applications are brought essentially on the ground that the relevant decision is not a "decision" to which the *JRA* applies. The issue is whether I should exercise my discretion to dismiss the proceeding at this stage, or, instead, permit it to proceed to a final hearing.

Background

[2] The applicant is the Director of Cardiology at the Prince Charles Hospital ("PCH") which is part of the Metro North Hospital & Health Service ("MNHHS") run by the second respondent, of which the first respondent is Chief Executive.

[3] The applicant is an eminent cardiologist and has been Director of Cardiology at the PCH since 2005. He is also a Professor of Medicine (Preeminent Senior Medical Officer) at the University of Queensland. Prior to his suspension he had a heavy clinical, teaching and research workload at PCH, and one of the busiest workloads in the Cardiologist Unit. The unit has become one of the largest cardiac units of its type in the country, with an operating annual budget of around $78 million and employing the equivalent of 356 staff.

[4] About 85 per cent of the applicant's time at PCH involved performing clinical work for patients. He also helped train other clinicians. The balance of his time was spent managing research grants and projects, and general management responsibilities related to the medical aspects of the Cardiology Program. His role did not include business management, however, at a high level he was accountable for ensuring that the Cardiology Department operated in line with departmental budgets.

[5] Because of his concern over the differences in health and life expectancy between indigenous and non-indigenous Australians, especially those living in remote areas, the applicant proposed in 2005 a program to address this health outcome gap, with the goal of improving the cardiovascular health of indigenous Australians in remote areas. The Indigenous Cardiac Outreach Program ("ICOP") involves cardiac clinicians and support staff travelling to remote centres to conduct clinics. The applicant helped secure government funding to establish the program, and it commenced operations in 2007.

[6] The second respondent employed the ICOP State Manager and other project officers. The State Manager reported to the Cardiology Program's Business Manager, who in turn reported to:

(a) the PCH's Finance Manager, who reported to the PCH's Executive Director; and separately to

(b) MNHHS's Finance Director, who reported to MNHHS's Chief Finance Officer, who in turn reported to MNHHS's Chief Executive.

The ICOP State Manager reported to the applicant about clinical matters.

[7] Over the years there were organisational changes and MNHHS proposed that the ICOP State Manager notionally report to the applicant. At this time the applicant spoke to the Executive Director of PCH and said words to the following effect:

> "I do not have the necessary expertise and training, or access to the software and computing systems, to oversee ICOP's business and financial functions. The ICOP State Manager and the Business Manager must continue to manage ICOP's business and financial affairs, as they always have."

[8] According to the applicant, the Executive Director of PCH agreed and ICOP's State Manager and Business Manager continued to manage and be responsible for ICOP's business, financial and administrative affairs between 2015 and 2018. Notably, in an email on 21 February 2017, PCH's Human Resources Manager said that she had spoken to the Executive Director and, amongst other things, he had confirmed that the "Business Manager is responsible for Financial Oversight of ICOP program".

[9] Issues arose about the administration of ICOP and investigations followed. A decision was made that an external investigation be undertaken. On 23 March 2018 the third, fourth and fifth respondents were each appointed by the first respondent as an investigator pursuant to s 190 of the *Hospital & Health Boards Act* 2011. Each is employed by BDO (Qld) Pty Ltd. The third respondent is also a director and partner of the associated partnership. The fourth respondent is employed as a senior manager by BDO. The fifth respondent is also a director and partner of BDO. Although she was appointed as a health service investigator in respect of the subject of the proceeding, she played no role in the investigation or report provided by BDO. As a result, I ordered by consent on 27 March 2019 that she be removed as a party.

[10] Eventually the investigation was completed and a report dated 17 August 2018 set out what was described as "the BDO findings from our investigations, analysis and relevant inquiries undertaken."

[11] Section 199(1) of the *Hospital & Health Boards Act* 2011 requires a health service investigator to prepare and provide a report to the appointer for each health service investigation. Section 199(8) applies to a report provided to a health service chief executive, such as the first respondent, after an investigation. Section 199(8) states:

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

[12] After receiving the BDO Report and considering it, the first respondent, by notice dated 24 September 2018, advised that the applicant was, subject to his response, liable to discipline under the *Public Service Act* 2008 (Qld) ("*Public Service Act*") and MNHHS policies for

"maladministration", as found in the BDO Report. The first respondent also notified the applicant that he was suspended from duty under s 189(1) of the *Public Service Act*.

[13] The applicant's suspension clearly was based on the BDO Report. Incidentally, the *Public Service Act* does do not use the term "maladministration". This is a term that can be found in the *Ombudsman Act* (which is irrelevant for present purposes) but which the BDO Report chose to use.

[14] The applicant's suspension has had adverse effects upon his career and reputation, not to mention the operation of the PCH Cardiology Unit and its patients.

[15] The BDO Report was not concerned with any aspect of the applicant's clinical work for patients, his oversight and training of other clinicians or his research work. It made no adverse findings against him in respect of clinical issues. There were clinical duties at PCH that the applicant was ready, willing and able to perform, namely providing treatment to patients on his list. There was no end date to the applicant's suspension. A large number of employees at PCH have petitioned the Chair of the Board of the second respondent and politicians with their concerns about the applicant's suspension, including the loss of his clinical leadership, mentoring and skills from the cardiac program and an increase in waiting times for patients to have urgent surgical interventions.

[16] Although the applicant was suspended on "normal pay", because of his suspension he has not been able to work the overtime hours and other hours that attract loadings at PCH and has not been able to earn fees that he had expected to earn for private practice work and consulting work. He has been able to undertake some private practice work at a private hospital since October 2018. However, there is a complicated accounting process for income he earns from such a source to be deducted from his "normal pay". The financial losses he has suffered since October 2018 are still being assessed.

