SUPREME COURT OF QUEENSLAND

CITATION: *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95

PARTIES: **In Matter No 2105 of 2022**

AUSTIN BMI PTY LTD (ACN 164 204 308)
(applicant)

V

DEPUTY PREMIER, MINISTER FOR STATE DEVELOPMENT, LOCAL GOVERNMENT AND PLANNING AND MINISTR ASSISTING THE PREMIER ON OLYMPICS INFRASTRUCTURE
(first respondent)

AND

WANLESS RECYCLING PARK PTY LTD (ACN 623 407 081)
(second respondent)

AND

IPSWICH CITY COUNCIL
(third respondent)

In Matter No 2198 of 2022

VEOLIA ENVIRONMENTAL SERVICES (AUSTRALIA) PTY LTD (ACN 051 316 584) AND (AUSTRALIA) PTY LTD (ACN 100 535 751) trading as TI-TREE BIO-ENERGY (ABN 67 450 387 919) an unincorporated join venture
(applicant)

V

DEPUTY PREMIER, MINISTER FOR STATE DEVELOPMENT, LOCAL GOVERNMENT AND PLANNING AND MINISTR ASSISTING THE PREMIER ON OLYMPICS INFRASTRUCTURE
(first respondent)

AND

WANLESS RECYCLING PARK PTY LTD (ACN 623 407 081)
(second respondent)

AND

IPSWICH CITY COUNCIL
(third respondent)

In Matter No 2192 of 2022

CAROL ASHWORTH
(first applicant)

AND

CORNELIA TURNI
(second applicant)

AND

ROSEMAREE THOMASSON
(third applicant)

AND

KERRY MAREE BUTLER
(fourth applicant)

AND

KERRI ANNE LYNCH
(fifth applicant)

AND

MARK MEIER
(sixth applicant)

V

DEPUTY PREMIER, MINISTER FOR STATE DEVELOPMENT, LOCAL GOVERNMENT AND PLANNING AND MINISTR ASSISTING THE PREMIER ON OLYMPICS INFRASTRUCTURE
(first respondent)

AND

WANLESS RECYCLING PARK PTY LTD (ACN 623 407 081)
(second respondent)

AND

IPSWICH CITY COUNCIL
(third respondent)

FILE NO/S:	2105 of 2022; 2192 of 2022; 2198 of 2022
DIVISION:	Trial
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	5 May 2023
DELIVERED AT:	Brisbane
HEARING DATES:	28 to 30 September and 10 October 2022; Further written submissions of the joint applicants dated 7 October 2022; further written undated submissions of the Ashworth parties, further written submissions of the first respondent dated 14 October 2022; further written submissions of the second respondent dated 14 October 2022; further written submissions of the Attorney-General dated 20 October 2022; and further written submissions of the joint applicants dated 21 October 2022.
JUDGE:	Freeburn J
ORDERS:	**1. The applications are dismissed.** **2. The parties be heard on the form of the orders and on costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – where a decision was made to call-in a development application – where the applicants argue that the decision made was affected by apprehended bias – whether the decision maker had an obligation of procedural fairness - whether the principles of procedural fairness will apply or whether the principles have been excluded by statute ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – APPREHENDED BIAS – where the bias rule is not excluded by statute – where it is argued the decision to call in the development was influenced by political considerations and lobbying – whether a fair-minded lay observer would apprehend bias based on the circumstances ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FAILURE TO TAKE INTO ACCOUNT A RELEVANT CONSIDERATION - where it is submitted that the decision maker failed to consider representations in deciding whether to call in the application – whether the decision maker was required to evaluate the representations – whether the decision maker has considered all things required by the legislation

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where it is alleged that the decision maker's decision was an improper exercise of power on the basis that it was unreasonable or irrational – whether consistency is fundamental to a decision being reasonable and rational - whether the decision maker was required to act consistently or provide justification as to why similar applications were decided differently – whether the decision lacked intelligible justification

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – REASONS FOR DECISION – where the decision maker provided reasons for the decision to call-in the application - whether the decision maker was required to explain the path of reasoning for the decision to call in the application

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – HUMAN RIGHTS – where it is argued that the decision made was incompatible with human rights – where it is argued that the decision maker failed to give proper consideration to a relevant human right – whether the decision to call-in the application deprived the applicant of their right to a fair hearing, the right to participate in public life without discrimination or their right to property – whether there was a failure by the decision maker to properly consider human rights impacted by the call-in decision

Authorities

Acts Interpretation Act 1954 (Qld)
Anti-Discrimination Act 1991 (Qld)
Electoral Act 1992 (Qld)
Human Rights Act 2019 (Qld)
Integrated Planning Act 1997
Integrity Act 2009 (Qld)
Judicial Review Act 1991
National Health Act 1953 (Cth)
Planning and Environment Court Act 2016 (Qld)
Planning Act 2016 (Qld)
Planning Regulations 2017 (Qld)

ABT17 v Minister for Immigration and Border Protection [2020] HCA 34
Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223
Andrews v Law Society of British Columbia [1989] 1 SCR 143
Annetts v McCann (1990) 170 CLR 596

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Australia Pacific LNG Pty Ltd & Ors v The Treasurer, Minister for Aboriginal and Torres
Baker v DPP (Vic) [2017] VSCA 58; 2017) 270 A Crim R 318
Bare v Independent Broad-Based Anti-Corruption Commission (2015) 48 VR 129
British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283
Builders' Registration Board of Queensland v Rauber (1983) 47 ALR 55
Carrascalao v Minister for Immigration and Border Protection (2017) 252 FCR 352
Castles v Secretary, Department of Justice (2010) 28 VR 141
Charisteas v Charisteas (2021) 95 ALJR 824
Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation (1979) 24 ALR 658
Council of the City of Parramatta v Pestell (1972) 128 CLR 305
CNY17 v Minister for Immigration and Border Protection (2019) 268 CLR 76
Cummings v Claremont Petroleum NL (1996) 185 CLR 124
Dilatte v MacTiernan [2002] WASCA 100
Dovuro Pty Ltd v Wilkins [2003] 215 CLR 317
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
Elias v Commissioner of Taxation (2002) 123 FCR 499
Francis v Crime and Corruption Commission [2015] QCA 218
Garde-Wilson v Legal Services Board (2018) 19 VR 398
Gas & Fuel Corporation Fund v Saunders [1994] 52 FCR 48
Goode v Common Equity Housing Ltd [2014] VSC 585
Greenwood v Winsor [2008] QSC 68
Gwandalan Summerland Point Action Group Inc v Minister for Planning (2009) 75 NSWLR 269
HJ v Independent Broad-based Anti-Corruption Commission (2021) 64 VR 270
Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438
Idonz Pty Ltd v National Capital Development Commission (1986) 13 FCR 70
Isbester v Knox City Council (2015) 255 CLR 135
Landel Pty Ltd v Hinchliffe [2009] QSC 408
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70
Legal Services Commissioner v Voll [2008] LPT 1
Legal Services Commissioner v Rowell [2013] QCAT 397
McGovern v Ku-ring-gai Council (2008) 72 NSWLR 504
Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 246
Minister for Home Affairs v Brown (2020) 275 FCR 188
Minister for Immigration v Li (2013) 249 CLR 332
Minister for Immigration and Border Protection v Sabharwal

[2018] FCAFC 160
Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437
Minister for Immigration and Ethnic Affairs v *Wu Shan Liang* (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
Olympic Holdings Pty Ltd v Lochel [2004] WASC 61
Owen-D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273
Plaintiff M1-2021 v Minister for Home Affairs [2022] HCA 17
PJB v Melbourne Health (2011) 39 VR 373
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Politis v Federal Commissioner of Taxation (1988) 16 ALD 707
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295
Rasmussen v Denmark [1984] ECHR 17; (1984) 7 EHRR 371;
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1
Sabet v Medical Practitioners Board (Vic) (2008) 20 VR 414
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252
Stambe v Minister for Health (2019) 364 ALR 513
Strait Islander Partnerships and Minister for Sport [2019] QSC 124
Swan Hill Corporation v Bradbury (1937) 36 CLR 746
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152
SZVFW (2018) 264 CLR 54
Town of Gawler v Minister for Urban Development and Planning [2011] SASC 26
The Australian Institute for Progress Ltd v Electoral Commission of Queensland (2020) 4 QR 31
The Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka (2001) 206 CLR 128
Thompson v Minogue [2021] VSCA 358
Twist v Randwick Municipal Council (1976) 136 CLR 106
Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492
Webb v The Queen (1994) 181 CLR 41
Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources (2007) 166 FCR 154
Willis v State of Queensland [2016] QSC 80
Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252

CLR 480

COUNSEL:	SC Holt KC, with S Spottiswood, for applicant in proceeding No 2105 of 2022 J Underwood, for applicant in proceeding No 2198 of 202 M Stewart KC, with S Caries, for applicant in proceeding No 2192 of 2022 D O'Brien KC, with N Loos, for first respondent in all proceedings R Traves KC, with SJ Webster, with S Marsh, for second respondent in all proceedings S McLeod KC, with D Chesterman, for third respondent in all proceedings N Kidson KC, with KJE Blore, for the Attorney-General (intervening)
SOLICITORS:	McCullough Robertson for applicant in proceeding No 2105 of 2022 Ashurst for applicant in proceeding No 2198 of 2022 AJ & Co for applicant in proceeding No 2192 of 2022 Herbert Smith Freehills for first respondent in all proceedings Gadens for second respondent in all proceedings McInnes Wilson for third respondent in all proceedings Crown Law for Attorney-General (intervening)

REASONS

INTRODUCTION

[1] This proceeding concerned three separate applications:

(a) an application by Austin BMI Pty Ltd (2105/22) (**Austin**);

(b) an application by Carol Ashworth and a number of other local residents of Ipswich (2192/22) (the **Ashworth applicants**); and

(c) an application by Veolia Environmental Services (Australia) Pty Ltd and JJ Richards Ti Tree Pty Ltd trading as Ti Tree Bioenergy (2198/22) (**Veolia**).

Austin and Veolia made submissions jointly. For convenience, they are referred to as the joint applicants.

[2] The three groups of applicants each seek a statutory order for review of a decision made by the first respondent (the **Deputy Premier**) on 27 January 2022 to "call-in" a development application made by the second respondent, Wanless Recycling Park Pty Ltd (**Wanless**). Wanless' development application was to establish a new resource recovery and landfill facility involving the rehabilitation and reuse of existing mining voids at Ebenezer, west of Ipswich. The third respondent, the Ipswich City Council (the **Council**), approved the resource recovery component but

refused the landfill component of the development. Wanless appealed the Council's partial refusal to the Planning and Environment Court (**P&E Court**).[1]

[3] In the meantime, Wanless took steps to by-pass the appeal process by requesting the relevant Minister to call-in the Wanless development application. Those steps, which are the subject of challenge,[2] resulted in the decision of the Deputy Premier to call-in the Wanless development application. Having called-in the Wanless application, the Deputy Premier has not yet decided whether to approve or reject the application.

[4] It is necessary to explain, briefly at least, the power of the relevant Minister, in this case the Deputy Premier, to make a decision to call-in a particular development. The power to call-in is used where a "*State interest*" is involved.[3] The effect of a call-in decision means that the approval process for that development is:

(a) removed from the conventional system whereby developments are approved or refused by a local council and are then subject to Planning and Environment Court appeals; and

(b) placed within the jurisdiction of the Minister who has power to assess and decide the application.[4]

[5] Each of the three applicants challenges the Deputy Premier's decision to call-in the Wanless Application on four grounds:

(a) Ground 1: that a fair-minded lay observer might reasonably apprehend that the Deputy Premier might not have brought an impartial mind to the call-in decision;

(b) Ground 2: that the call-in decision was an improper exercise of power because the Deputy Premier failed to take into account relevant considerations or otherwise failed to carry out his statutory task by failing to consider the representations made to him under section 102(4) of the *Planning Act 2016* (the *Planning Act*);

(c) Ground 3: that the call-in decision was an improper exercise of power because it was legally unreasonable and/or irrational; and

(d) Ground 4: that the Deputy Premier failed to provide 'reasons' for the call-in Decision as required by section 103(3)(a) of the *Planning Act*.[5]

[6] The Ashworth applicants also contended that the Deputy Premier's call-in decision was made in circumstances which give rise to a reasonable apprehension of bias but went further and raised a fifth ground to the effect that the call-in decision was incompatible with the Ashworth parties' human rights as guaranteed under the

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1 The Council is named as the third respondent in each of the applications. However, the Council's submissions supported the applicants, at least in respect of the second, third and fourth grounds.

2 The steps and the challenges are discussed in more detail below.

3 A "State interest" is widely defined in Schedule 2 of the *Planning Act 2016* as an interest that the Minister considers affects on economic or environmental interest of the State, or part of the State, or affects the interest of ensuring that the Act's purpose is achieved.

4 See s 101 to 106 of the *Planning Act 2016*.

5 This summary is taken from the joint submissions of Austin and Veolia at [2]. There was no dispute regarding the issues.

Human Rights Act 2019 (Qld) (*Human Rights Act*). That fifth ground has led to the intervention of the Attorney-General pursuant to s 50 of the *Human Rights Act*.

[7] Each of the five grounds of challenge are considered in turn below. There is, however, a threshold issue that needs to be resolved first.[6]

THRESHOLD ISSUE: RULES OF PROCEDURAL FAIRNESS

Is there an Obligation of Procedural Fairness?

[8] As the submissions for the Deputy Premier explained, the test for apprehended bias is well-established.[7] It will arise where a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the decision.[8] In oral argument this was referred to as the 'double might' test.[9] The apprehension of bias must be firmly established and will not be found lightly.[10]

[9] The applicants' arguments that the Deputy Premier's decision was affected by apprehended bias faced a threshold challenge. That challenge was whether the principles of procedural fairness, including apprehended bias, applied at all. Wanless' submissions put that challenge in this way:

> "*…whether an obligation of procedural fairness applies at all, to whom the obligation is owed, and the content of any such obligation depends on "the particular statutory framework as well as the particular factual context of a particular exercise of the power*".[11]

[10] There are two aspects to that submission. The *first* is that, depending on the statutory context, the obligations of procedural fairness may not apply at all.[12] The *second* is that the questions of to whom the obligations of procedural fairness are owed, and the particular content of those obligations of procedural fairness, are also dependent on the statutory framework, as well as the particular circumstances.[13]

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6 Incidentally, some of the grounds of challenge overlap. And some of the submissions of the various parties overlapped. That has given rise to some unavoidable, but regrettable, repetition in these reasons.

7 Submissions of the first respondent at [57].

8 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also *Charisteas v Charisteas* (2021) 95 ALJR 824 at [11] (per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

9 This expression is used by the High Court. See, for example*, CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [18]. [132].

10 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at [44]-[46] per French CJ. See also Byrne J in *Greenwood v Winsor* [2008] QSC 68 at [89]: "*It is not enough that the reasonable bystander has a vague sense of unease or disquiet*."

11 Wanless submissions at [74] relying on *Isbester v Knox City Council* (2015) 255 CLR 135 at [55]; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [130]; *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* (2007) 166 FCR 154 at [82].

12 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26].

13 *Isbester v Knox City Council* (2015) 255 CLR 135 at [23], [55]. See also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26].