[17] Apart from any financial loss suffered as a result of the applicant's suspension, the applicant says that the first respondent's suspension of him has damaged his professional and personal reputation. He has been the subject of incomplete and inaccurate reports in *The Courier Mail* about the facts of this case. Because of his confidentiality obligations, he has not been able to defend himself in public against the "maladministration" allegations which he says are fatally flawed and without substance. The fact that he has been suspended is widely known and has tarnished his reputation in the cardiology community and more broadly.

[18] By notice dated 23 October 2018 the first respondent, on behalf of the second respondent, invited the applicant to respond to the "maladministration" allegations contained in the BDO Report. By various letters the first respondent has confirmed the applicant's suspension.

The BDO Report

[19] Certain allegations that arose in the course of the investigation were found to be unsubstantiated. The relevant part of the BDO Report in issue in this proceeding relates to one aspect of the ICOP. An agreement was negotiated between the second respondent and a federal entity known as CheckUp in relation to outreach services. This involved the completion of an electronic Local Visit Report ("LVR") claiming reimbursement. Issues had arisen in the past about the involvement of administrative staff in the outreach program undertaking

certain tasks. This led to errors in the LVRs. An internal audit in 2015 concluded that the applicant held "a vast number of other obligations and [had] little time to dedicate to the verification and scrutiny of ICOP expenditure". In late 2015 the applicant sent a memorandum to the then ICOP manager about corrective action. He also wrote to the Executive Director of PCH about matters concerning the incorrect identification of some staff members as nurses on forms.

[20] As the applicant explained to the third respondent when interviewed on 21 June 2018, he directed the State Manager and the Business Manager to resolve the issues identified in 2015 and did not have the capacity to be involved in the detail of the financials and the day to day operations of ICOP. He expected and hoped the second respondent would resolve the issues identified in the 2015 report.

[21] Despite this, the BDO Report concluded that the applicant was responsible for ICOP and that his actions were "maladministration". Despite the reference to "the actions of" the applicant, the relevant acts attributed to the applicant, so far as one can understand the report, are omissions or alleged neglect concerning governance in failing to ensure that others addressed errors and mistakes in LVRs that have been lodged in recent years.

[22] Remarkably, the BDO Report, having accused the applicant of "maladministration" on a basis which the applicant contends is deeply flawed and unfair, went on to address s 15 of the *Crime and Corruption Act* 2001 and the definition of corrupt conduct. One element of the definition that applied at the relevant time required the conduct to be "engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person". The BDO Report refers to the financial benefit in LVR reimbursement from CheckUp for employees who would not be defined as a "cardiology health worker". The BDO Report notes that ICOP did not claim reimbursement for the administrative officers from other funding sources. Assuming a net benefit to ICOP as a result of these errors, the BDO Report seems to insinuate that the alleged conduct of the applicant was "engaged in for the purpose of providing" such a benefit. This involves peculiar reasoning. The applicant's case is that such an allegation is flawed, unfair and lacks evidence. His case seems very strong since the relevant conduct of which he was accused by BDO in respect of governance of ICOP was neglect. The BDO Report does not explain on what possible basis it could be concluded that an omission or lapse in governance (as distinct from some positive and purposeful act) could possibly have been engaged in by the applicant "for the purpose of providing" a benefit to ICOP. I leave to one side the additional problem under s 15(1)(d) as to whether such neglect would, if proved, be a criminal offence or a disciplinary breach providing reasonable grounds for terminating the applicant's services.

[23] In short, the BDO Report's findings of "maladministration" against the applicant in respect of governance of ICOP in relation to LVRs and its insinuation that the applicant engaged in corrupt conduct through an omission in governance are extremely damaging to the applicant's career, professional standing and hard-earned reputation.

Alleged flaws in the BDO Report

[24] Because the BDO Report was a precondition to the exercise of power under s 199(8) and was fundamental to the decision of the first respondent to suspend the applicant on 24 September

2018, its alleged flaws are relevant to the applicant's case and the utility of the matter proceeding to a hearing against all of the respondents. The alleged flaws in the BDO Report can be summarised briefly for the purposes of this interlocutory application, which is not a hearing on the merits. A summary will suffice, particularly because the respondents do not apply to dismiss the proceeding against them on the grounds that it is frivolous or vexatious.

[25] The applicant contends that the BDO Report in making erroneous findings about "maladministration" against him and in making observations about corrupt conduct is deeply flawed and the product of a flawed process. Of course, the fact that the BDO Report made erroneous findings of fact is not itself a ground for judicial review. For example, the fact that it allegedly made errors in relation to the limited range of ancillary duties performed by administrative officers in taking details of height and weight, taking blood pressure and doing "blood-pricking" to obtain blood sugar levels and that their flexible job descriptions permitted them to perform such ancillary duties may be, if proved, an unfortunate factual error. The alleged errors are, however, more fundamental and are said to be the product of a flawed process. The third and fourth respondents are alleged to have failed to interview critical witnesses, including the Human Resources Manager at PCH, Ms Leighton, who the applicant repeatedly emphasised with the investigators needed to be interviewed because of her knowledge of the organisational structure of ICOP and the manner in which business and financial matters were managed. Mr Williams, the Executive Director at PCH, was interviewed, but not by either of the appointed investigators. It is said that, perhaps because of this, he was not asked to comment in relation to the demarcation of responsibility for the implementation of the 2015 audit report, a central issue to the allegation of maladministration. These and other flaws in the investigative process are said to have led the investigators to not obtain evidence from witnesses about the financial roles played within ICOP, the use of administrative staff for low-grade tasks within a clinical setting and the assignment of governance responsibility after 2015. By failing to interview these witnesses, the investigators are said to have reached a factually false conclusion about the ICOP organisational structure, the functioning of ICOP clinics and the role of the applicant.

[26] A related failure to accord procedural fairness is said to be the failure of the investigators to particularise or put the allegations of maladministration (which the report found established) to the applicant.