[11] As the High Court has emphasised, the statutory framework within which a decision-maker exercises a statutory discretion is of critical importance when considering what, if anything, procedural fairness requires.[14]

[12] In *Isbester v Knox City Council*[15] Kiefel, Bell, Keane and Nettle JJ explained:

> How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision. [footnotes omitted]

[13] Gageler J took a similar view:

> The standard incidents of procedural fairness, as it ordinarily conditions the exercise of a statutory power, include "*the absence of the actuality or the appearance of disqualifying bias*" in addition to "*the according of an appropriate opportunity of being heard*".[16] The content of each of those incidents of procedural fairness accommodates to the particular statutory framework as well as to the particular factual context of a particular exercise of the power.

[14] Thus, the statutory context is important. As McHugh J explained in *Hot Holdings Pty Ltd v Creasy,*[17] where a statutory power is to be exercised by a Minister, it is necessary to respect the role of the executive:

> While the test for a reasonable apprehension of bias is the same for administrative and judicial decision-makers, its content may often be different. What is to be expected of a judge in judicial proceedings or a decision-maker in quasi-judicial proceedings will often be different from what is expected of a person making a purely administrative decision. One difference arises when the decision-maker is a Minister who is accountable to the Parliament and the electorate. In *Minister for Immigration and Multicultural Affairs v Jia Legeng*, Gleeson CJ and Gummow J, Hayne J agreeing, said that "[t]*here are . . . consequences that flow from the circumstance that a power is vested in, and exercised by, a Minister*". Their Honours noted that, subject to any contrary indication in the legislative grant of power, a Minister would be entitled to act in accordance with governmental policy when making a decision. Thus, it will ordinarily be very difficult to impute bias or the reasonable apprehension of bias to the decision of a Minister who has considered all applications on their

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14 *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCR 154 at [57] based on *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26].

15 (2015) 255 CLR 135 at [23], [55].

16 The footnote in the original, with reference to the quotes within this passage, refers the reader to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367.

17 (2002) 210 CLR 438 at [70].

merits but made it clear that preference would be given to applicants who complied with government policy.

[15] Just how does the statutory regime influence the infiltration of the rules of procedural fairness? Wanless addressed that question in their submissions by making three points. *First*, in some cases, the rules of procedural fairness including those relating to apprehended bias are implicitly excluded by the existence of a detailed statutory code. This occurs where the "*statute manifests a sufficiently clear intention that no more than the statutory procedure is required, perhaps permitted*".[18]

[16] *Second*, in other cases, an obligation to accord procedural fairness, including to avoid the appearance of bias, may exist in favour of some persons, but not others. Thus, "*in general, the consideration of a planning matter does not invoke the rules of natural justice so far as concerns third parties*".[19]

[17] *Third*, the cases identify various important matters of statutory context, including:[20]

(a) the stated objects of the relevant Act;[21]

(b) the person upon whom Parliament has conferred the decision-making capacity;[22]

(c) the institutional setting for the decision;[23]

(d) the task which is committed to the decision maker;[24]

(e) whether the decision is part of a multi-stage decision-making process;[25] and

(f) the way a person, or class of persons' interests may be affected by the decision.[26]

[18] I accept that those are the relevant principles. They do not appear to be in contest.[27] It remains to consider whether, applying those principles, it can be shown that the statutory regime here evinces a legislative intention to include or exclude obligations of procedural fairness.[28]

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18 Wanless submissions at [75] relying on *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109-110; *Hannay v Brisbane City Council* [1999] 2 Qd R 54 at 55.

19 Wanless submissions at [76] relying on *Idonz Pty Ltd v National Capital Development Commission* (1986) 13 FCR 70 at 82.

20 Wanless submissions at [79].

21 *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCR 154 at [81]

22 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [78]; *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at [80].

23 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at [80].

24 *Gwandalan Summerland Point Action Group Inc v Minister for Planning* (2009) 75 NSWLR 269 at [44].

25 *Isbester v Knox City Council* (2015) 255 CLR 135 at [58].

26 *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* (2007) 166 FCR 154 at [82], [86], [88].

27 No submissions were made that contested these paragraphs of the Wanless submissions.

28 In analysing the statutory regime, it is necessary to bear in mind that the concern of the law is to avoid practical injustice: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ).

The Statutory Context

[19] The call-in power in the *Planning Act* can be described as a multi-stage decision-making process.[29]

[20] The *first* stage applies if the Minister proposes to call-in an application. In that event, the Minister must give notice seeking representations about the proposed call-in to four categories of people:

(a) the decision-maker (here that is the Ipswich City Council); and

(b) the applicant (here, Wanless); and

(c) each referral agency, other than the chief executive; and

(d) if the application is a development application or change application other than for a minor change—any submitters[30] for the application who the Minister is aware of when the notice is given.[31]

[21] Those four categories of persons are a confined class in the sense that the Act does not require that notice be given to the public generally, or even to any person who might be affected by the proposed call-in. Even the fourth category, 'submitters', is limited to those submitters of whom the Minister is aware. And there may well be no submitters, or very few, at the time of the notice.[32]

[22] The *second* stage is that the four categories of people then have a representation period within which they may make representations to the Minister.[33] Before deciding to call-in the application, the Minister must consider any representations that have been made during the representation period.[34]

[23] Then, the *third* stage is that, within 20 business days after the end of the representation period, the Minister may call-in an application by giving a call-in notice to the four categories of people.[35] The call-in notice must state the reasons for the call-in, including the State interest giving rise to the call-in, and the point from which the process must restart.[36]

[24] As explained briefly above, the effect of a call-in notice is that the decision-maker is stripped of its power to make a decision on the application, and any appeal against the decision-maker is discontinued. The process for assessing the application devolves to the Minister from the specified restart point.[37]

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29 *Isbester v Knox City Council* (2015) 255 CLR 135 at [58].

30 A submitter is a person who makes a properly made submission about the application (for a development application or change application) or the person who made the submission (for a particular submission): Schedule 2 of the *Planning Act 2016*.

31 *Planning Act 2016* s 102(2).

32 The "submitters" referred to in s 102(2) are any members of the public (of whom the Minister is aware) who made a submission about the original development application, whether in favour, neutral or against it.

33 *Planning Act 2016* s 102(3)(d).

34 *Planning Act 2016* s 102(4).

35 As well as the P&E Court: see *Planning Act 2016* s 103(1). Note that the notice need only be given to any principal submitter.

36 *Planning Act 2016* s 103(3).

37 *Planning Act 2016* s 104(1). In deciding the restart point, the Minister may consider anything that the Minister considers relevant: *Planning Act 2016* s 103(4).

[25] Thus, the *fourth* stage is reached in the event that the Minister gives a call-in notice to the decision-maker. In that event, the Minister effectively replaces the decision-maker - it is the Minister who is to assess and decide the application.[38] The role of the decision-maker, usually the local council, is reduced to being obliged to give the Minister all reasonable help that the Minister requires.[39]

[26] In deciding the called-in application, the Minister —

(a) may assess and decide, or reassess and re-decide, all or part of the application; or

(b) may, if the call-in notice is given before the decision-maker decides the application—

(i) direct the decision-maker to assess all or part of the application; and

(ii) decide the application, or part of the application, based on the decision-maker's assessment;[40]

(c) is not bound to decide the application against any assessment benchmarks such as a code, a standard, or an expression of the intent for a zone or precinct (i.e. the application is not subject to code assessment or impact assessment);[41]

(d) may consider anything that the Minister considers relevant;[42]

(e) may decide not to consider any referral agency's response.[43]

[27] Thus, the assessment process for a called-in application is radically different from the conventional assessment process. A called-in application become subject to matters the Minister considers relevant.

[28] The *fifth* stage is that the Minister's decision is notified to the four categories of people.[44] The notice must state—

(a) the matters the Minister considered in making the decision; and

(b) if the Minister decided only part of the application—

(i) that the assessment manager must assess and decide, or reassess and re-decide, the other part; and

(ii) the point in the process for assessing the application, and the day from which the assessment must restart, for the other part.

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38 *Planning Act 2016* s 105(1).
39 *Planning Act 2016* s 105(3).
40 *Planning Act 2016* s 105(1).
41 *Planning Act 2016* s 105(4)(a).
42 *Planning Act 2016* s 105(5). For present purposes, I have excluded cancellation applications.
43 *Planning Act 2016* s 105(6).
44 The four categories of people are slightly modified. The fourth category involves 'principal submitters' and there is a possible fifth category of the P&E Court. Incidentally, by Schedule 2 to the Act a 'principal submitter', for a properly made submission, means—(a) if the submission is by 1 person—the person; or (b) otherwise—(i) the submitter that the submission identifies as the principal submitter; or (ii) if the submission does not identify a submitter as the principal submitter—the submitter whose name first appears in the submission.

[29] The *sixth* stage is another notice requirement. If the Minister decides a called-in application, the Minister must prepare a report that explains the nature of the decision, and the matters the Minister considered in making the decision and must include in the report a copy of the notice of the decision.[45] The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after giving the notice of the decision.[46]

The Statutory Concept of a 'State Interest'

[30] As explained above, the Minister's call-in notice must state the reasons for the call-in, including the State interest giving rise to the call-in. That is because the Minister may only exercise a power under Part 6 of the Act - which is the Part that includes the Minister's call-in power - if the matter involves, or is likely to involve, a 'State interest'.[47]

[31] Counsel for Wanless described the threshold of a 'State interest' as relatively undemanding.[48] That is true. Section 91 is expressed as a limitation on the Minister's power to intervene: "*The Minister may exercise a power under this part in relation to a matter only if the matter involves, or is likely to involve, a State interest*." However, the definition of 'State interest' imposes little by way of practical restraint on the Minister's powers:

> **State interest** means an interest that the Minister considers—
>
> (a) affects an economic or environmental interest of the State or a part of the State; or
>
> (b) affects the interest of ensuring this Act's purpose is achieved.

[32] The Minister need only consider that the application affects an economic or environmental interest of the State, or a part of the State, or affects a *Planning Act* purpose. The strong subjective element is notable because the intention is to give the Minister a discretion to intervene where the Minister perceives a 'State interest'. And, when the Minister intervenes, the assessment of the application is largely a matter for the Minister who is not bound by planning codes or standards. The underlying intention of the legislation is to confer the discretion on the Minister who is responsible to Parliament.

[33] Fortunately, all parties agree that this project falls within the concept of the State interest.

Statutory Scheme: Non-Appealable Decisions of the Minister

[34] Chapter 6 Part 1 of the *Planning Act* defines the various appeal rights of parties under the Act. Section 231(1) provides that "*unless the Supreme Court decides a decision or other matter under this Act is affected by jurisdictional error, the decision or matter is non-appealable*".

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45 *Planning Act 2016* s 106(1).
46 *Planning Act 2016* s 105(2).
47 *Planning Act 2016* s 91.
48 Wanless submissions at [47].

[35] The expression "*non-appealable*" is defined as meaning that the decision or matter—

(a) is final and conclusive; and

(b) may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way under the *Judicial Review Act 1991* or otherwise, whether by the Supreme Court, another court, any tribunal or another entity; and

(c) is not subject to any declaratory, injunctive or other order of the Supreme Court, another court, any tribunal or another entity on any ground.[49]

[36] However, s 12 of the *Planning and Environment Court Act 2016* makes specific provision for challenging a ministerial decision in relation to a call-in notice. That section permits the "*assessment manager*" (here the Council) to apply to the P&E Court for a declaration about "*a matter done, to be done or that should have been done in relation to the call in*".[50] On such an application, the P&E Court has power to deal with any "*noncompliance*" with a provision of the *Planning Act* in "*the way it considers appropriate*".[51]

[37] There are, therefore, restricted rights of challenge to Ministerial decisions. Together, these provisions evince a clear legislative intention to restrict challenges to Ministerial decisions made in relation to the exercise of a call-in power to two circumstances:

(a) where there has been jurisdictional error, in which case the application may only be made under Part 5 (rather than Part 3)[52] of the *Judicial Review Act 1991*;

(b) those in which the assessment manager seeks a declaration from the P&E Court – in which case the P&E Court has a broad discretion to deal with any statutory noncompliance.[53]

[38] It will be necessary to return to s 231 when discussing the fifth ground (human rights).

The Legislative Intention

[39] Does that statutory regime evince a legislative intention to include or exclude obligations of procedural fairness?[54]

[40] The joint applicants[55] contend that there was an obligation to afford the applicants procedural fairness. That contention is based on the following submissions.

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49 *Planning Act 2016* s 231(4).

50 See the summary in Wanless' submissions at [64].

51 *Planning and Environment Court Act 2016* s 37.

52 Part 3 of the *Judicial Review Act 1991* deals with applications for statutory orders for review. Part 4 enables statements of reasons and Part 5 deals with prerogative orders and injunctions. Only challenges under Parts 4 and 5 are permitted.

53 See Wanless' submissions at [66].

54 See Wanless' submissions at [75], [76] and [79].

55 As explained, the first and third applicants (Austin and Veolia) filed joint submissions. The second applicants (the Ashworth Applicants) filed separate submissions.

[41] *First*, the joint applicants say that procedural fairness obligations are not excluded from the statutory scheme. The correct starting point, according to the joint applicants, is the "*fundamental principle*" that, when a statute confers power to destroy or prejudice a person's rights or interests, the common law implies an obligation to afford procedural fairness unless it is excluded by words of "*irresistible clearness*" or "*plain words of necessary intendment*".[56]

[42] It is true that procedural fairness obligations are not expressly excluded from the statutory scheme. However, it is difficult to characterise the call-in power in the *Planning Act* as, to use the language of Mason CJ, Deane J and McHugh J in *Annetts v McCann*, a statute that confers power on a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations.[57] The evident legislative intention of the call-in power is to replace the decision-maker (such as the local council) with the Minister where the Minister considers that a State interest is affected. Certainly, the rights or interests of citizens might ultimately be affected if the Minister's decides a called in application in a different way to the decision that has been made, or likely to be made, by the local council. But that is not the point of the call-in power. The point of that power is to invest the Minister, rather than the local authority and P&E Court, with decision-making power for planning applications of State interest. In that respect, this case is some distance from the individual visa rights considered in *Saeed v Minister for Immigration and Citizenship*[58] or the right to be heard in a coroner's inquest as considered in *Annetts v McCann.*[59]

[43] *Second*, the joint applicants contend that the existence of procedural fairness obligations is confirmed by the Explanatory Notes, which state that the clause that became s 102 of the Planning Act "*is intended to afford procedural fairness to affected parties*". However, that statement in the Explanatory Notes does not assist the argument. The full explanation was:

> *"Clause 101* [now s 102] *provides for the Minister to seek representations from affected parties if the Minister proposes to call in a development application. The provision is intended to afford procedural fairness to affected parties*."

[44] That full explanation suggests that the legislative intention was that the Minister's seeking of representations was to, in effect, stand in the place of any obligation to afford procedural fairness. However, this substitute mechanism for affording procedural fairness was not particularly broad. Those permitted to make representations are the "*affected parties*" but later parts of the Explanatory Note (and the legislation itself) make it clear that the "*affected parties*" are intended to be a limited class.[60]

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56 Joint Applicant's supplementary submissions at [13] relying on *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [11]-[15] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

57 (1990) 170 CLR 596 at 598.

58 (2010) 241 CLR 252.

59 (1990) 170 CLR 596.

60 The later discussion refers to notice of the call-in being given to the assessment manager, the applicant and, if relevant, any referral agency or principal submitter for the application.

[45] Further, the next part of the Explanatory Notes rather supports the idea, explained above, that the point of the call-in power is to invest the Minister with decision-making power for planning applications of State interest:

> Clause 102 enables the Minister to call in a development application to assess and decide, or reassess and re-decide the development application. A Ministerial call in power may be exercised for both a development application that has been decided and a development application that has not been decided.
>
> As with other Ministerial powers, **the call in power is intended to allow the Minister to intervene in the development assessment process, where State interests are involved, and to be the final arbiter on State interest matters.** Though not commonly used, occasions may arise where State interests could be severely affected by the implementation of a development approval or the refusal of a development application. In these situations, exercising the reserve power to call the application in and assess and decide, or reassess and re-decide, the application allows the Minister to redress what otherwise could become a serious problem. [emphasis added]

[46] Read as whole, the Explanatory Notes shed little or no light on whether the legislative intention was that the call-in regime include, or exclude, obligations of procedural fairness. The Explanatory Notes largely summarise the proposed legislation without disclosing any particular objectives with regard to procedural fairness.

[47] *Third*, the joint applicants contend that:

(a) it should be uncontroversial that the power in s 103 of the Act confers a power to destroy or prejudice the rights and interests of persons beyond that of an ordinary member of the public or a mere commercial competitor;

(b) in *Landel Pty Ltd v Hinchliffe*,[61] Fryberg J reached that conclusion in relation to the call-in power under the predecessor *Integrated Planning Act 1997*;[62]

(c) the key question is whether the applicants have an interest that directly affects them individually and not simply as a member of the public;

(d) Here, the applicants plainly do have such an interest.

[48] However, it is doubtful that s 103 can properly be described as conferring a power to destroy or prejudice the rights and interests of persons beyond that of an ordinary member of the public or a mere commercial competitor. As explained, the broad purpose of the call-in power is to invest the Minister with decision-making power for planning applications of State interest. And, care should be taken not to confuse notions of a person's standing to make submissions or to bring proceedings with the question of whether the statutory regime evinces a legislative intention to include or exclude obligations of procedural fairness.

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61 [2009] QSC 408.

62 The call-in power under the *Integrated Planning Act 1997* involved a different, more abbreviated regime which just empowered the Minister to call-in.

Some Features of the Call-in Regime

[49] It is important to identify some of the relevant features of the call-in regime.

[50] *First*, the multi-stage character of the call-in regime means that, if the Minister proposes to call-in an application, the Minister is to give notice to four categories of persons, each of whom may make representations – which the Minister is obliged to consider. However, the four categories of persons who are entitled to notice and to make submissions are a confined group. The first two categories, the decision-maker and the applicant, are obviously parties who are already directly interested. The decision-maker is to be replaced. And the applicant is entitled to know that the entity deciding the application may be different, and the State interests that are said to be involved. Similarly, notice needs to be given to each referral agency which is assessing the application.[63] The fourth category, those submitters of whom the Minister is aware, comprises those who have made submissions and are therefore engaged in the application process. A person who intends to make a submission does not make the cut. Nor does a person who might be directly affected by the decision on the application – unless they happen to have already made a submission.

[51] Thus, the persons entitled to notice of the proposed call-in, and entitled to make submissions to the Minister, do not include all those parties who might be affected by the decision on the application. The confined categories of persons entitled to make representations to the Minister means that the legislature cannot have intended that the Minister would be obliged to consider the representations of all of those who might be affected by the decision to approve or reject the application. Indeed, the confined nature of the categories may mean that the people most affected by the application may have no entitlement to make representations to the Minister on whether the call-in should be exercised.

[52] Rather than affording those affected by the application with access to practical justice,[64] the focus appears to be to providing a limited opportunity for representations to be made by those already directly engaged in the decision-making process.

[53] *Second*, the confined categories of persons entitled to notice of the proposed call-in is continued with the persons entitled to notice of the Minister's decision to call-in. Within 20 business days after the end of the representation period, the Minister may call-in an application by giving a call-in notice to the four categories of people.

[54] *Third*, the Minister's call-in decision has a distinctive character. The reasons for the call-in must include the State interest giving rise to the call-in. And, State interest is a concept that has a strong subjective element. It is an interest that the Minister considers affects an economic or environmental interest of the State, or a part of the State, or affects the purposes of the *Planning Act*. The fact that the decision to call-in depends on a State interest, accompanied by a strong subjective element residing with the Minister, strongly suggests that the legislature did not contemplate that that

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63 See *Planning Act 2016* s 55.

64 *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* (2007) 166 FCR 154 at [82].

those affected by the application were entitled to be heard on the Minister's decision to call-in.[65]

[55] The call-in power is concerned with the State's interests, or at least the Minister's view of State interests, rather than the protection of private rights or avoiding practical injustice.

[56] *Fourth*, as explained above, if the Minister decides a called-in application, the Minister must prepare a report that explains the nature of the decision, and the matters the Minister considered in making the decision and must include, in the report, a copy of the notice of the decision (that is, including the reasons). A copy of that report must be tabled by the Minister in the Legislative Assembly within 14 sitting days after giving the notice of the decision. That duty to report to Parliament, in respect of a discretionary decision of the Minister, reinforces the impression that, rather than accommodating a right to be heard for those affected, the intention was to ensure that the Minister's decision regarding State interests was reported to Parliament.

[57] And so, in summary, the statutory framework provides that:

(a) only four categories of people are entitled to notice of the proposed call-in from the Minister;

(b) those categories of people also have an entitlement to put representations to the Minister on whether the Minister should exercise the call-in power;

(c) the Minister then has a duty to consider those representations before arriving at his decision to call-in or not call-in;

(d) the Minister may call in an application by giving a call-in notice to the four categories of people;

(e) The call-in notice must state that the Minister is proposing to call-in the application, the reasons for the proposed call-in, including the State interest giving rise to the call-in, and the point from which the process must restart;

(f) Whether the application involves, in the opinion of the Minister, a State interest is a decision that has a strong subjective element;

(g) The Minister then decides the called-in application and gives notice to the four categories of people and reports to Parliament; and

(h) The Minister's decision is subject to restricted challenges or appeals.

A Wide Obligation to Afford Procedural Fairness?

[58] It is well-established that the common law implies an obligation of procedural fairness unless it is excluded by "*irresistible clearness*".[66] However, in my view, the features outlined above make it irresistibly clear that the legislative regime is

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65 The position might be different if, for example, the decision-maker was required to assess whether there was evidence satisfying criteria.

66 Joint Outline of Submissions in Further Reply to the Applicants at [9]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [14]. See also the useful discussion of this topic at Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed at [8.190]

inconsistent with the Minister having a wide obligation to afford procedural fairness to those that might be directly or indirectly affected by the Minister's call-in decision.[67]

[59] The critical issue is whether the wide application of the rules of procedural fairness is inconsistent with the proper operation of the statute.[68] Here, the application of the hearing rule is inconsistent with a regime which:

(a) confines notice of the proposed call-in to those already participating in the application process, and so implicitly excludes notice to and the participation of a broader class of persons who may be affected by the call-in decision;

(b) has, as its core, a consideration of whether a State interest is involved, in a statute whether State interest is defined subjectively as any interest that the Minister considers affects an economic or environmental interest of the State, or a part of the State, or a Planning Act purpose.

[60] In that context, it would make no sense to engraft on to the call-in provisions of the statute a broad right for any person affected to be heard on the proposed call-in and to make submissions as to whether a State interest was involved. I find that there is no broad right to be heard. The legislative regime is inconsistent with there being such an obligation.

Is the Bias Rule Excluded?

[61] That said, I have considerable hesitation in accepting that the legislative intention was that the procedural fairness rules were intended to be excluded in their entirety. There is considerable force in the submission by the joint applicants that:

> For Wanless's procedural fairness argument to succeed the Court would have to accept the proposition that the Parliament intended, by implication from the terms of the Planning Act, that persons affected by a call-in decision could suffer a biased (actual or apprehended) decision-maker. That proposition only needs to be stated to be rejected. No section of the Planning Act comes close to implying that the bias rule is excluded.[69]

[62] The decision of the Minister, to call-in or not, requires the Minister to consider the representations and the State interest. In considering that decision the common law would ordinarily imply an obligation to avoid bias or the appearance of bias unless that obligation is excluded by "*irresistible clearness*".[70] There is no such irresistible clearness here. To the contrary, it would be expected that a Minister would consider the representations, and decide whether to call-in the application, and do so free of

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67 By a 'wide' obligation of procedural fairness the intention is to refer to both the hearing rule and the bias rule.

68 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed at [8.130].

69 Joint Outline of Submissions in Further Reply to the Applicants at [11]. The submission has parallels with the approach Kirby J took to what his Honour described as an "*astonishing*" submission that the bias rule did not apply to a tribunal decision: *The Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 138 at [45], [46].

70 See the discussion above at 0.

bias or the appearance of bias. The exercise of a statutory power should be exercised free of bias and the appearance of disqualifying bias.[71]

[63] At its core, the Minister's decision to call-in or not call-in is a decision designed to serve public purposes. It is appropriate that decisions for public purposes do not deviate from the true course of decision-making.[72] The legislature can be presumed to have intended that a statutory decision of the Minister for public purposes would be attended by integrity in the decision-making process. After all, the rule that decisions be made without bias is a principle of common sense and common decency that is shared by all democratic societies and their systems of jurisprudence.[73] For those reasons, I conclude that the legislative intention was not to exclude the bias rule.

[64] That conclusion differs from the conclusion reached in relation to the implication of the rules of procedural fairness more generally. Those different conclusions are justified because, as explained above, whether an obligation of procedural fairness applies at all, and to whom the obligation is owed, and the content of any such obligation, depends on the particular statutory framework as well as the particular factual context of a particular exercise of the power.[74] Here, the statutory features outlined above and, in particular, the multi-stage and confined character of the statutory framework, make it difficult to engraft a broad right to be heard on to that statutory regime. However, the considerations are different for the Minister's call-in decision which involves a consideration of the representations and State interests.

[65] On that aspect, in their text, Aronson, Groves & Weeks acknowledge that legislation which expressly alters the hearing rule, such as by introducing procedures that are said to be an exhaustive statement of the requirements for hearings, are impliedly confined to the hearing rule.[75] A distinction between the implication of the hearing rule and the bias rule is also clear in the High Court's decision in *The Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka.*[76] In that case Kirby J spoke of "*the deeply entrenched presupposition that a repository of statutory power will be free from actual or ostensible bias in exercising such power*". His Honour continued:

> Depending on the circumstances, the presence of actual or ostensible bias may be so antithetical to the lawful performance of statutory functions that it could strike at the very heart of the power conferred and suggest that such power has been deployed for a personal or idiosyncratic (and thus unlawful) purpose.[77]

[66] All of those considerations make it impossible to conclude that the legislature intended to exclude the operation of the bias rule. Thus, it is now necessary to apply the bias rule to the facts of this case.

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71 *Isbester v Knox City Council* (2015) 255 CLR 135 at [55].

72 This is the language of Hayne J in *Minister for Immigration and Cultural Affairs v Jia Legeng* (2001) 205 CLR 337 at [183]. See also *Isbester v Knox City Council* (2015) 255 CLR 135 at [21].

73 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed at [8.10].

74 See above at [9].

75 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed at [8.170]

76 (2001) 206 CLR 128 at 138 and 144.

77 (2001) 206 CLR 128 at [57], [60].

FIRST GROUND: APPREHENDED BIAS

The Bias Rule

[67] No party contended that there was actual bias. The applications turn on whether there was apprehended bias.

[68] The apprehended bias rule arises where a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the decision - commonly referred to as the 'double might' test or the *Ebner* test.[78] Whether the fair-minded lay observer would have that reasonable apprehension is largely a factual one to be answered by reference to the full factual context in which the decision is made.[79] The hypothetical fair-minded observer is taken to be aware of the nature of the decision and the context in which it was made, as well as to have knowledge of the circumstances leading to the decision.[80]

[69] It is important to recognise the broad scope of the bias rule. In *Webb v The Queen*, Deane J identified four distinct (but overlapping) categories of cases in which apprehended bias might arise:

> "The first is **disqualification by interest**, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is **disqualification by conduct**, including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias. The third category is **disqualification by association**. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is **disqualification by extraneous information**. It will commonly overlap the third and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.[81] [emphasis added]

[70] The approach of the fair-minded lay observer[82] may vary according to the type of apprehended bias alleged. As Spigelman CJ has noted:

> A conflict of interest requires a different analysis as to the relationship, as reasonably perceived, between the interest and the decision. Questions of fact and degree do not arise in the same way. In a pre-judgment case it is necessary

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78 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Charisteas v Charisteas* (2021) 95 ALJR 824 at [11] (per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ). Note that there is a helpful discussion of the law on the legal test for apprehended bias in the ALRC's Final Report 138: *Without Fear or Favour*, December 2021 at [3.13].

79 *Isbester v Knox City Council* (2015) 255 CLR 135 at [20]; Joint Applicants' submissions at [34].

80 Ibid.

81 (1994) 181 CLR 41 at 74. These four categories are discussed in some detail in ALRC 138 at [3.32].

82 The concept of a fair-minded lay observer has been described as a 'kind of thought experiment': The Hon Richard Chisholm, '*Apprehended Bias and Private Lawyer-Judge Communications: The Full Court's Decision in Charisteas*' (2020) 29(3) Australian Family Lawyer 18, 30 discussed in the ALRC 138 at [3.27].

> to consider the degree of "closure" of the allegedly closed mind. Where a relevant conflict of interest is established the reasonable apprehension follows almost as of course.[83]

[71] Of course, again, the application of the bias rule must be accommodated within the particular statutory framework, as well as the particular factual context of the particular exercise of the statutory power.[84] An illustration can be given of the need to accommodate the bias rule to this particular statutory regime,[85] although, in doing so, it is necessary to re-visit the threshold issue considered above.[86]

A Neutral Decision-Maker?

[72] It will be recalled that the first stage of the call-in process is activated if the Minister proposes to call-in an application. Thus, this statutory framework presupposes that, before any representations are received, the Minister is already inclined to call-in the application. The legislation makes clear that the submitters are not entitled to a neutral decision maker, at least at the outset.[87]

[73] However, that feature of the statutory regime cannot be taken too far. The regime contemplates that, having started from the standpoint that the Minister proposes to call-in the application, the Minister is then obliged to consider the representations made to him before the Minister makes a decision. And, in making the decision, the Minister is obliged to state the reasons for the call-in, including the State interest giving rise to the call-in.

[74] None of that can be regarded as the legislature impliedly excluding the operation of the bias rule. Instead, the evident objective of these provisions is to ensure that the Minister does consider the views of those already engaged in the application process and that his reasons for the call-in are clearly articulated and identify the relevant State interest. In short, the regime contemplates the likelihood that the Minister may not start the process from a neutral position, but it aims to ensure that the Minister's decision at the end-point, the call-in decision, has been arrived at after the Minister has properly considered the representations and the State interest.

[75] Thus, by its nature, the call-in decision is discretionary and will not involve an initial neutral stance, or even a balanced consideration of the issue in the same way as a judge or arbitrator may approach a dispute in a conventional adversarial context. For example, a Minister may take an initial view that a large infrastructure project, such as an airport or a rail line, involves a State interest. The Minister's subsequent consideration of the representations, and the State interest, may do little, if anything, to alter that view.