[27] BDO's failure to interview witnesses and otherwise to understand the ICOP organisational structure is said to have resulted in a finding that the applicant was ultimately responsible for financial governance of ICOP when in fact, according to the applicant, the relevant business and financial responsibility for the program lay with the Business Manager at the PCH, who then reported through the managerial chain leading to the first respondent. The failure of the investigators to interview critical witnesses, including Ms Leighton, so as to establish the organisational structure and lines of reporting is said to have involved a denial of procedural fairness and other errors. For example, the failure to take into account ICOP's true organisational structure is alleged to have been a failure to consider a relevant matter.

[28] If the applicant is correct about these matters, then any administrative neglect (or "maladministration" to use the term adopted the BDO Report) would be with line managers employed by the second respondent, and ultimately with the first respondent. This gives rise to another aspect of the applicant's claim against BDO, namely that a partner of BDO is a

member of the Board of the second respondent. The applicant alleges a conflict of interest and a reasonable apprehension of bias because it was in the interests of the first respondent and the second respondent (of which a BDO partner was a Board member after 18 April 2018) to see themselves exonerated of wrongdoing or mismanagement by the report, and this could only occur if blame was laid at the feet of the applicant.

[29] Finally, insofar as the BDO Report made observations about corrupt conduct, the applicant's case is that there was no evidence that he engaged in the alleged conduct, let alone for the purpose described. In addition, even if the highly contested factual findings made by the investigators about the roles and responsibilities within ICOP were correct, the alleged negligent oversight identified in the report could not be described as engaging in conduct "for the purpose of providing a benefit". There was no evidence of any such intent and, in any case, the persons doing the work were entitled to be paid for their work from one source or another.

[30] In short, the applicant's case in respect of the BDO Report is that it is deeply flawed, liable to be set aside on judicial review grounds and the product of a denial of natural justice which led to findings and observations about the applicant which are highly damaging to his reputation. The last matter, namely a denial of natural justice, might found at least a remedy by way of declaration in accordance with *Ainsworth v Criminal Justice Commission*.[1]

The s 48 application by the third and fourth respondents

[31] In an application filed 11 March 2019 and amended with my leave on 27 March 2019, the third and fourth respondents apply for the proceeding against them to be dismissed on the ground that there is no reasonable basis for the application as against them and it would be inappropriate for it to be continued. The essence of their argument is that the BDO Report is not a "decision" to which the *JRA* applies. Part of their argument is that the BDO Report was not a condition precedent to a final determination which affected the applicant's legal rights. In particular, the report is said to not be a necessary precondition to any disciplinary decisions which might ultimately be made, and it was not mandatory for the first respondent to consider the report before exercising the power to suspend on 24 September 2018. The fact that a health service investigator's report is something that is required to be considered in respect of a decision under s 199(8) of the *Hospital & Health Boards Act* 2011 is submitted by the third and fourth respondents to be irrelevant. Finally, and in the alternative to these legal arguments about whether the report is amenable to judicial review under the *JRA*, the third and fourth respondents submit that where there is a continuing disciplinary proceeding under the *Public Service Act*, there is no utility in the Court considering whether judicial review of the BDO report might be available. It is submitted to be a waste of the parties' and the Court's resources, and that any attack on the BDO Report should properly be considered "where it is of some practical effect and not simply for academic interest".

[32] In response, the applicant submits that the BDO Report is a condition precedent to the first respondent's exercise of power under s 199(8) of the *Hospital & Health Boards Act* 2011, and

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[1] (1992) 175 CLR 564; [1992] HCA 10 ("*Ainsworth*").

that the position is analogous to the situation considered in *Vega Vega v Hoyle*,[2] in which a report delivered by a health service investigator pursuant to s 199 constituted a reviewable decision. The BDO Report is submitted to have been a "foundational consideration" for the action taken by the first respondent, including his decision to suspend the applicant on 24 September 2018, each of his subsequent decisions confirming that suspension and the notice given on 23 October 2018 (which the applicant describes as a "show cause" letter) which invited the applicant to explain why he should not be disciplined for the maladministration found by the health service investigators.

[33] In simple terms, the applicant's case is that the BDO Report determined that the applicant had engaged in maladministration, and the report was a precondition to the first respondent taking action under s 199(8). That action included the suspension decision on 24 September 2018 and other decisions, including the decision to advise the applicant that day that, subject to his response, he was liable to discipline under the *Public Service Act*. His case is that the BDO Report is a "decision" for the purposes of the *JRA*. In any event, he seeks to engage the Court's jurisdiction to grant declaratory relief. This is on the basis that a denial of natural justice or procedural fairness which led to a report that was damaging to his reputation may justify declaratory and other relief to remedy it.[3]

A decision to which the JRA applies

[34] Section 4 of the *JRA* relevantly 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)."

Section 6 of the *JRA* states:

> "**6 Making of report or recommendation is making of a decision**
>
> 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."

[35] The meaning of "decision" and "under an enactment" in a provision like s 4 has been illuminated by leading authorities such as *Australian Broadcasting Tribunal v Bond*[4] as to the meaning of "decision" in the context of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and by *Griffith University v Tang*[5] as to when a decision is to be regarded as having been made "under an enactment" within the meaning of s 4 of the *JRA*. As to the latter, *Tang* establishes that a decision will be made "under an enactment" if it:

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2 [2015] QSC 111 (*"Vega Vega"*).

3 *Ainsworth*.

4 (1990) 170 CLR 321; [1990] HCA 33 ("*Bond*").

5 (2004) 221 CLR 99; [2005] HCA 7 ("*Tang*").