[76] All of that is perfectly consistent with the scheme of the Act and illustrates that the process required of the Minister is substantially different from that of a judge, or quasi-judicial officer, adjudicating in adversarial litigation.[88] The Minister is not required to start from a neutral position, and the Minister's consideration of whether

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83 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at [26].
84 *Isbester v Knox City Council* (2015) 255 CLR 135 at [55].
85 Wanless submissions deal with this aspect in some detail at [103]-[106] of the Wanless submissions.
86 There is some overlap in the way the issues fall to be considered.
87 Wanless submissions at [105], [106].
88 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [102].

to call-in merely requires a consideration of the representations made during the representation period, and a determination of what the Minister considers to be the State interest.

[77] However, despite Wanless' submissions to the contrary,[89] those requirements of the legislation do not exclude the application of the principles of bias and apprehended bias to the Minister's call-in decision. As explained above, the legislature ought to be presumed to have intended that a statutory decision of the Minister for public purposes would be attended by integrity in the decision-making process.

[78] It is necessary to inquire as to what kind or degree of neutrality (if any) is to be expected of the decision-maker.[90] The expectation will differ from one statutory context to another.[91] In some contexts what is required is a 'fair and unprejudiced mind' which 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.[92] As explained, a Minister may well commence consideration of the representations with a firm view that the airport or a rail line or other development involves a State interest.

[79] Certainly, it is a mistake to start from the position that a Minister's decision under a statute is akin to a judicial decision or even that neutrality is required. The starting point is the statutory scheme.

A Policy or Political Decision?

[80] The Deputy Premier and Wanless contend that the Minister's call-in decision is a policy or political decision, or is a decision strongly influenced by policy or political considerations. Both the Deputy Premier and Wanless draw a distinction between judicial and quasi-judicial decision-makers, on the one hand, and an elected Minister exercising statutory powers on the other hand.[93] However, there are no clean lines of demarcation between these types of decisions. As *Aronson, Groves & Weeks* point out:

(a) even highly political decisions involving Cabinet are not necessarily precluded from the requirements of fairness, although the involvement of Cabinet presents a hurdle at which many claims fail;

(b) different considerations arise where the decision is one that seeks to give effect to general social or political goals, or which formulate or apply general principles that are not concerned with the circumstances of particular individuals;

(c) the formulation or adoption of a policy does not attract a duty to hear but its application to a particular case does attract such a duty;

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89 Wanless submissions at [109].

90 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 565 [187] relied on by Spigelman CJ in *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at [11].

91 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at [11].

92 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at [22].

93 See the Deputy Premier's submissions at [62]; Wanless submissions at [107]. Those submissions emphasise the distinction between political and judicial decision-making but do not go on to explicitly contend that by reason of the political nature of the decision-making the rules of procedural fairness are excluded.

(d) decisions made pursuant to statutory powers often involve a combination of an application of policy as well as a consideration of the interests of individuals.[94]

[81] Here, the call-in decision plainly involves policy and political considerations, as well as an impact on a number of affected individuals. That mix makes it different to the decisions of Cabinet, but also different from the mere application of a policy to an individual case.

The Allegations of Apprehended Bias Alleged

[82] The applicants argue that there are six reasons which support a finding of apprehended bias against the Deputy Premier.[95] Broadly, they are:

(a) The Deputy Premier called in this application, despite not calling-in other applications which are 'materially indistinguishable'.

(b) Donations were made to the Deputy Premier's political party, the Australian Labor Party (ALP), by a lobbying firm retained by Wanless;

(c) That lobbying firm had direct and outside-of-work-hours access to the Deputy Premier's Chief of Staff;

(d) A request was made by former long-serving ALP Lord Mayor of Brisbane, who is also the project director of the Wanless Application, to the Deputy Premier that the call-in decision be made expeditiously;

(e) The call-in request was placed in the "*VIP corro*" email folder;

(f) The Deputy Premier opted to call-in the application despite the Deputy Premier's government subsequently banning the "dual hatting" practice which likely occurred in this instance.

[83] It is necessary to examine these individual allegations, and also to look at the allegations in a collective way.

Failure to Call-in Indistinguishable Applications

[84] The joint applicants submit that that the Deputy Premier did not call-in other applications that were materially indistinguishable. They submit that the call-in decision was made following a series of decisions refusing to call-in development applications similar to the Wanless application. Like the Wanless application, each concerned proposed resource recovery and landfill facilities in the Ipswich City Council area. Prior to the call-in of the Wanless application, the three similar call-in requests were rejected.[96]

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94 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed at [8.130]. See also *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [50] where Gaudron, Gummow and Hayne JJ repeated the observation of text writers Wade and Forsyth, *Administrative Law*, 8th ed at 464 that ''*the whole object*'' of a statutory provision placing a power into the hands of the Minister ''*is that he may exercise it according to government policy*''.

95 The Deputy Premier is the relevant Minister.

96 Submissions of the Joint Applicants at [4]. The Ashworth Parties make a similar objection. They point out that of the four development applications for landfill facilities in Ipswich that have been before the P&E Court, the Deputy Premier decided to call-in only the Wanless Development Application: Ashworth Parties' submissions at [73(k)].

[85] The *first* of those three requests was made on 2 March 2018, when the Council requested the Hon Cameron Dick MP, the then Minister for State Development, Manufacturing, Infrastructure and Planning, to call-in an application by Bio Recycle.[97] Bio Recycle's application was to expand an existing resource recovery and landfill facility at Swanbank, and for a new waste and transfer facility at Jeebropilly. The Council made this request on the basis that the application involved a State interest.

[86] On 3 April 2018, the then Planning Minister refused the request on the basis that it "[did] *not involve a state interest in a manner that warrants a call in*" and that the "*Planning and Environment Court is the appropriate forum*".[98]

[87] The *second* of the call-in requests was also made by the Council. On 13 June 2018 the Council requested that the Planning Minister call-in four development applications, on the basis that they involved State interests. The four development applications were as follows:

(a) The Bio Recycle application at Swanbank;

(b) A development application by Austin BMI to build a new resource recovery and landfill involving the rehabilitation and reuse of existing mining voids at New Chum;

(c) A development application by Lantrak to build a new resource recovery and landfill facility involving the rehabilitation and reuse of existing mining voids at Jeebroopilly;

(d) A development application by Cleanaway to extend an existing resource recovery and landfill facility at New Chum.[99]

[88] On 22 August 2018 the Council's request to call-in those four development applications was, again, refused.[100] The Planning Minister stated that the Austin BMI and Lantrak applications did not involve State interests, and the Cleanaway application remained to be assessed by the Council and by the State Assessment and Referral Agency. The Minister relied on his earlier decision in relation to the Bio Recycle application.

[89] The *third* of the call-in requests was made a year later. On 12 August 2019, the Council requested that the Planning Minister call-in all development applications involving landfill that were pending before the Council in 2019. The request was again refused.[101] The Planning Minister at the time reiterated that "*there are no grounds for a call-in*" and the aspects that impacted State interests would be "*adequately assessed and addressed*" by the State Assessment and Referral Agency.

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97 The request is at 5.1 of the Agreed Bundle.

98 Agreed Bundle at 5.2.

99 The applications are useful summarised by the submissions of the joint applicants at [6]. Note however, that Ms Morrissy's report refers to the Bio Recycle project as involving both an expansion of an existing resource recovery and landfill facility at Swanbank and a new waste and transfer facility at Jeebropilly.

100 Agreed Bundle at 5.4.

101 Agreed Bundle at 5.6.

[90] In this proceeding the Deputy Premier submits that, in refusing each of the three requests, the Planning Minister did not decide that the applications were not capable of giving rise to a State interest. That is, the character of the then Planning Minister's decisions, was not to reject the applications on the grounds that the applications were incapable of giving rise to a State interest. In my view that is right. A fair reading of each of the refusals makes it clear that the Minister's decisions not to exercise his call-in power were based on these views:

(a) the application "*does not involve a state interest in a manner that warrants a call in*";

(b) "*no State interests are affected by the proposed developments which warrant his involvement*";

(c) "*The exercise of ministerial call in powers, as a reserve power, also necessitates me to take the view, above and beyond determining that a state interest is affected, that the circumstances should also warrant the exercise of these powers*."

[91] Thus, the Planning Minister's call-in decision plainly involved a policy or political choice. It is also worth noting that each of the requests for the Minister to exercise his power to call-in was made by the Council. The Council's concern was that it continued to receive development applications for landfills contrary to the then operating planning instruments, and that each of the applications were subject to community opposition. The result was that the Council was being required to expend large sums defending its decisions to refuse applications. In other words, the Council's view was that it was being besieged by applications that, if successful, those applications would benefit Southeast Queensland or even broader Queensland, and yet the burden of dealing with the applications was being unfairly borne by the ratepayers of Ipswich.

[92] Wanless made its application to the Council on 24 December 2019. The application sought a new resource recovery and landfill facility involving the rehabilitation and reuse of existing mining voids at Ebenezer. On 16 September 2021, the Council refused the Wanless application, at least in part. The Council approved the resource recovery component and refused the landfill component. Wanless appealed against the Council's decision refusing the landfill component. The appeal was proceeding in the P&E Court. However, by reason of the Deputy Premier's call-in, the P&E Court appeal was discontinued pursuant to s 104(1)(b) of the *Planning Act*.

Materially Indistinguishable

[93] The joint applicants submit that the Wanless application is materially indistinguishable from the previous applications. The joint applicants say that:

> "the decision to call-in the Wanless application is inexplicable (or at least left unexplained in the reasons) in light of the repeated refusals to call-in projects based on materially indistinguishable requests in the past. None of those previous similar applications were found to involve State interests."

[94] There are three broad problems with that submission. The *first* is that an assumption that underlies the submission is the notion that the Minister is obliged to adopt a

consistent approach to call-in decisions. For the reasons that follow, that is an assumption that cannot be accepted.

[95] At the outset it is important to note that there is some difficulty in properly categorising this allegation of apprehended bias. It is an allegation which is based, not so much on the circumstances of this particular call-in, but on the allegation of an inconsistency between the decision made on this call-in as against prior decisions. The difficulty is more than an issue of taxonomy or nomenclature. Of the four categories described by Deane J in *Webb v The Queen*,[102] the only relevant category is 'disqualification by conduct'. That category of apprehended bias comprises conduct, either in the course of, or outside, the proceedings, that gives rise to an apprehension of prejudice, partiality or prejudgment.[103] And so a judge might be disqualified by reason of having made strong adverse findings about a party in unrelated proceedings.[104] Or extrajudicial writing and statements made out of court, including to the media, may raise issues of prejudgment. That occurs if the judge expresses 'preconceived views which are so firmly held' that the hypothetical observer may think it might not be possible for them to approach cases with an open mind'.[105]

[96] Thus, it appears that the joint applicants contend that the conduct of the Minister in calling in the Wanless application, having previously refused the three similar prior applications, is disqualifying conduct that gives rise to an apprehension of bias. It is hard to see why that is so. The submission assumes that it is incumbent upon the relevant Minister to treat applications consistently and to explain any inconsistency in decision-making. It is not apparent why the Minister is required to deal with Wanless' application in a manner that is consistent with similar, or even materially indistinguishable, prior applications.

[97] The call-in discretion and the associated policy decisions of the Minister are dynamic rather than static. In this case, the Council first requested that the then Planning Minister call-in the Bio Recycle application in March 2018. The Wanless application was called-in by the Deputy Premier, the new Planning Minister, on 27 January 2022 – nearly four years later. Nothing in the legislative regime requires that the new Minister exercise the call-in power in a manner that is consistent with that Minister's predecessor, let alone consistently over a period of nearly four years. The political and environmental context can hardly be thought to be static over that four-year period. And so, there is no reason to oblige the Minister to apply a static treatment to similar applications over that four-year period, or indeed for any period.[106]

[98] The Minister's call-in power is a power personal to the Minister. As explained, it has a strong subjective element, as well as a right to consider policy issues. The call-in power is not confined by any principle of, or akin to, precedent. The Minister is ultimately responsible to Parliament for the decisions and discretions exercised.

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102 (1994) 181 CLR 41 at 74. See the discussion above at FIRST GROUND: APPREHENDED BIAS, The Bias Rule.

103 *Webb v The Queen* (1994) 181 CLR 41 at 74; ALRC 138 at [3.42].

104 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at [145].

105 ALRC 138 at [3.45]; Aronson, Groves and Weeks at 676, citing *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, 495.

106 If there were an obligation of consistency, for how long was the Minister bound to render consistent decisions?

[99] To return to the joint applicants' submission, there is no requirement for the decision to call-in the Wanless application to be explicable in the sense of being consistent with the repeated refusals to call-in projects based on materially indistinguishable requests in the past. For reasons I will come to shortly, the prior projects have not been shown to be '*materially indistinguishable*'. However, for present purposes it must be emphasised that, even if the Wanless application was materially indistinguishable from the prior applications, the call-in power exercised by the Minister under the *Planning Act* is not confined or restricted by previous decisions. The Minister was entitled to make the determination afresh.

[100] The *second* broad problem with that submission by the joint applicants is a factual problem. As explained above, the previous applications did not involve a substantive determination by the previous Minister that there was no State interest involved in each application. And, even if the previous Minister had made such a determination, or determinations, about State interest, the new Minister was entitled to take a different view.

[101] *Third*, the court is unable to make a finding of fact that the Wanless application was "*materially indistinguishable from the previous applications*". For one thing, in each case the land sought to be developed was different. With one exception, the sites were located in different suburbs of Ipswich.[107] One can easily envisage that planning, housing, environmental and transport corridor issues are likely to make the policy choices different in each case.

Morrissy Report

[102] The joint applicants relied on an expert report of a town planner, Ms Jennifer Morrissy, as evidence that the Wanless application was '*materially indistinguishable*' from the previous applications. The Deputy Premier and Wanless contended that the expert report was inadmissible but, for reasons explained below, those objections fail. However, the expert report is of little assistance and is not persuasive that the Wanless application was materially indistinguishable from the prior applications.

[103] Ms Morrissy's 'key observation' at paragraph [6.1] of her report is that:

> "In my opinion, there are more commonalities than differences that exist between the Wanless application and the No Call-in waste applications,[108] which makes the Ministerial call-in of the Wanless application confusing to me as a town planner, having regard to the matters an Assessment Manager is required by the *Planning Act 2016* to consider (as explained earlier in this report). With those matters in mind, as well as the reasons in the Call-in Notice about the State Interests, in my opinion, the Minister's decision remains unexplained in substantive terms."

[104] At [6.4] of her report Ms Morrissy continues:

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107 The suburbs are Swanbank (Bio Recycle), New Chum (Austin and Cleanaway), Jeebropilly (Lantrak and Bio Recycle) and Ebenezer (Wanless). Swanbank and New Chum are adjoining suburbs to the east of Ipswich. Jebropilly and Ebenezer are adjoining suburbs to the west of Ipswich.

108 Ms Morrissy describes the applications by the other four waste/recycling entities by using the expression 'No Call-in waste applications', meaning the prior applications discussed above.

> "For the reasons provided in this report, I cannot identify any town planning reasons for why the Wanless application was called-in by the Minister for SDILGP,[109] though the No-Call-in waste applications were not."

[105] It is an odd process that Ms Morrissy has been asked to undertake. Her exercise involves a weighing of commonalities (or similarities) and differences between the Wanless application and the prior applications. That raises the question: what are the features that are assessed for their similarity or difference? The answer to that question appears to be that the features considered and compared by Ms Morrissy are:

(a) The State statutory assessment framework applicable to the development applications;

(b) The local statutory planning framework applicable to the development applications; and

(c) The site and/or proposal characteristics that distinguish the Wanless application from the prior applications that would be of State interest.[110]

[106] It is not surprising that the State and local statutory frameworks are the same or similar for waste applications in the same local government area. Thus, Ms Morrissy expresses this opinion:

> "While there are **differences** between the waste applications referenced in this report (in terms of site locations and intensity of proposed development, such as footprint of landfill; landfill capacity; and resource recovery/recycling capabilities), **they have all undergone the same assessment process**, by the same Assessment Managers, where assessment has been against the same State and local categorising instruments. Relevantly, through the assessment of each application against the SPP,[111] SEQRP[112] and SDAP[113] by State agencies, the State's interests have been considered."[114] [emphasis added]

[107] And, later in her report, Ms Morrissy says:

> Overall, I can find no material differentiation to what applies**, in terms of process and benchmarks**, for assessing the No Call-in waste applications and the Wanless application, when having regard to **the applicable State statutory framework**.[115] [emphasis added]

[108] Ms Morrissy reaches a similar (but not identical) conclusion in relation to local regulation.[116]

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109 This is Ms Morrissy's abbreviation for the Minister for State Development, Infrastructure, Local Government and Planning.
110 See Ms Morrissy's report at [1.13].
111 State Planning Policy.
112 South East Queensland Regional Plan 2017.
113 State Development Assessment Provisions.
114 Ms Morrissy's report at [2.14].
115 Ms Morrissy's report at [2.22].
116 Ms Morrissy's report at [3.10].

[109] The result is that Ms Morrissy's exercise involves a weighing of not simply the similarities and differences between the Wanless application and the prior applications. Her exercise also involves a weighing of the similarities and differences in the State and local regulatory regime that applies to each of the applications. Ms Morrissy's conclusion must be seen in that light. Certainly, the weighing of both the individual differences and the largely similar regulatory regime, dilutes any proper consideration of the similarities and differences in the compared applications. Certainly, I am not persuaded that the expert report provides evidence that the Wanless application is materially indistinguishable from the prior applications.

[110] One further observation supports that view. The Morrissy expert report contains no comprehensive analysis of the features of the prior applications as against the Wanless application. Ms Morrissy does observe that each of the applications shared a need for assessment from a number of common disciplines or areas of expertise such as:

(a) need for the development – involving planning, community and economic need to be demonstrated;

(b) waste industry markets, dynamics and operations;

(c) traffic impacts;

(d) ecological impacts (flora and fauna, and aquatic and terrestrial);

(e) hydraulics/flooding and stormwater quality impacts;

(f) groundwater levels, movement and quality;

(g) surface water (and where relevant, void dewatering);

(h) geotechnical and engineering matters;

(i) landfill engineering and design matters, including leachate and landfill gas management;

(j) environmental impacts (air quality, odour, noise, dust and light);

(k) rehabilitation of former mining areas including voids;

(l) general amenity impacts, including character impacts/ sense of place/ intangible and perceived impacts; and

(m) visual amenity impacts.[117]

[111] Ms Morrissy has not compared or analysed how each of the applications deal with those 13 categories of assessment. That is not said as a criticism. Such an analysis is likely to be a massive undertaking. However, there is a conspicuous absence of even a superficial comparison as to how the Wanless and the prior applications deal with those 13 categories.[118] That makes it impossible for the court to use the expert report as some evidence that the Wanless application is materially indistinguishable from the prior applications.

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117 Ms Morrissy's report at [4.5].

118 For example, the applications may have entirely similar or entirely different traffic and ecological impacts. One does not know that from the report.

[112] Curiously, Ms Morrissy states that the need for each of the applications to be assessed as against the 13 categories of discipline or expertise was a factor that all five applications had in "*common*". That, again, makes it clear that the focus of the expert report is on the process by which the applications were to be assessed rather than on the substance of each application and their substantive similarities and differences.

[113] It is interesting to note that Ms Morrissy records that the Wanless application does differ from the prior applications in one respect. Wanless' application succeeded in attaining the council's approval for part of its development.[119] However, that difference is not explored in any detail.

Objection to the Morrissy Report

[114] The objection to Ms Morrissy's report was on the basis that any similarities or differences between the Wanless application and the other development applications are apparent on their face.[120] The similarities and differences are, it is argued, not matters that involve any expertise.[121] However, it is plain that town planning is a recognised field of expertise. In my opinion, an expert in that field could provide an explanation of the substantive similarities and differences between different town planning applications. Those similarities and differences may not be obvious from the face of the applications, and the substantive features may not be obvious to a person without the relevant expertise. There is some expertise in the analysis of applications of this type, which are technical and comprehensive documents. A town planning expert can provide useful analysis.

[115] There are some odd features of this objection. The Deputy Premier's objection was that the similarities and the differences are apparent on their face. However, no party sought to perform such a comparison, or to identify what the similarities and differences were on the face of the documents. I was not invited to undertake the exercise myself and would be reluctant to do so in the absence of the parties.[122] The result is something of a vacuum. And so, the court has no way of knowing whether it is true that the similarities and the differences are apparent on the face of the applications. On the other hand, the Morrissy report was relied on by the applicants as showing that the Wanless application is materially indistinguishable from the prior applications. However, as explained, the expert report does not, in a useful way, perform the relevant analysis of the similarities and differences.

[116] The Deputy Premier also objects to Ms Morrissy's report being admitted into evidence because neither Ms Morrissy's expert report, nor the other applications, were before the decision-maker, the Deputy Premier, when he made the call-in decision.[123] In other words, it is contended that the expert report is irrelevant. The joint applicants respond by making this submission:

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119 Ms Morrissy's report at [4.8].

120 There are in fact two Morrissy reports but the second adds little of present significance to the first.

121 Deputy Premier's Submissions at [66].

122 Presumably it would be a significant undertaking to compare, for example, the 13 categories of assessment listed above. Environmental impacts alone would require some effort to make the comparison.

123 Deputy Premier's Submissions at [68].

> That is something that undermines his case rather than supports it. The Deputy Premier received multiple representations contending that it was inappropriate to call in the Wanless Application because several, materially identical Applications had not been called in in the past. Either the Deputy Premier read those representations and chose not to obtain or consider the previous Applications; or he did not read the representations and was wholly ignorant of the previous Applications. Either he was wilfully blind or ignorant. Neither assists his case in relation to Ground 1 or Ground 2.[124]

[117] Thus, the joint applicants contend that:

(a) the prior applications were in fact 'materially indistinguishable' from the Wanless application;

(b) the Deputy Premier either:

(i) knew that; or

(ii) chose not to investigate;

(c) and, in either case, the Deputy Premier's different treatment of the 'materially indistinguishable' Wanless application was such as to infer that a fair-minded lay observer might reasonably apprehend that the Deputy Premier might not have brought an impartial mind to the call-in decision.

[118] In my view, a report that explores the similarities and the differences between the applications is relevant to that argument.

[119] In the circumstances, the report is relevant and admissible, but its shortcomings mean that I can give it little or no weight.

Conclusions on Failure to Call-in Indistinguishable Applications

[120] For those reasons, the conclusions reached are that:

(a) the evidence does not establish that the Wanless application is 'materially indistinguishable' from the prior applications;

(b) the context of the refusals to call-in the prior applications – decisions made by a previous Minister - provides no proper basis for saying that the decision of the Deputy Premier to call-in the Wanless application was 'inexplicable';

(c) that context also does not assist the contention that a fair-minded lay observer might reasonably apprehend that the Deputy Premier might not have brought an impartial mind to the call-in decision – a fair-minded observer would appreciate that the Wanless call-in was a personal decision of the new Minister in respect of different applications for development of different blocks of land;

(d) in any event, the call-in power exercised by the Minister under the *Planning Act* is not confined or restricted by previous decisions; the Deputy Premier was entitled to make the determination afresh.

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124 Submissions in reply of the joint applicants at [33].

The Factual Background to the Apprehended Bias Claims

[121] It is necessary to now turn to the other allegations of apprehended bias.

[122] As the High Court explained in *CNY17 v Minister for Immigration and Border Protection*[125] the application of the 'double might' or *Ebner* test involves a two-stage process. *First*, one must identify what it is that might lead a decision-maker to decide a case other than on its legal and factual merits. What is it that is said to affect a decision-maker's impartiality? *Second*, a logical connection must be articulated between the identified thing and the feared deviation from deciding the case on its merits. How will the claimed interest, influence or extraneous information have the suggested effect?

[123] To apply that two-stage process, it is necessary to explain some more of the factual background to the apprehended bias claim. The joint applicants have usefully explained the background in their submissions.[126] The facts here are not controversial.

[124] Anacta Strategies Pty Ltd (**Anacta**) is a lobby group registered under the *Integrity Act 2009*. Two of Anacta's directors, David Nelson and Evan Moorhead, were directly involved in that firm's lobbying activities. Both played a substantial role in the ALP's successful campaign in the 2020 State Election. Mr Moorhead was the State Secretary of the ALP.

The First Phone Call

[125] On 21 September 2021, five days after the Council's partial refusal of Wanless' application, Mr Nelson telephoned the Deputy Premier's Chief of Staff, Danielle Cohen. He foreshadowed that Wanless would be making a call-in request of the Deputy Premier.

[126] The joint applicants emphasise that Ms Cohen made no written record of this call and say that it was an unscheduled, outside-of-work-hours private telephone call to Ms Cohen's mobile phone. However, there is no basis for concluding that there was anything surreptitious or untoward in:

(a) the call being 'unscheduled';[127]

(b) the call occurring outside of normal business hours; many professionals work outside conventional business hours (if there is such a thing), and, in any event, Ms Cohen's evidence was that this call is likely to have occurred between 8am and 9am when she was driving to work;[128]

(c) the call being made to Ms Cohen's mobile phone - mobile phones have largely replaced landlines; and

(d) there being no written record of the call.[129]

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125 [2019] 268 CLR 76 at [58], [59].
126 Submissions of the joint applicants at [14] to [25].
127 Ms Cohen uses the expression 'unscheduled' in her first affidavit.
128 Transcript at T1-55 line 20.
129 The Deputy Premier's submissions (at [12(c)]) point out the 'conspiratorial tone' to this combination of allegations.

[127] As to that last point, Ms Cohen was driving when she received the call and so she could not have made a note at the time. She could have made a note soon after arriving at her office. However, no evidence suggested that a person in Ms Cohen's position was required to document this telephone call, or even that it was good practice to do so. Police officers, lawyers and some other professionals have a practice of making contemporaneous notes in situations where a contemporaneous record is called for. But, even in those professions, it can hardly be said that all calls should be noted, even those that are courtesy calls or not contentious.[130] Certainly, there is no basis in the evidence for concluding that there is some widespread practice operating in government and business, or in Ministerial offices such as this, requiring calls to be recorded in writing. Ms Cohen's evidence was that she did not routinely make notes of phone calls.[131] It was not put to her that, in adopting that practice, she breached some relevant code or standard of practice.

[128] When she was cross-examined, Ms Cohen's evidence was that the call was a 'heads up' or a courtesy call to the effect that the request for a call-in of the Wanless application was on its way. Ms Cohen described the call as having the character of a professional courtesy whereby the Wanless application and the Council partial refusal was explained to her in high level terms.[132] There is no basis for concluding that the nature of such a call would ordinarily require a person in Ms Cohen's position to make a written record. Certainly, there is no evidence that the call involved anything substantive or any lobbying by Mr Nelson.[133]

[129] Mr Nelson and Ms Cohen's had each other's mobile telephone number because they had known each other for many years.[134] Ms Cohen's mobile phone number was on the signature block for her emails, and so anybody who had received an email from Ms Cohen would have her mobile phone number.[135]

[130] It is true that ordinary citizens do not have such easy access to a Minister's Chief of Staff. But any reasonable observer looking at this situation would be realistic enough to recognise that the halls of politics are not occupied by people who are strangers to each other. Relationships, and continuing relationships, are a part of political process. Importantly, though, the fact that Mr Nelson and Ms Cohen knew each other merely led to Mr Nelson making this courtesy call. It did not lead to any substantive advantage. No barriers have been shown to have been evaded by reason of the personal relationship.

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130 For example, in Lewis & Kyrou's *Handy Hints on Legal Practice* 4th ed at [26.65] there is a recommendation that legal practitioners should take detailed diary notes of all telephone conversations and discussions in conference with clients, witnesses, opposing practitioners and counsel. It is not easy to apply that analogy to a Chief of Staff. Courtesy calls are unlikely to be comprehended by the practice. The professional practice of taking notes of conversations with clients is designed to guard against negligence claims. Thus, in *Olympic Holdings Pty Ltd v Lochel* [2004] WASC 61, *Legal Services Commissioner v Voll* [2008] LPT 1, and Legal Services Commissioner v Rowell [2013] QCAT 397 the absence of a contemporaneous note by the solicitor of conversations with the client was decisive in disputes between solicitor and client. Corones, Stobbs & Thomas, *Professional Responsibility and Legal Ethics in Queensland*, 2nd ed at [5.50].

131 Transcript T1-55 line 1.

132 Transcript T1-59 lines 4 to 18.

133 See the later discussion of the topic of lobbying.

134 Transcript T1-55 line 30.

135 Affidavit of Savannah Kuylaars, ex SFK-5 at page 31.

[131] At its core, a lobbying activity, as it is commonly understood,[136] and as it is defined in the *Integrity Act 2009,* means a contact with government in an effort to influence decision-making.[137] The attempt to influence is at the heart of lobbying. Here there is no evidence that can satisfy the court that this first phone call comprised an effort to influence the Minister's decision-making. As explained above, there is no evidence that the call involved anything substantive or any attempt by Mr Nelson to persuade Ms Cohen or, indirectly, the Minister.

[132] As will be seen, the position is the same for the later calls.

The Soorley-Doss Phone Call

[133] A week or so later, on 1 October 2021, Mr Jim Soorley, the former ALP Lord Mayor of Brisbane (from 1991 to 2003) and the project manager for the Wanless application, telephoned Mr Kerry Doss, the State Planner and Deputy Director-General of the Department of State Development, Infrastructure, Local Government and Planning (DSDILGP). Mr Soorley told Mr Doss that Wanless was seeking a call-in. He said a "*request* [is] *coming ... today asking the* [Deputy Premier] *to consider calling in the* [Wanless] *application*". Mr Doss relayed this information to the Deputy Premier's Department Liaison Officer, who notified Ms Cohen. The point of the call was merely to foreshadow what was to come later in the day.

[134] There is no evidence that the contents of this call were communicated to the Deputy Premier. Nor can it be said that the call involved a lobbying activity, or indeed anything substantive. The call can also be characterised as a courtesy call.

[135] At 3.00pm on the same day, 1 October 2021, Wanless formally requested that the Deputy Premier call-in its development application. This call-in request, which was by email, was added to the Deputy Premier's "*VIP corro*" file.[138] There was some controversy as to the label "*VIP corro*". I will return to that topic below.