(a) is expressly or impliedly required or authorised by the enactment; and

(b) confers, alters or otherwise affects legal rights or obligations.[6]

[36] To qualify as a "decision" for the purposes of a provision like s 4 of the *JRA*, the decision must be final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration.[7] An essential quality of a reviewable decision is that it be a substantive, rather than a procedural, determination.[8]

[37] As to a report, prerogative relief by way of *certiorari* did not lie in the case of a report that "has, of itself, no legal effect and carries no legal consequences".[9] This principle was applied in *Ainsworth* in the case of a report prepared by the Criminal Justice Commission about the poker machine industry which contained adverse comments about certain individuals. The High Court declined relief by way of *mandamus* and *certiorari*. *Mandamus* was inappropriate as the Commission was under no statutory duty to investigate and report about the persons against whom adverse comments were made. *Certiorari* did not lie because the report made and delivered by the Commission did not, of itself, have legal effect or carry legal consequences. Instead, the High Court made declarations about the failure of the Commission to observe the requirements of procedural fairness.[10]

[38] More generally, reports by commissions or other investigative bodies may be placed into one of two broad categories:

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

(b) those which need not be taken into account.[11]

For example, the making and consideration of a report may be a condition precedent to the making of a decision.[12]

[39] In this matter, provision was made by s 199 of the *Hospital & Health Boards Act* for a health service investigator (in this case the third and fourth respondents) to prepare and provide a report to the appointer (in this case the first respondent). Section 199 required the making of the report. The Act provided for the making of a report before the chief executive took action in relation to the matters identified in the report. This is apparent from s 199(8), quoted above, which commences "After considering the report, the chief executive …"

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6 *Tang* at [79] – [80]; [89].

7 *Bond* at 337.

8 *Bond* at 337*; Edelsten v Health Insurance Commission* (1990) 27 FCR 56 at 68.

9 *Ainsworth* at 580.

10 Ibid at 581, 597.

11 *Wells v Carmody* [2014] QSC 59 at [21].

12 This gives rise to the application of a provision such as s 3(3) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) or s 6 of the *JRA*: see *Wells v Carmody* [2014] QSC 59 at [36]-[51] citing *Edelsten v Health Insurance Commission* (1990) 27 FCR 56.

[40] A similar issue arose in *Vega Vega*[13] in respect of a report to which s 199(5) applied. Section 199(5) provides:

> "After considering the report, the chief executive may issue a direction to the Service."

Ann Lyons J observed that it was clear that s 199(5) made specific provision for a decision which might follow from the health service investigator and that no such decision can be made without consideration of the report. This made the report a precondition to such a decision. The same reasoning applies in this case. The report of the third and fourth respondents is a precondition to the making of a decision to take action under s 199(8). By virtue of s 6 of the *JRA*, the report is itself taken, for the purposes of the *JRA*, to be the making of a decision.

[41] The decision must still qualify as one to which the *JRA* applies. It must have the essential quality of being substantive. Again, there is an analogy with the final report considered in *Vega Vega*. It was found to be determinative in relation to the issues of fact being investigated. The determinations, findings and recommendations of the investigators in that case were held to be decisions under an enactment because the regime of determinations which was required by s 199 was such that they constituted final decisions, including factual determinations about those matters. They were reports on matters within the expertise of the investigators, based on their investigations. Whilst the chief executive could decline to make a direction pursuant to s 199(5), that in no way affected the finality of the findings of the investigators. Also, the provision of a report was an essential prerequisite to any such action.

[42] The applicant relies upon the decision in *Vega Vega* and submits that the report in this case is similarly "determinative" in respect of the factual findings made by the investigators, upon which the chief executive may (or may not) subsequently act. This submission should be accepted. The health service investigators in *Vega Vega*, informed by a clinical review, assessed matters about the clinical competence of the applicant in that case. I do not consider this to be a basis to distinguish that case from this. In this case, the investigators inquired into matters and made findings about the applicant's competence as an administrator. In both cases the investigator's report determined, at least in a practical sense, the matter about which the investigators had been required to make findings and report.

[43] The next issue is whether the applicant's rights were affected by the provision of the report. In my view they were. The making of a report was an essential precondition to the taking of action by the chief executive under s 199. It exposed him to official action that the first respondent considered appropriate in relation to the matters identified in the report, including the taking of action affecting his employment, such as initiation of a disciplinary proceeding and suspension from performing his duties.

[44] The report was made under an enactment, namely s 199 of the *Hospitals & Health Boards Act*. It was a precondition to the taking of action under s 199 by the first respondent and is itself taken to be the making of a decision. The decision, in the form of the report, was "final and

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[13] [2015] QSC 111.

operative".[14] In the language of *Bond*, it was a substantive determination and resolved, at least in a practical sense, a substantive issue that had called for investigation.[15]

[45] The report was something that the first respondent was required to consider before taking action under s 199(8). The first respondent took action, including action purportedly authorised by s 189(1) of the *Public Service Act* to suspend the applicant. That decision and the decision communicated the same day that, subject to his response, the applicant was liable to discipline under the *Public Service Act* for alleged "maladministration" were clearly founded upon the BDO Report. In circumstances in which the first respondent took action on the basis of a health service investigator's report provided to him under s 199, I would not regard s 199 as irrelevant. The first respondent does not say that he took no action under s 199 and the circumstances strongly support the inference that he did. The action that he seems to have thought appropriate included the suspension of the applicant. The fact that s 189(1) of the *Public Service Act* conferred a power to suspend simply serves to identify from where the first respondent derived a specific power to suspend. It does not alter the fact that he was empowered by s 199(8) to take that action and whatever other action he thought appropriate. The position would be the same if the first respondent enjoyed a contractual power to suspend. The existence of that contractual power would not alter the fact that suspension action was authorised by s 199.

[46] The applicant is justified in submitting that the BDO Report was a "foundational consideration" for the action taken by the first respondent, including his decision to suspend on 24 September 2018. I am not persuaded by the third and fourth respondents' submission that the disciplinary regime engaged under the *PSA* "has nothing to do with the regime under the Board's Act". In my view, the position is fairly simple and clear. The BDO Report was a statutory precondition to the first respondent taking action under s 199(8) of the *Hospital and Health Boards Act* 2011. The action which the first respondent decided to take included suspending the applicant on 24 September 2018. The action taken, including the suspension, was based on the BDO Report.

[47] The fact that the *Public Service Act* does not state that it is mandatory to consider a health service investigator's report does not, in my view, alter matters. The BDO Report was a necessary precondition to the first respondent taking action under s 199(8) and the action he chose to take included action permitted by the *Public Service Act*.

[48] In my view, the BDO Report is amenable to judicial review. It was a substantive determination of the matters about which it was required to report. The report was final and operative. It was a precondition to the exercise of power by the first respondent under s 199(8). The making of the report exposed the applicant to adverse action under s 199(8) and thereby affected his legal rights. That action included action that the first respondent was authorised to take either under the law of contract or under statutory powers governing suspension and discipline. The analogy with *Vega Vega* is strong.

Declaratory relief

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[14] *Bond* at 337; *Tang* at [61].

[15] *Bond* at 337.

[49] If I am wrong in concluding that the BDO Report is taken to be the making of a decision for the purposes of the *JRA* and is a decision to which the *JRA* applies, then, at the very least, the applicant's reputation was seriously affected by the report. If, as alleged, the report was made as a result of the applicant not being afforded natural justice/procedural fairness then *Ainsworth* is authority for the granting of declaratory relief. Personal reputation is well-established as an interest which should not be damaged by an official finding after a statutory inquiry, unless the person has been accorded natural justice/procedural fairness. As Brennan J (as his Honour then was) stated in *Ainsworth*:

> "It is especially appropriate that judicial review should be available when the function conferred by statute is to inquire into and report on a matter involving reputation, even though the report can have no effect on legal rights or liabilities, for no remedy may otherwise be available to vindicate the damaged reputation."[16]

[50] Therefore, if I had concluded that the BDO Report was not a decision to which the *JRA* applied, I would not have dismissed the applicant's proceeding against the third and fourth respondents. To do so would have foreclosed the opportunity for him to seek declaratory relief in relation to an alleged breach of natural justice in respect of an official finding after a statutory inquiry, being a finding damaging to his reputation.

Should the discretion to dismiss the proceeding be exercised?

[51] It is strictly unnecessary for me to decide if the BDO Report is a decision to which the *JRA* applies. That is, however, my view. It is sufficient to conclude that there is a strong basis in law for that conclusion. In those circumstances, it would be a strong thing, indeed, to dismiss his proceeding against the third and fourth respondent. The discretion to dismiss is sought to be exercised primarily on the ground that "no reasonable basis for the application or claim is disclosed".[17] I am not persuaded that no reasonable basis for the application is disclosed. On the contrary, I am persuaded that the application does disclose a basis to engage the *JRA*. Although the report is not a statutory condition precedent under the *Public Service Act* for the taking of disciplinary action, it is a statutory condition precedent to the taking of action under s 199(8). In exposing the applicant to action authorised by s 199(8), including such action as the first respondent thought appropriate under the *Public Service Act*, the BDO Report affected the applicant's legal rights.

[52] An additional discretionary consideration is that the application is brought fairly late in a proceeding which is well advanced and set down for a final hearing. The applicant's proceeding was filed on 21 December 2018. Although directions made by Mullins J on 7 February 2019 permitted the respondents to file applications, this simply was a permission to file applications. Rule 577 of the *Uniform Civil Procedure Rules* 1999 provides that a party who seeks to have a review application dismissed under s 48 "must apply promptly for the

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[16] (1992) 175 CLR 564 at 585.

[17] *JRA*, s 48(1)(b).

dismissal".[18] The proceeding is now closer to the trial dates than to the date of filing. The applications to dismiss were not filed until 11 March and then were set down for hearing on 27 March 2019.

[53] In circumstances in which I have concluded that the applicant has at least strong grounds to argue that the BDO Report is a decision to which the *JRA* applies and that, in any event, he should not be precluded from seeking appropriate declaratory relief in respect of a denial of natural justice in relation to a report that has seriously affected his reputation, it would be inappropriate to exercise my discretion at this stage to dismiss his proceeding against the third and fourth respondents under s 48. It is more desirable that the matter proceed to a hearing, especially in circumstances in which the applicant has filed substantial material and has a reasonable expectation of a trial on the merits in the near future.[19]

[54] The third and fourth respondents' final submission is that the proceeding against them should be dismissed in circumstances where there is a continuing disciplinary proceeding, and therefore there is no utility in considering whether the report is open to judicial review. The submission is that any attack on the BDO Report should be considered "where it is of some practical effect and not simply for academic interest". I do not accept that submission. The BDO Report has had a practical effect upon the applicant and his reputation. It was the foundation for action being taken against him by the first respondent on behalf of the second respondent. The BDO Report is far from a matter of "academic interest" to the applicant.

[55] I decline to exercise my discretion under s 48 to dismiss the applicant's proceeding against the third and fourth respondents.

The application by the first and second respondents

[56] The first and second respondents apply pursuant to s 48 of the *JRA* for the proceeding against them to be dismissed on the ground that none of the purported decisions of the first respondent is a "decision" for the purposes of Part 3 of the *JRA*. Alternatively, they seek the dismissal of certain aspects of the proceeding, so as to narrow its scope.

[57] The purported decisions of the first respondent that are challenged in this proceeding are:

(a) a decision made by notice dated 24 September 2018 that the applicant is, subject to his response, liable to discipline under the *Public Service Act* 2008 (Qld) and the MNHHS policies for maladministration. (This decision is described in the application for review as "the September decision");

(b) the decision of the first respondent, notified by letters dated 24 September 2018 and 16 November 2018 to suspend him from duty under s 189(1) of the *Public Service Act* ("the suspension decisions");

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[18] Section 48(2)(b) of the JRA also seeks to ensure that any exercise of the power under s 48(1) "happens at the earliest possible time".

[19] *BHP Coal Pty Ltd v Treasurer and Minister for Trade and Investment* [2017] QSC 326 at [20] – [24].

(c) a decision made by notice dated 23 October 2018, which invited the applicant to show cause why he should not be disciplined for maladministration in breach of the *Public Service Act* ("the October decision").