The Second Phone Call

[136] On 17 November 2021, sometime between 8am and 9am, Ms Cohen received another 'unscheduled' telephone call from Mr Nelson – again as she was driving to work. Ms Cohen says that:

> Mr Nelson informed me that he was following up regarding the Deputy Premier's decision on the call-in request noting that there was an upcoming statutory deadline for the decision. I told Mr Nelson that I was cognisant of the statutory deadline, I was aware officials in the Department of State

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136 See, for example the definition of 'lobby' in the *Macquarie Concise Dictionary*, 3rd ed, which speaks of 'attempt to enlist popular and political support for some particular cause' and to 'frequent the lobby of a legislative chamber to influence the members'.

137 See s 42(1)(a) of the *Integrity Act 2009.* For present purposes I have simplified the definition to its core. Lobbying of course can involve contact with an Opposition representative in an effort to influence the Opposition's decision-making [see s 42(1)(b)] and there are exclusions [see s 42(2)].

138 It was a little unclear as to precisely how correspondence came to be placed into the VIP corro file. The joint applicants contended that it was the Minister who added the request to that file. However, that seems unlikely. The evidence is that the correspondence was tagged as 'VIP corro' – presumably by Ms Cohen or another member of staff (see paragraph [143](c) below) - and then printed by an administrative staff member and placed in a folder to be provided to Ms Cohen and the Deputy Premier.

> Development, Infrastructure, Local Government and Planning were preparing advice on the call-in request for the Deputy Premier's consideration, and that I was confident the departmental advice would be received with sufficient time for the Deputy Premier to consider it and make a decision within the applicable statutory timeframes.[139]

[137] Ms Cohen's evidence is that she did not discuss with the Deputy Premier the contents of either of her telephone conversations with Mr Nelson. However, she does recall saying to the Deputy Premier that the statutory deadline for a decision on the Wanless application was coming up and that Mr Nelson had telephoned her about the upcoming deadline.[140] Presumably that signalled to the Deputy Premier that Mr Nelson, or his firm, Anacta, had an interest in the call-in request, but little else can be inferred.

[138] The Ashworth parties contended that:

> …the lobbyists acting on behalf of Wanless [Anacta] sought to exploit their special relationship with the Deputy Premier by gaining privileged access to public servants responsible for assisting and advising the Deputy Premier in respect of the Call-in Decision. The fact that Mr Nelson was able to gain access to the Deputy Premier's Chief of Staff by mobile phone outside work hours on two occasions (to press Wanless' case) is telling in itself. In all the circumstances, there is also a justifiable suspicion that the Deputy Premier's Chief of Staff may have been influenced by something communicated to her and that influence might well have informed, consciously or unconsciously, the advice she would then give to the Deputy Premier.[141]

[139] There are some significant problems with those submissions, namely:

(a) The communications between Anacta and the Deputy Premier's office were the subject of evidence, and yet there is no satisfactory evidence of any lobbying of any person within the Deputy Premier's office;[142]

(b) Nothing substantive appears to have made its way to the Deputy Premier as the decision-maker – all that made its way to the Premier was that Mr Nelson had telephoned Ms Cohen about the upcoming deadline;

(c) The evidence does establish that Ms Cohen's mobile phone number was a privileged channel of communication, or that there was privileged 'out-of-hours' access;

(d) Even if there was 'privileged access' there is no evidence that Anacta exploited that access for the purpose of lobbying the decision-maker;

(e) The evidence does not establish that Anacta gained access to the Deputy Premier, or to his office, so as to "*press Wanless' case*";

(f) There is no evidence, and no reasonable inference available, that Ms Cohen was influenced by something communicated to her in these calls, and it was

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139 Ms Cohen's first affidavit at [5]; Agreed bundle at 1979.

140 Ms Cohen's third affidavit at [4]; Agreed bundle at 1984.

141 The submissions of the Ashworth parties at [80].

142 Ms Cohen regarded the first call as a courtesy call. The Soorley-Doss call has a similar character. And the second call appears to have been a reminder about the statutory deadline.

not put to her that she was influenced by something substantive communicated to her by Mr Nelson;

(g) It is difficult for the court to conclude that, *one*, Ms Cohen was influenced by something (unidentified) which Mr Nelson communicated to her and, *two*, that whatever was communicated to her somehow influenced her advice to the Deputy Premier;

(h) Those propositions were never put to Ms Cohen and, in any event, Ms Cohen's testimony was that all that made its way to the Deputy Premier was that Mr Nelson had telephoned Ms Cohen about the upcoming deadline – Ms Cohen was not challenged about that and her evidence should be, and is, accepted about that;

(i) In applying the 'double might' or *Ebner* test, there is limited scope for suspicions given that the apprehension of bias must be soundly or reasonably based[143] and there is a need to articulate how the source of the alleged bias may give rise to the reasonable apprehension.[144]

[140] The Ashworth parties criticise the Deputy's Premier's office for its willingness to entertain "*favourable relations*" with certain lobbyists, that is Mr Nelson and Mr Soorley.[145] However, the evidence does not establish anything that could be characterised as 'favourable relations' or the receipt of lobbying. In short, nothing substantive appears to have been communicated in any of the three phone calls.

[141] Applying the first stage of the High Court's two-stage process explained in *CNY17 v Minister for Immigration and Border Protection*[146] I cannot identify anything in the telephone calls that might lead the decision-maker, here the Deputy Premier, to decide whether to call-in other than on its legal and factual merits. Certainly, the one communication that does seem to have infiltrated its way through to the Deputy Premier, namely that Mr Nelson had telephoned Ms Cohen about the upcoming deadline, can hardly be said to qualify as a communication likely to affect the Deputy-Premier's impartiality.

Correspondence

[142] The request for the Deputy Premier to call-in the Wanless application is dated 30 September 2021 from Wanless' town planner, Urbis. The request is a detailed submission. When it was received somebody in the Deputy Premier's office noted: "*Admin – I will add this to the DP's VIP Corro*".[147] The joint applicants contend that this meant that the Wanless request received privileged treatment – an aspect discussed below.

[143] In her evidence Ms Cohen explained how correspondence is dealt with in the Deputy Premier's office:

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143 See Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed at [10.40] quoting *Gas & Fuel Corporation Fund v Saunders* [1994] 52 FCR 48.

144 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7].

145 The submissions of the Ashworth parties at [81].

146 [2019] 268 CLR 76 at [58], [59].

147 Agreed Bundle at 1542.

(a) in her role as Chief of Staff to the Deputy Premier, she is responsible for the management of the Deputy Premier's Office, including the administrative processes that are implemented to manage correspondence;

(b) the email account with the email address *deputy.premier@ministerial.qld.gov.au* (DP Email Account) is a shared inbox, which is accessible by her and by other staff in the Deputy Premier's Office;

(c) some emails to the DP Email Account are tagged as "*VIP corro*" by the administrative staff member with access to the email account if it is an email from an elected member of any level of government, from a peak body, association or stakeholder or involves a personal decision to be made by the Deputy Premier;

(d) the email dated 30 September 2021 is in the last of these categories;

(e) each day, correspondence in the DP Email Account that is tagged "*VIP corro*" is printed and placed in a folder to be provided to the Chief of Staff and the Deputy Premier.

[144] On the other hand, the joint applicants contended that:

(a) the Deputy Premier gave special "*VIP corro*" treatment to the lobbyists' client's call-in request;[148]

(b) Ms Cohen's evidence establishes an administrative practice that emails from a "*key stakeholder*" are tagged as "*VIP corro*";

(c) the court should find that the Deputy Premier gave the call-in request "*VIP*" treatment because the lobbyists and Mr Soorley paved its way to him; they were, and they made Wanless, "*key stakeholders*";

(d) the court should give no weight to Ms Cohen's ex-post facto explanation that "*VIP corro*" could also describe matters destined for a personal decision by the Deputy Premier;

(e) no internal guidelines or operating procedures for administrative staff in the Deputy Premier's office are adduced to verify Ms Cohen's characterisation;

(f) the label "*VIP corro*" only sits comfortably as a label for "*key stakeholders*" and not as a label for matters to be decided personally by the Deputy Premier;

(g) it surely cannot be in contention that the acronym "*VIP*" means "*Very Important Person*".

[145] Thus, the joint applicants' submission was that Wanless was classified as a 'key stakeholder' or a "*Very Important Person*" and therefore accorded priority or special treatment. However, the evidence and the context illustrate some problems with that characterisation of these facts.

[146] *First*, there were no internal guidelines as to what was to be included in the "*VIP corro*" file. The likelihood is that that was because the process of allocating some

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148 Submissions of the Joint Applicants at [38], [48].

communications to the "*VIP corro*" file was a relatively informal process. Ms Cohen' cross-examination involved this exchange:

> But you would agree with me, I'm sure, that the acronym "VIP" means "very important person"?--- The acronym VIP means very important person. Yes, I agree.
>
> And has a classical connotation of, kind of, special access, roped of areas, that kind of stuff, in its classical connotation?--- In its – in its classical – in its - - -
>
> I know what you say about this. And we'll talk about it in a moment?--- - - - classic connotation, I'd – there's – there's certainly nothing very – very glamourous or red-carpet, razzle-dazzle associated with our correspondence process.
>
> Well, no. But the thing about getting into the VIP corro file, as I understand your evidence, is that that correspondence gets printed out and given in a folder to both you, as the Chief of Staff, and to the deputy premier personally?--- That's correct. **And that's the sum total of the significance of the VIP corro designation. It simply gets printed out and put in a manilla folder. It doesn't dictate any other step in the correspondence handling process. It doesn't lead to a quicker turnaround time or any kind of more senior examination within the Department.** It is simply an administrative process to allow for certain types of correspondence to be printed and a copy given to me and the deputy premier.
>
> For the purposes of reading?--- Yes. For the – for the purposes of general awareness.
>
> By the people who are reading it, who are the deputy premier and the Chief of Staff to the deputy premier?--- Yes.
>
> Thank you. So if I send a piece of correspondence to the deputy premier, it doesn't go in the VIP corro file and doesn't get printed out for you and he to read?--- Well, Mr Holt, if you were to send a letter to the deputy premier, it almost certainly would be printed out into the VIP corro folder.
>
> Well, I don't seem to fit into any of the categories. But let's - - -?--- As – as would correspondence - - -
>
> - - - close up this rabbit hole for a moment - - -?--- As would correspondence from your client.[149] [emphasis added]

[147] Ms Cohen explained that correspondence from Mr Holt's client (meaning Austin BMI Pty Ltd), and his client's parent company, had previously appeared in the "*VIP corro*" file. She explained that an email from one of the residents of the Willowbank area to the Deputy Premier would appear in the "*VIP corro*" file if it concerned a call-in request. That was because a call-in request was something that required the Deputy Premier's personal attention and was unable to be delegated.[150]

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149 Transcript T1-62 line 29 to T1-63 line 16.

150 Transcript T1-63 lines 34-43.

[148] That evidence rather directly explains that the label "*VIP corro*" file was not designed to confine the contents of the file to communications from persons who could be classified as 'VIPs'. It was little more than an informal label for communications that should be printed and available to be perused in hard copy. Further, it is relevant to note that there is no evidence that the correspondence that did not make it into the "*VIP corro*" file was ignored or cast aside as dross.

[149] Ms Cohen's evidence, quoted above, was that the designation "*VIP corro*" did not dictate any other step in the correspondence handling process. It did not speed up a response and did not lead to the correspondence being handled by a more senior staff member.

[150] In short, I am unable to reach the conclusion that the "*VIP corro*" file was confined to communications from persons, corporations or entities that might be classified as VIPs. The Deputy Premier's office was performing something of a triage exercise for incoming correspondence and, as part of that process, some correspondence was printed and placed in the "*VIP corro*" file merely to ensure that hard copies were available to the Deputy Premier and the Chief of Staff at the time the correspondence came in – rather than when the electronic versions of the communications came to be addressed.

[151] *Second*, that view of the "*VIP corro*", as having a temporal role, accords with Ms Cohen's description that a key part of her role, and presumably her staff, was to manage information flow.[151] And so the printing of the communications, and the placing of them on the "*VIP corro*" file, enabled Ms Cohen and the Deputy Premier to be aware of the "*VIP corro*" at the time it came in. That was the effect of this part of Ms Cohen's evidence:

> Who gets read by the Deputy Premier?--- It's about the timing of which – that gets read by the Deputy Premier, to be – to be quite specific. The purpose of the VIP corro folder is to allow the Deputy Premier and me to have awareness of correspondence that has come in at close to the time, you know – close to or near enough close to the time at which it's sent. The Deputy Premier – without that process, the Deputy Premier isn't going to see correspondence that's sent to him until it comes back to him with a response for his consideration.
>
> With a response drafted either within the office or by the department depending on the nature of the inquiry?--- It'll be by – by the department, and, in fact, he might – and he won't see the response to all correspondence - - -
>
> All right?--- - - - that is sent to him, because far too much correspondence gets sent for him to deal with personally. A lot of it will be dealt with in the department without him ever seeing it. There are some types of correspondence that he ought to have some awareness of, because someone might call him about it, a journalist might ask him about it at a press conference, a colleague might ask him about it when they're in Parliament, and that is – and that is why there are some things that he needs, in my judgment, or the – would need to know about close to the time at which it's sent and can't wait until it comes back to him with a response. And those things are, as set out in paragraph 6 of my second affidavit, if we're to try to

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151 Transcript T1-48 line 19.

> reduce them into a – into, you know – into a category, it's correspondence from any State, Local or Federal Member of Parliament, government, opposition or crossbench - - - [152]

[152] In cross-examination, Mr Holt KC[153] put to Ms Cohen that emails that required a personal decision or action by the Deputy Premier was not a category of communications that has any logical relationship to the title 'VIP'. Ms Cohen's response was as follows:

> If the email requires a personal decision to be made or action taken by the Deputy Premier?---Yes.
>
> Now, that is not a category that appears to have any logical relationship to the title VIP?--- No.
>
> No?--- It's not. And that's why I say that VIP corro is a shorthand.
>
> Well, it's not in – shorthand tends to indicate - - -?--- It's a – it's a shorthand name within our office - - -
>
> Well, on this explanation, isn't it just - - -?--- For that process.
>
> Isn't it just wrong?--- Well, no. It's what we call – it's the name that we've given to the administrative process of printing out certain types of correspondence for the Deputy Premier to read on a day-to-day basis.[154]

[153] *Third*, the evidence does not connect, on the one hand, the calls from Mr Nelson and Mr Soorley and, on the other hand, the allocation of Wanless' call-in request to "*VIP corro*". In fact, there is no evidence that suggests that it was a mistake or inappropriate to ensure that a hard copy of the call-in request was available to the Deputy Premier and his Chief of Staff soon after it was received. The very nature of the request supports the idea that both Ms Cohen and the Deputy Premier needed to be promptly informed of the call-in request.

[154] And so, I am not satisfied that the office of the Deputy Premier gave any special treatment to Wanless' call-in request. By being printed, and thereby being available to be perused by the Deputy Premier and his Chief of Staff, the call-in request received the personal attention of the Deputy Premier and his Chief of Staff. That was the priority it deserved. There is certainly no evidence that Wanless' call-in request received a priority that was not justified, or which its competitors would not have received in a similar situation.