The September decision

[58] The first and second respondents' submission that "the September decision" is not a "decision" that is reviewable under Part 3 of the *JRA* points to the fact that the first respondent's letter dated 24 September 2018, while stating "I am satisfied that, subject to your response, you are liable to discipline in accordance with the Act and MNHHS' policies", expressly stated that no decision had been made in relation to the applicant's employment. On this basis, the first and second respondents submit that the first respondent's decision did not finally determine anything and did not resolve or determine any substantive issue. Instead, the September decision is submitted to be a "step along the way", in that it commenced a particular procedure for the proper consideration of whether disciplinary action is appropriate. According to the first and second respondents, the September decision effectively commences a process of inquiry in relation to disciplinary matters. In addition, it is submitted to not alter or otherwise affect legal rights or obligations, so as to be a decision "under an enactment".

[59] The first and second respondents have a reasonable argument that the September decision is a procedural rather than a substantive determination. However, it is also arguable that the decision to commence a disciplinary proceeding and the first respondent's finding that, subject to the applicant's response, he was "liable for discipline in accordance with the Act and MNHHS' policies", was a substantive finding. The fact that the decision had not been made at that stage to, for example, terminate the first respondent's employment does not mean that the decision was not one without consequences for the applicant's legal rights. After all, the power to suspend (the exercise of which was communicated in the same notice) only arises under s 189(1) if the chief executive reasonably believes the employee "is liable to discipline under a disciplinary law". Therefore, the first respondent's decision directly affected the applicant's legal rights by exposing him to suspension.

[60] Although there is much to be said for the proposition that the September matter did not finally determine anything or resolve a substantive issue, the applicant's argument that it is a "decision" for the purposes of the *JRA* cannot be said to be without merit. In circumstances in which I have reached the conclusion that the decision to suspend is itself a "decision" for the purposes of the *JRA*, I do not consider that it is appropriate to strike out the part of the applicant's proceeding which relates to the September matter. It is not said that striking out that part of the proceeding would obviate the need for a hearing or shorten its duration. The "September decision" and the suspension were conveyed in the same letter. The evidence at the final hearing is unlikely to be affected by a decision on the point. Where the parties' competing contentions about whether the September decision is a "decision" are arguable, it is inappropriate to strike the matter out at this stage. To do so might simply generate an unnecessary interlocutory appeal and, if I was later found to be wrong in striking out that part of the application, the pending hearing might miscarry.

The suspension decision of 24 September 2018

[61] This decision was made under an enactment. The applicant was not offered alternative or restricted duties. He was directed not to present himself in the vicinity of the PCH or any other facility within the MNHHS area than to seek necessary medical treatment or to visit family or friends receiving medical treatment, without prior permission. The decision to suspend had an immediate and practical effect on the applicant in that it precluded him from performing his ordinary duties. His affidavit shows that this had a significant effect on his ability to practise at other hospitals.

[62] The first and second respondents point out in the present context that the applicant was suspended from duty on "full pay" and he was able to engage in alternative employment. However, the material suggests that the first and second respondents regard "full pay" as the applicant's base salary, which does not take into account overtime and fees earned from private practice. The 24 September 2018 suspension letter noted that the alternative employment the applicant was permitted to engage in did not include any other employment he held at the time of his suspension, including any private practice work for hospitals within MSHHS. Further, any alternative employment resulted in an adjustment to his pay.

[63] *Dunstan v Orr*[20] supports the view that a suspension which has an immediate effect in precluding an employee from performing his or her ordinary duties is a decision which is amenable to judicial review under a statutory judicial review regime like the *JRA*. Besanko J based that conclusion upon the immediate effect of the decision in precluding the employee from performing ordinary duties. In addition, the suspension in that case operated to bring payment of the officer's salary to an end. The first and second respondents seek to distinguish the decision on that basis. However, I do not consider that this is a sufficient basis to distinguish the decision. The decision to suspend in this case precluded the applicant from performing his ordinary duties. It precluded him from exercising his right to undertake private practice for hospitals within the Metro North area. It affected his livelihood. It was a substantive, not a procedural, decision, which directly affected the applicant's legal rights. In my opinion, it is a "decision" to which the *JRA* applies.

[64] Had the matter been less clear, I nevertheless would have declined to exercise my discretion to dismiss the application to review the decision under Part 3 of the *JRA* at this stage.

Confirmatory decisions to suspend

[65] The applicant has received other letters, including the one noted in his application, which have advised that his suspension was being monitored and that the matters being considered under the Discipline Policy were not finalised. In substance, these letters communicated decisions to confirm his suspension. The decisions to confirm his suspension were communicated on 12 October, 16 November and 21 December 2018, and on 25 January and 28 February 2019, with a further confirmation anticipated at the end of March 2019. In the light of the first and second respondents' position that these communications simply confirm the earlier suspension, and are not new decisions to suspend, I would not regard any of them as being a "decision" for the purposes of Part 3 of the *JRA*. The position would be otherwise if the first and second respondents' position was that any of these decisions had the effect of replacing

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[20] (2008) 217 FCR 559; [2008] FCA 31 at [101].

or overtaking the earlier 24 September 2018 suspension decision. The making of these confirmatory decisions remain relevant to the financial and other consequences of the applicant's decision and to his application for an extension of time to challenge the 24 September 2018 suspension decision.

The October decision

[66] The applicant also seeks to review the decision of the first respondent on behalf of the second respondent made by notice dated 23 October 2018 which invited the applicant to provide a response to the first respondent's letters of 24 September and 12 October 2018. The applicant characterises this as a decision which invited the applicant to "show cause" why he should not be disciplined for maladministration. That is one way to characterise a letter, which did not in fact use the words "show cause". Instead, the letter indicated that, if substantiated, the alleged maladministration might amount to misconduct and a breach of the relevant Code of Conduct.

[67] The first and second respondents submit, correctly in my view, that the 23 October 2018 invitation to provide a response was not a final decision, and was not operative and determinative of any substantive issue. Its apparent purpose was to afford the applicant procedural fairness in relation to an ongoing disciplinary process. Therefore, I would not regard the October decision as a decision to which Part 3 of the *JRA* applies. If requested, I would make a formal order striking out subparagraph (b) of the application. However, I perceive that the proceeding as a whole will go to a final hearing in which, in the light of my ruling, the October decision will not be a decision which the applicant challenges pursuant to Part 3 of the *JRA*. If, however, the applicant or the first and second respondents seek an order in relation to that point so as to generate an appeal right or to formally narrow the scope of the application for review under Part 3 of the *JRA*, I will make the necessary order.

The continuation of the proceeding against the first and second respondents

[68] The BDO Report triggered action by the first respondent. Since the BDO Report was prepared under s 199 of the *Hospitals & Health Boards Act*, the evidence strongly suggests that the first respondent considered it appropriate to take action in relation to the matters identified in the BDO Report, and that such action included suspending the applicant from duty. I have concluded that the decision to suspend is amenable to judicial review. If I had not reached that conclusion then I would nevertheless have been disinclined to dismiss the proceeding against the first and second respondents. The BDO Report was foundational to the decision to suspend. The applicant seeks orders in relation to the BDO Report and its reputational and other consequences, particularly the decision to suspend him. If the BDO Report is successfully challenged and set aside under the *JRA* or declared to have been made in breach of natural justice/procedural fairness and of no effect as a matter of law, then the applicant is likely to seek declaratory and ancillary relief in the Court's inherent jurisdiction setting aside his suspension. On that basis, the first and second respondents would appear to have been properly joined as respondents because of their interest in whether or not such relief is granted.

[69] The applicant advances separate and additional bases to challenge the first respondent's decisions. It is unnecessary to detail them. They allege a reasonable apprehension of bias by

association, actual bias and/or a conflict of interest arising from dealings between the applicant and the first respondent. There are also allegations of a breach of procedural fairness.

[70] The application for a statutory order of review and application for review filed 21 December 2018 seeks a variety of orders, including an order quashing the BDO Report, the applicant's suspension and other decisions. It seeks declarations of invalidity and an order to not proceed further with the disciplinary proceedings against the applicant. It is not apparent to what extent the applicant intends the proceeding to engage Part 5 of the *JRA*. Alleged jurisdictional errors in respect of decisions which would attract prerogative orders are not clearly identified. It is possible that the applicant can seek certain relief because the relevant decision is amenable to judicial review under the general law on the grounds of a jurisdictional error, such as the denial of natural justice. However, the submissions of the parties proceed on the basis that the focus of the applicant's proceeding against the first and second respondents will be on Part 3, rather than Part 5, of the *JRA*. So much was acknowledged at the hearing before me by Mr Murdoch QC. In the circumstances, it seems appropriate for the applicant to particularise in advance of the final hearing the decision, if any, in respect of which relief under Part 5 of the *JRA* is sought and the grounds for judicial review if reliance is placed upon Part 5 of the *JRA*.

Extension of time

[71] An application for a statutory order of review under Part 3 of the *JRA* must be made within 28 days. The first and second respondents applied to have the applicant's proceeding against them declared incompetent as being filed out of time. The applicant's approach had been to seek an extension of time at the final hearing. However, the matter having been raised at the hearing before me, his counsel applied for an extension of time. Under s 26(1)(b) the Court may allow further time for an application under Part 3, and under s 46 the Court may grant an extension of the three months that applies to the making of an application under Part 5. The discretionary considerations that apply to s 26(1)(b) are well-established.[21]

[72] In this matter the applicant has explained his delay, including attempts to obtain a full copy of the BDO Report. The first and second respondents do not point to any prejudice arising from the delay. The course of correspondence indicates that the applicant was likely to challenge the matters which he has challenged in this proceeding. Apart from their arguments as to whether the decisions were amenable to judicial review, the first and second respondents do not submit that the application is without merit. I have not been invited to form any view about the applicant's prospects of success at the final hearing, and therefore do not do so. In circumstances in which the first and second respondents do not assert any prejudice arising from the delay in filing the application for judicial review and in which the proceeding against them is not said to be without prospects, it is appropriate to grant any necessary extension of time required so as to permit the filing of the application on 21 December 2018.

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[21] See, for example, *Waratah Coal Pty Ltd v Nicholls* [2013] QSC 68 at [39]; *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663 at 665; *Hoffman v Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 372.

Conclusion – the s 48 application by the third and fourth respondents over the BDO Report

[73] The BDO Report was an essential pre-condition to action by the first respondent pursuant to s 199(8) of the *Hospital and Health Boards Act* 2011. It is reasonably apparent that the first respondent took action pursuant to s 199(8). The action he took included action with respect to the applicant's employment, specifically to set in train disciplinary proceedings and to suspend him from duty. That action was founded on the BDO Report and its finding of maladministration identified in the report with respect to the applicant and ICOP.

[74] The BDO Report was a substantive determination of matters about which the health service investigators had been required to report, and was an essential preliminary to the first respondent's decision to take action pursuant to s 199. The BDO Report therefore was a "decision" according to the definitions of ss 4 and 6 of the *JRA*.

[75] The BDO Report affected the applicant's legal rights by directly exposing him to action by the first respondent under s 199(8) which affected his right to perform his normal duties and to attend at the PCH to do so.

[76] The fact that the action included the exercise of powers under the *Public Service Act* does not alter the fact that the taking of action was authorised by s 199(8). This is especially so when the exercise of powers under the *Public Service Act* was founded on the same matter as the exercise of power under s 199(8), namely the findings in the BDO Report. The BDO Report was made under an enactment and is a "decision" to which the *JRA* applies.

[77] In any case, the applicant's claim over reputational damage caused to him by the BDO Report engages the Court's jurisdiction to grant declaratory relief, and does not require him to establish that the report is a decision to which the *JRA* applies.

[78] In the circumstances, including the pending final hearing for which the applicant has prepared, I decline to exercise my discretion under s 48 to dismiss the applicant's proceeding against the third and fourth respondent.