[155] Applying the first of the two-stage process in *CNY17 v Minister for Immigration and Border Protection*,[155] I am unable to identify anything in the treatment of the correspondence that might lead the Deputy Premier, the decision-maker, to decide the call-in request other than on its legal and factual merits. The call-in request has not been shown to receive preferential treatment beyond that which would be afforded to call-in requests by its competitors or by any entity requesting a call-in.

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152 Transcript T1-64 line 38 to T1-65 line 15.
153 Mr SC Holt KC appeared with Ms S Spottiswood for the joint applicants.
154 Transcript T1-65 line 65.
155 [2019] 268 CLR 76 at [58], [59].

And so, there is no satisfactory evidence identifying the conduct that is said to affect the Deputy Premier's impartiality.

Engagement of Anacta and Anacta's Donations to the ALP

[156] The joint applicants point out that on 1 October 2021 Wanless requested that the Deputy Premier call-in Wanless' development application. They say that, only four weeks later, on 28 October 2021, Wanless' lobbying firm, Anacta, made a $30,000 donation to the Deputy Premier's political party, the ALP. A further donation of $5,500 was made by Anacta on 17 November 2021. On 29 November 2021, the Deputy Premier approved the recommendation to issue a proposed call-in notice. Ultimately, after receiving representations by 21 December 2021, the Deputy Premier made the call-in decision on 27 January 2022.

[157] Evidence from the Electoral Commission of Queensland's electronic disclosure system establishes that Anacta made frequent but irregular donations to the ALP between 16 July 2019 and 20 June 2022. Dealing only with the donations made prior to the call-in decision on 27 January 2022,[156] the donations are as follows:

Date of Donation	Amount
16.07.2019	$1,870.00
09.09.2019	$900.00
10.09.2019	$900.00
27.09.2019	$1,100.00
29.10.2019	$160.00
30.01.2020	$250.00
10.02.2020	$1,200.00
27.02.2020	$770.00
16.03.2020	$950.00
16.03.2020	$330.00
30.07.2020	$1,000.00
05.08.2020	$1,320.00
20.08.2020	$6,577.09
24.08.2020	$1,375.00
26.08.2020	$100.00
26.08.2020	$5,000.00
27.08.2020	$750.00
03.09.2020	$250.00
06.09.2020	$478.02
06.09.2020	$1,584.00
22.09.2020	$1,100.00
23.09.2020	$880.00
02.10.2020	$3,119.00
08.10.2020	$10,000.00
10.10.2020	$2,251.50
29.10.2020	$500.00
04.11.2020	$6,093.22

156 A donation of $35,000 was made on 15 February 2022 – shortly after the call-in decision.

30.11.2020	$1,584.00
30.05.2021	$28,950.00
28.06.2021	$300.00
29.06.2021	$1,000.00
12.10.2021	$2,005.40
15.10.2021	$3,611.61
28.10.2021	$30,000.00
08.11.2021	$2,500.00
17.11.2021	$5,500.00
25.11.2021	$990.00
09.12.2021	$2,000.00
Total	$129,248.84

[158] Those donations comprise 38 irregular amounts totalling $129,248, with a range from $100 to $30,000, and an average of just over $3,400. The two largest amounts, $28,950 on 30 May 2021 and $30,000 on 28 October 2021, exceed the other donations with some leeway, although the 30 May 2021 donation was preceded by no donations at all in the 6-month period between 30 November 2020 to 30 May 2021.[157]

[159] The relevant category here, again adopting the categories described by Deane J in *Webb v The Queen*,[158] is 'disqualification by association'. For judicial officers, the Australian Law Reform Commission Report 138 describes the relevant principles in this way:

> A judge's association with a party or other person involved in the proceedings may also result in an apprehension of 'prejudice, partiality or prejudgment'. This includes relationships with family members, personal friends, counsel, witnesses, or organisations that may suggest a lack of impartiality. Whether a reasonable apprehension of bias arises depends on the nature and extent of the relationship and the application of the *Ebner* test. Ultimately, the question is whether the reasonable observer would consider that the existence of the association might 'divert the judge from deciding the case on its merits'.[159] [footnotes omitted]

[160] Of course, the principles that apply to judges are not so easily applied to other decision-makers. Relationships and associations that would be impermissible for judicial officers may be permissible and unobjectionable in a statutory body which is entrusted with other functions which necessitate a continuing relationship with those engaged in a particular industry.[160] And, where the decision-maker is a Minister, and therefore likely to be a member of a political party, a reasonable

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157 The highest of the other donations is $10,000, with another of $6,093, although there is a donation on 15 February 2022 of $35,000.

158 (1994) 181 CLR 41 at 74. See the discussion above at the section: FIRST GROUND: APPREHENDED BIAS, The Bias Rule.

159 ALRC Report 138 at [3.36].

160 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 90; Aronson, Groves & Weeks (supra) at 693 [10.330].

observer would accept that the Minister's decision is to be made in the context of the Minister's active involvement in political affairs.

[161] In invoking the device of the hypothetical fair-minded observer, it is important not to jump to a characterisation of the process as "*tainted*". A reasonable observer who knows some of the facts, but not others, might be suspicious about what had gone on.[161]

[162] As McHugh J said in *Hot Holdings Pty Ltd v Creasy*:

> …no conclusion of apprehended bias by association can be drawn until the court examines the nature of the association, the frequency of contact, and the nature of the interest of the person associated, with the decision-maker. It is erroneous to suppose that a decision is automatically infected with an apprehension of bias because of the pecuniary or other interest of a person associated with the decision-maker. Each case must turn on its own facts and circumstances.[162]

[163] And so, all the circumstances, including the nature of the association, the frequency of contact, the nature of the interest of the associated person, needs to be examined. In doing so, the purpose of the examination is to apply the two-stage process of the 'double might' test explained by the High Court in *CNY17 v Minister for Immigration and Border Protection.*[163] *First*, what is it that is said to affect the decision-maker's impartiality? *Second*, what is the logical connection between the identified thing and the feared deviation from deciding the case on its merits?

[164] The following circumstances and context are relevant to those two questions.

[165] The *first* involves looking at the lobbying aspect. Anacta is a registered lobby group. Lobbying is a lawful activity as part of our democratic process, albeit a regulated activity. Lobbying is regulated by Chapter 4 of the *Integrity Act 2009*.

[166] The *second* involves the donations aspect. Donations to political parties are also lawful but regulated by Division 6 of the *Electoral Act 1992*.[164]

[167] The *third* is that both donations and lobbying are part of the political process. There is nothing in the legislation that prohibits donations by a lobbyist. Whether desirable or not, the legislative context makes clear that, subject to appropriate regulation, parties are entitled to make donations to political parties. They are entitled to lobby decision-makers. It is, apparently, to be expected that lobbyists will make representations and donations to political decision-makers.[165]

[168] An idealistic observer would entertain some apprehension at the idea that a decision-maker might be subject to persuasion from a lobbyist who donated to the

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161 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [20] per Gleeson CJ.

162 (2002) 210 CLR 438 at [74].

163 [2019] 268 CLR 76 at [58], [59].

164 Applegarth J considered a part of the regulatory regime that prohibited donations from property developers in *The Australian Institute for Progress Ltd v Electoral Commission of Queensland* (2020) 4 QR 31.

165 See *Town of Gawler v Minister for Urban Development and Planning* [2011] SASC 26 at [76]-[79] (a case relied on by the Deputy Premier at [85] of his submissions).

decision-maker's political party. Idealism, though, has no particular role to play in 'thought experiment' that comprises the fair-minded lay observer.[166] The fair-minded lay observer would take into account the legislative background.[167]

[169] *Fourth*, Wanless was one of Anacta's many clients. Anacted acted for a number of other organisations in Queensland such as Downer Group, Football Queensland, Glencore Holdings Australia Pty Ltd, Griffith University, Lion Beer Spirits & Wine Pty Ltd, Queensland Motorways Pty Ltd, and Tabcorp Holdings.[168] And Anacta's donations were to the Deputy Premier's political party. In that way the donations are more diffuse than might have been the case if, say, Wanless itself had directly donated to the Deputy Premier's campaign for re-election.

[170] The donations were made by Anacta. There is no evidence of any donations by Wanless itself. And there is no evidence of any connection between the Anacta donations and Wanless.

[171] *Fifth*, as explained, here there is no evidence of a substantive lobbying exercise undertaken by Anacta on behalf of Wanless and targeted at the Deputy Premier. And, the donations are part of Anacta's irregular practice of donating to the ALP. They have no demonstrated temporal connection to the call-in decision and no connection with Wanless – except that Wanless was one of Anacta's clients.

[172] *Sixth*, even if the fair-minded lay observer were concerned by the involvement of a lobbyist who was also a donor to the decision-maker's political party, it is important to consider whether there is a logical connection between, on the one hand, the lobbying and the donations and, on the other hand, the fear that the Deputy Premier may deviate from deciding the call-in on its merits. That is the second stage of the High Court's two-stage process explained in *CNY17 v Minister for Immigration and Border Protection*.[169]

[173] Here, there is no evidence that the Deputy Premier knew of the donations or even that it can be inferred that he must have known of the donations at the time they were made. Indeed, it would be surprising if Ministers were kept up to date on donations made to their political party in, effectively, real time. The donations list, taken from the Electoral Commission records merely records the dates of the donations by Anacta to the ALP. The evidence does not establish whether or when the fact of those donations was passed on to the Parliamentary wing of the ALP, or when the donations became public, or when it might be expected that the Deputy Premier became aware of the donations. The issue was not explored in the cross-examination of Ms Cohen, the Deputy Premier's Chief of Staff.

[174] Therefore, it has not been demonstrated that there is any connection between the donations made by Anacta and the Deputy Premier's decision-making process. The

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166 The Hon Richard Chisholm, '*Apprehended Bias and Private Lawyer-Judge Communications: The Full Court's Decision in Charisteas*' (2020) 29(3) Australian Family Lawyer 18, 30 discussed in the ALRC 138 at [3.27].

167 The hypothetical observer will consider the relevant legislation: see the discussion in Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th edition at [10.80] - [10.110]; see also *CNY17 v Minister for Immigration and Border Protection* [2019] 268 CLR 76 at [58], [59].

168 Agreed Bundle at 1332-1334; see also Transcript T3-29.

169 [2019] 268 CLR 76 at [58], [59].

same is true of lobbying. Ms Cohen concedes that she reminded the Deputy Premier of the statutory deadline for a decision on the Wanless application and that she told the Deputy Premier that Mr Nelson had telephoned her about that deadline.[170] Thus, the Deputy Premier must have known that Mr Nelson and Anacta were concerned to ensure the deadline was met. But there is no suggestion that there was any contemporaneous lobbying of the Deputy Premier or his Chief of Staff on the merits of the application for a call-in.

[175] It is possible that the donations and lobbying and might be carried out in a subtle way. But nothing in the circumstances supports the idea that the mere advice to the Deputy Premier that Mr Nelson and Anacta were concerned to ensure the deadline was met comprised a nuanced lobbying communication, let alone a nuanced communication that called in aid Anacta's donations to the ALP.

[176] Therefore, in my view, there is something quite unrealistic in this submission by the joint applicants:

> "*The timing of this second donation coincided with another, unscheduled, outside-of-work-hours telephone call by Mr Nelson to the mobile phone of Ms Cohen.*"[171]

[177] No conclusions can be drawn about the timing of the donation. The Deputy Premier may not have become aware of the donation until weeks or months later, or he may never have become aware of the donations. All that is known is that the donations were made by Anacta to the ALP on the dates stated. And, as explained, there was no substantive content to the telephone calls. The only aspect communicated to the Deputy Premier was the impending deadline.

Six Additional Documents – Out of Time

[178] The deadline for representations to the Deputy Premier was 21 December 2021. However, on 25 January 2022, after the expiry of the deadline for representations, Wanless' town planner, Urbis, sent to the Director of Development Assessment in DSDILGP[172] six additional documents urging him to call-in the Wanless application.

[179] The joint applicants say that this out-of-time representation was sent directly to the Deputy Premier by email on 27 January 2022, the day by which the call-in decision had to be made. The joint applicants say that thirty-five minutes later, the Deputy Premier decided to call-in the Wanless application. On the afternoon he made the call-in decision, the Deputy Premier was conducting press conferences in Cairns.

[180] I am unable to attach any significance to the timing of the decision or the press conferences in Cairns. The issue was not explored in the evidence, and it is certainly possible that a Minister of the Crown might make a decision which is later communicated.

[181] The Deputy Premier submits that:

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170 Ms Cohen's third affidavit at [4].
171 Joint submissions at [18].
172 Department of State Development, Infrastructure, Local Government and Planning.

(a) the late material was not solicited or requested;

(b) five of the six documents had already been provided at an earlier time;

(c) the sixth document merely summarised the project and did not provide any new information;

(d) there is no evidence that the documents affected the recommendation to and decision by the Deputy Premier;

(e) in those circumstances, the reasonable fair-minded observer would attach no significance to the late representation.[173]

[182] I accept those submissions. In their reply submissions the joint applicants contend that these submissions miss the point. They submit that:

> *The issue is not that the material affected the Call In Decision; it is that it reveals willingness by the Deputy Premier's office to give preferential treatment to Wanless. No other party was permitted to give the Deputy Premier out-of-time material. In addition to the "VIP" treatment, this was a privilege enjoyed by Wanless alone.*[174]

[183] That submission might have had some force if there was some evidence that the late submission was invited, or if there were evidence that it was accepted and relied upon, or if the late material contained new material. I am unable to infer preferential treatment when there is no evidence of any positive step by the office of the Deputy Premier. On balance, it seems unlikely that these facts would concern the reasonable fair-minded observer.

Truncation of the Representation Period

[184] Nor does the evidence establish that the fair-minded observer would be troubled by the Deputy Premier's decision to truncate the representation period to 16 business days. The *Planning Regulations 2017* specify a minimum representation period of only 5 days.[175] Some 61 representations were received. No evidence suggests the period was unreasonable, or that the period of 16 business days – to 21 December 2021 – was effective to 'shut out' some intended representors. The period of 16 business days is not disproportionate to the period of 20 business days for the Minister to consider each of the representations

Conclusions

[185] Looking at all of the circumstances, a fair summary[176] is as follows:

(a) The first phone call between Mr Nelson and Ms Cohen on 21 September 2021 comprised a 'heads up' or a courtesy call that the request for a call-in of the Wanless application was on its way.

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173 The Deputy Premier's submissions at [102].

174 Joint applicants reply submissions at [45].

175 Regulation 50 provides: *The representation period for a proposed call in is the period, of at least 5 business days after the proposed call in notice is given, stated in the notice*.

176 Of course, the danger in any summary like this is some features are jettisoned in the exercise of abbreviating.

(b) The Soorley-Doss phone call on 1 October 2021 comprised a call by Mr Soorley to Mr Doss, the relevant Director-General, advising that a call-in request was coming later that day asking the Deputy Premier to consider calling in the Wanless application. Mr Doss relayed this information to the Deputy Premier's Department Liaison Officer, who notified Ms Cohen.

(c) The second phone call between Mr Nelson and Ms Cohen on 17 November 2021 had the character of a reminder that there was an upcoming statutory deadline for the call-in decision.

(d) The only aspect of the three phone calls that was communicated by Ms Cohen to the Deputy Premier was to the effect that Mr Nelson had telephoned her about the upcoming deadline for deciding the call-in.