Conclusion – the s 48 application by the first and second respondents

[79] I have concluded that at least the suspension decision and, arguably, the related decision by which the first respondent expressed that he was satisfied that the applicant was "liable to discipline" in accordance with the *Public Service Act* are decisions to which the *JRA* applies.

[80] The subsequent confirmations of the applicant's suspension would not appear to be separate decisions since they are consistent with the position that the decisions notified on 24 September 2018 remained operative. The October 2018 invitation to respond is not a decision to which the *JRA* applies.

[81] I decline to exercise my discretion under s 48 to dismiss the applicant's proceeding against the first and second respondents. They are appropriate respondents to the applicant's proceeding

to quash the BDO Report, and, as a result to halt the suspension and disciplinary proceedings which are based upon the BDO Report and its finding of maladministration. In addition, the first and second respondents are proper respondents to the proceeding which seeks to challenge the decisions of the first respondent notified on 24 September 2018. These decisions affected the applicant's legal right to continue to perform his duties at PCH and to undertake private practice at hospitals in the Metro North area.

Orders

[82] Subject to any additional orders formally striking out "the October decision" for the purposes of review under Part 3 of the *JRA* and directing particulars of any reliance upon Part 5 of the *JRA*, I propose to order:

1. The time for filing the application for a statutory order for review be extended to 21 December 2018.

2. The applications filed on 11 March 2019 pursuant to s 48 of the *Judicial Review Act* 1991 to dismiss the proceeding be dismissed.

[83] The applicant has enjoyed substantial success in resisting the applications to dismiss and the appropriate order as to costs would appear to be:

3. The respondents pay the applicant's costs of and incidental to the applications filed 11 March 2019 to be assessed on the standard basis.

Other matters – alternative dispute resolution and resolution of the proceeding

[84] I emphasise that I have not embarked upon a consideration of the merits of the principal proceeding. In essence, I have been required to decide some legal issues about whether relevant decisions are "decisions" within the meaning of the *JRA*. I have not been required to embark upon an assessment of the merits of the principal proceeding and, in any event, would not be able to do so because the respondents have yet to file their material.

[85] The following observations relate to the resolution of the principal proceeding at either mediation or trial. I trust they will assist the parties to resolve matters at a minimum of expense.

[86] The starting point is that judicial review proceedings do not concern the merit of decisions. The Supreme Court does not sit as a merits review tribunal. Instead, the applicant must establish a ground for judicial review or that he has been denied natural justice/procedural fairness so as to warrant declaratory and other relief in the court's inherent jurisdiction in accordance with the principles in *Ainsworth.*

[87] The next observation is that this proceeding will not resolve employment issues between the applicant and the second respondent, let alone personal and professional relationships between the parties. The resolution of this judicial review proceeding (either in favour of the applicant or the respondents) will not resolve the future working relationship between the applicant and the second respondent. It may affect his current suspension and ongoing

disciplinary proceedings if he succeeds. But it will not decide his future employment with the second respondent.

[88] It should be added that this proceeding and proceeding No. 9090/18 in relation to an earlier decision to suspend are not claims for damages over financial loss resulting from suspension or loss of reputation.

[89] I mention that the status of that earlier proceeding is not clear to me. No order has been made for it to be heard together with this proceeding. The matter was adjourned to the registry on 25 September 2018 to be relisted on three clear days' notice. The parties will need to clarify with the court what their intentions are in relation to that matter and obtain appropriate directions about its conduct in due course.

[90] The cost of this proceeding to date must be enormous and the collective costs to be incurred by the parties by the end of a trial will be substantially greater. The existing affidavit material is voluminous. The personal costs to parties, including the hurt suffered by allegations and counter-allegations must be significant. If the matter proceeds to a final hearing then the parties will be airing dirty laundry in public, at great private and public cost.

[91] The limitations on a judicial review proceeding of this kind resolving all of the issues between the parties, and the personal and financial cost associated with a proceeding of this scale, warrant the parties pursuing an alternative form of dispute resolution.

[92] A mediation can offer forms of resolution that a court cannot. It can spare the parties the anxiety and uncertainty of litigation and the collective damage done to reputations as allegations and counter-allegations are played out in public. Depending on the scope of the matters that are defined by the parties to be the subject of mediation, it can resolve matters which this proceeding is incapable of resolving. An early resolution of this matter at a mediation may enable:

- Professor Walters to devote his time and energy to the practice of cardiology, rather than to being a litigant;
- Mr Drummond to devote his time and energy to the challenging task of being the Chief Executive of the second respondent, rather than responding to the applicant's allegations against him and spending an inordinate amount of time in the company of lawyers; and
- The second respondent to devote resources to the health care of Queenslanders and reducing hospital waiting lists, rather than to litigation.

[93] A good start, with or without the assistance of a mediator, would be for BDO to withdraw any insinuation of corrupt conduct made in its report if, on reflection, there is no evidence to support such a serious insinuation and it was made without according the applicant natural justice in relation to that matter.

[94] I imagine that many members of the public would be curious as to why, assuming the validity of the BDO's findings in relation to alleged neglect in governance of the ICOP, it was thought necessary to suspend the applicant from his important clinical work at PCH and all other facilities in the Metro North area. A mediator might be able to explore that matter, and work

out a practical arrangement for Professor Walters to return to providing clinical care for patients at PCH and other public hospitals. A court cannot make those kind of arrangements.

[95] In the circumstances, I am inclined to direct the parties to engage in a mediation at a convenient time in the near future. A mediation referral order should be agreed and provided unless a party wishes to submit that the matters in dispute in this proceeding (along with other matters appropriate for mediation) not proceed to a mediation.

[96] If the parties are unable to resolve matters at a mediation, then it will be necessary for the remainder of this proceeding to be efficiently managed, and for the real issues in dispute to be resolved at a minimum of expense. That will include a trial plan which will ensure that the hearing concludes within its allocated hearing dates. I direct the parties to confer about an appropriate order for alternative dispute resolution, the preparation of a trial plan (in the event the matter does not resolve at mediation) and any required case conference or pre-trial review before the Resolution Registrar or the trial judge.