(e) There is no basis for concluding that Wanless' call-in request, by being placed in the 'VIP Corro' file, received a priority that was not justified or which its competitors or other entities would not have received in a similar situation.

(f) There is no evidence that the Deputy Premier knew of the donations or even that it can be inferred that he must have known of the donations at the time they were made.

(g) The late material was not solicited or requested. Five of the six documents had already been provided at an earlier time and the sixth document merely summarised the project and did not provide any new information. There is no evidence that the documents affected the recommendation to or decision by the Deputy Premier.

[186] Thus, looking at all the circumstances in a collective way, and applying the two-stage process of the 'double might' test, there is an absence of any lobbying that might be said to affect the Deputy Premier's impartiality and the donations are not shown to have a logical connection with the Deputy Premier's decision-making.

Objection to the Coaldrake Report

[187] The joint applicants sought to rely on the *Final Report of the Review of Culture and Accountability in the Queensland Public Sector* of 28 June 2022,[177] a report commonly known as the 'Coaldrake Report' because the reviewer was Professor Peter Coaldrake. The focus of the review, established by Premier Annastacia Palaszczuk on 18 February 2022, was on culture and accountability in the Queensland public sector and required the reviewer to consider both the accountability and integrity framework overall, but also its component parts and how those parts interact.

[188] The methodology of the report was explained in this way:

> Central to our analysis have been the views and experiences of members of the public and external organisations who have observed or experienced the

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177 https://www.coaldrakereview.qld.gov.au/assets/custom/docs/coaldrake-review-final-report-28-june-2022.pdf

> system. Equally important have been the observations of those who work at a variety of levels within it.
>
> In all, the Review received 327 submissions and almost 100 meetings were held. All written submissions have been read and acknowledged. Many of those who made submissions, either written or oral, were extremely concerned that their confidentiality be respected. That assurance stands. Where a quote from an individual is referred to in this Report, the prior consent of that individual was obtained with the condition that they remain unable to be identified.
>
> Some of the meetings we have held have been with those who have made submissions, often at their request. Others have involved ministers and Directors-General, both present and past, as well as office holders, public sector employees at all levels and including from integrity bodies, community groups, academics, ministerial advisers and representatives of the business sector.
>
> In terms of the submissions themselves, we assessed the information carefully and made provisional assessments of the reliability of the things that we were told, having regard to whether those things were confirmed by other independent evidence, along with the probability that what was said was correct.
>
> Naturally, we considered the motivations of individuals to exaggerate and the possibility of self-interest or unconscious bias that could affect their recollections. This process was not like a court case where our findings depended upon accepting the honesty and reliability of one or a few key witnesses. Instead, we obtained and assessed a large volume of information and opinions from diverse sources.
>
> The information that we were given was not sworn under oath. However, we doubt whether the matters upon which we rely, which came from many separate sources, would have been very different had we engaged in the long and laborious process of requiring those informing us to give sworn testimony. Had that course been adopted, then the Review would have been protracted, much more expensive and obviously legalistic. Still, this is a review and inquiry into the real state of play, of how a system and its component parts work and function together for the benefit of the community. We are confident that the information that has informed the Review's conclusions provides a reliable basis for those conclusions and a useful one for moving forward.[178]

[189] The report states the views of Professor Coaldrake, assisted by a small team of reviewers, and those views are based on unsworn statements and submissions of various people, many of whom are not identified.

[190] The joint applicants sought to rely on the Coaldrake Report and on two related documents, namely a joint statement issued by the Queensland Cabinet and Ministerial Directory[179] and a transcript of a press conference with the Premier.[180]

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178 Coaldrake Report at page 5.

179 Agreed bundle at 1519.

All three documents were objected to on the basis that they are irrelevant because they postdate the call-in decision by some five months,[181] and because they address a different question. The documents were also objected to on the basis that they comprise hearsay and opinion. It is necessary to make a ruling on the admissibility of the three documents.

[191] It is necessary to understand why the joint applicants seek to rely on the Coaldrake Report and the associated documents. One of the recommendations made in the Coaldrake Report was that the regulation of lobbyists be strengthened through the explicit prohibition of lobbyists conducting the practice of "*dual hatting*". The report explained the problem in this way:

> The skills of specialist lobbying firms have seen them operating both as lobbyists to governments and political consultants to the parties competing for government. This issue drew attention during the 2020 Queensland election when it was reported, and has since been confirmed, that the two largest lobby groups worked on the government's re-election campaign. Similar circumstances have occurred in elections at local government level.
>
> The appearance of guiding a political party to office one week and then advocating a client's case for a government or council decision a few weeks later naturally raises suspicion which cannot be remedied by promises to impose 'Chinese walls'. Suspicions about 'dual hats' may be heightened if subsequent government decisions favour clients of the firms engaged to run election campaigns.[182]

[192] The result of the Coaldrake Report was that the Cabinet, which included the Deputy Premier, banned Mr Nelson and Mr Moorhead from lobbying the Queensland Government for the remainder of the Government's term. The joint applicants submit that the Cabinet decision is relevant to this case because it constitutes an admission that the involvement of Mr Nelson in the Ministerial decision-making is apt to create an appearance of bias.[183] That admission is said to be relevant to what a fair-minded lay observer would consider in assessing whether the call-in decision is affected by apprehended bias.[184] According to the joint applicants, the hypothetical fair-minded lay observer would take note of the fact that the Deputy Premier has since acknowledged that Mr Nelson's involvement in Ministerial decision-making is apt to create an appearance of bias.

[193] I am unable to accept that reasoning.

[194] The sequence of reasoning relied on by the joint applicants has no real logic to it. The sequence seems to be that the opinions and recommendations expressed in the Coaldrake Report, which are themselves based on opinions and submissions of various stakeholders, have led to the Cabinet accepting the recommendation to ban

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180 Agreed bundle at 1521.
181 The call-in decision was made on 27 January 2022. The Coaldrake Report is dated 28 June 2022.
182 Coaldrake Report at p 56.
183 Submissions in reply of the applicants at [106].
184 Submissions in reply of the applicants at [107].

'dual hatting'. That ban, it is said, constitutes an admission by the Deputy Premier, whatever his own personal views, that the involvement of Mr Nelson in Ministerial decision-making is apt to create an appearance of bias.

[195] The problems with that reasoning are that:

(a) the sequence does not start with a factual base – it starts with a report of Professor Coaldrake's opinions, and his team's views, which are themselves based on unsworn opinions and submissions made to the review;

(b) the reasons for Cabinet's decision to accept the recommendation and ban 'dual hatting' are not clear and may well involve various different considerations for different Ministers;

(c) the precise admission is not identified or clear.

[196] Mr Webster, counsel for Wanless,[185] concentrated on that last point. His submission (which I accept) was that, in effect, to accept this ban as an admission by the Deputy Premier is to ignore the warnings concerning informal admissions, particularly matters involving mixed fact and law, explained by Gummow J in *Dovuro Pty Ltd v Wilkins*.[186] Care must be taken to identify the admission contended for and the factual basis for that admission. Here, there is nothing in the three documents that can constitute an admission by the Deputy Premier that Mr Nelson's involvement in Ministerial decision-making is apt to create an appearance of bias. Certainly, no specific admission was identified in the course of argument.

[197] If the three documents are not admissible as admissions, then on what basis could they be relevant and admitted into evidence? The joint applicants say that the three documents are relevant to what a fair-minded observer would consider in assessing whether the call-in decision was affected by apprehended bias. The joint applicants submit that the hypothetical fair-minded observer would take note of the fact that the Deputy Premier has since acknowledged that Mr Nelson's involvement in Ministerial decision-making is apt to create an appearance of bias because of the findings in the Coaldrake Report.[187]

[198] Whilst one should be careful not to limit the capacity of the hypothetical fair-minded observer to take note of any relevant facts, there is no justification for requiring that fair-minded observer to take note of what occurs into the future. To return to the 'double might' or *Ebner* test explained at the beginning of this section, the apprehended bias rule arises where a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the decision.[188] As explained, the hypothetical fair-minded observer is taken to be aware of the nature of the decision and, importantly for present purposes, the context in which the decision was made, as well as knowledge of the circumstances

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185 Mr R Traves KC appeared with Mr SJ Webster and with Ms S Marsh for Wanless in each application.

186 [2003] 215 CLR 317 at [66]-[71]. Heydon J agreed at [177] and McHugh agreed at [40]. Whilst in dissent as to the result, Gleeson CJ agreed on this aspect at [25].

187 Submissions in reply of the applicants at [107].

188 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Charisteas v Charisteas* (2021) 95 ALJR 824 at [11] (per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

leading to the decision.[189] But no authority requires that the hypothetical fair-minded observer be aware of any concessions that might be made some months, or perhaps even years, after the decision. It is unreasonable to require the hypothetical fair-minded observer to be so industrious.

[199] Nor is it appropriate to require that the fair-minded observer to take note of an 'acknowledgement' which, like the alleged admission, does not appear in the three documents.

[200] Finally, it is worth noting that the joint applicants' argument for the admissibility of the three documents is based on an alleged acknowledgement that Mr Nelson's involvement in Ministerial decision-making was apt to create an appearance of bias. However, as explained, the joint applicants have not established that Mr Nelson had any substantive involvement in the Deputy Premier's call-in decision.

[201] For those reasons, I rule that the three documents are not relevant and are thus inadmissible. I accept Wanless' submissions that:

(a) the Coaldrake Report was a general review, well after the fact, which gave no consideration to and made no findings about the specific call-in decision;

(b) to the extent the Coaldrake Report includes facts, they must be established in the usual way not by relying on the report; and

(c) to the extent the report contains findings, recommendations or statements of opinion, these all post-date the decision and are thus irrelevant.[190]

[202] Even if the three documents were permitted into evidence, they would have little or no relevance having regard to the fact that they postdate the call-in decision by some months and do not comprise facts but instead comprise opinions, or are based on opinions, which are themselves based on submissions and opinions.

Discretionary Matters

[203] For the reasons stated apprehended bias has not been established.

[204] If the opposite view had been reached, Wanless invited the court to refuse to exercise the discretion to grant relief.[191] Wanless' submission was that the decision that is challenged is merely the decision by the Deputy Premier to call-in the application. In that sense, it is argued, the only substantive consequence of the call-in decision is for the Deputy Premier to decide the application rather than the Council. Thus, Wanless argues that it would be appropriate for the court to decline to exercise its discretion to interfere in a process which has not reached its end point and has not resulted in any final decision which directly affects the underlying commercial interests of the commercial applicants or the economic and social interests of the Ashworth parties.

[205] If apprehended bias had been established, in my view the applicants would be entitled to relief. Citizens are entitled to expect that the statutory decisions of

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189 Ibid.

190 Wanless' submissions at [114(g)].

191 As to the existence of the discretion to refuse relief, see *Garde-Wilson v Legal Services Board* (2018) 19 VR 398 at [99] – a case relied on by Wanless in their submissions at [127].

Ministers of the Crown for public purposes would be attended by integrity in the decision-making process. A significant countervailing factor would need to be present for the court to decline to exercise the discretion.

[206] It is true that the legislative scheme involves a multi-stage decision-making process, and that the process is not yet at the point where the application is to be determined on its merits. However, there is an important public purpose served by the legislative scheme. In those circumstances, if the decision-making was clouded by apprehended bias, the applicants would be entitled to relief.

Necessity

[207] Wanless argued that, even if apprehended bias was shown, the Minister's decision should not be set aside because it was necessary for the Deputy Premier to exercise the power to discharge his statutory function.[192] This principle was referred to in argument as the doctrine of necessity.

[208] However, as the joint applicants point out, the doctrine applies where no decision-maker without such a disqualifying interest can exercise the statutory power. Here, section 281 of the *Planning Act* gives the Minister broad power to delegate any of the Minister's functions under the Act to an appropriately qualified public service officer or to another Minister.

[209] As it turns out, it is not necessary to decide this issue.

SECOND GROUND: FAILURE TO CONSIDER REPRESENTATIONS

The Issue

[210] The joint applicants submit that the Deputy Premier failed to obey the statutory command to consider any representations made during the representation period before deciding whether to call-in the application.[193] On this ground, and on the third and fourth grounds, the submissions of the joint applicants were supported by the submissions of the Council.

[211] It is to state the obvious that, as long as the decision-maker considers those things that the legislation requires to be taken into account, and ignores any prohibited consideration, the grounds of failing to take into account a relevant consideration, or taking into account an irrelevant consideration, will not be available.[194]

[212] The decision-maker's consideration of the representation must be a substantive consideration. The High Court explained the concepts in the recent decision of *Plaintiff M1-2021 v Minister for Home Affairs*:

> [24] Consistently with well-established authority in different statutory contexts, there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations. Adopting and adapting what

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192 *Builders' Registration Board of Queensland v Rauber* (1983) 47 ALR 55 at 71-72; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88-89.

193 See *Planning Act 2016* s 102(4) and the joint applicants' submissions at [53].

194 *Elias v Commissioner of Taxation* (2002) 123 FCR 499 at [57].

> Kiefel J (as her Honour then was) said in *Tickner v Chapman*, the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker. And the decision-maker is not obliged "*to make actual findings of fact as an adjudication of all material claims*" made by a former visa holder.
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> [25] It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.
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> [26] Labels like "*active intellectual process*" and "*proper, genuine and realistic consideration*" must be understood in their proper context. These formulas have the danger of creating "*a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision-maker's] decision can be scrutinised*". That is not the correct approach. As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, "[t]*he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind*". The court does not substitute its decision for that of an administrative decision-maker.
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> [27] None of the preceding analysis detracts from, or is inconsistent with, established principle that, for example, if review of a decision-maker's reasons discloses that the decision-maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument; misunderstood the applicable law; or misunderstood the case being made by the former visa holder, that may give rise to jurisdictional error.[195]

[213] A case that was not referred to in *Plaintiff M1-2021 v Minister for Home Affairs*, but is nevertheless helpful because the facts are similar, is the 2019 decision in *Stambe v Minister for Health*.[196] In that case Mortimer J was prepared to infer that the Minister had read the briefing note provided to him before he decided to exercise a statutory power conferred by s 90A(2) of the *National Health Act 1953* (C'th) and that the Minister therefore 'considered' what was in the briefing note. However, Her Honour was not prepared to draw an inference beyond that.[197]

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195 *Plaintiff M1-2021 v Minister for Home Affairs* [2022] HCA 17 at [24]-[27] (citations omitted).

196 (2019) 364 ALR 513. Both the applicants and the respondents relied on *Stambe* for different purposes: see, for example, Transcript 4-39 and 4-49.

197 (2019) 364 ALR 513 at [65].

[214] *Stambe*, of course, turned on the view that Mortimer J took of the facts. Her Honour's analysis of the facts in that case is useful because of these observations:

(a) An inference that the Minister considered the material might be available from the Minister's reasons;

(b) What the Minister examined before exercising the power, and adopting the reasons, should be the subject of evidence if there is any controversy about it;

(c) Where, as in that case, the reasons were drafted and settled by departmental officers and lawyers well after the exercise of the statutory power, and the Minister simply adopts them, it is difficult to draw inferences as to what the Minister considered, or read, at or prior to the exercise of the power;

(d) Where draft reasons are prepared and provided to the Minister at the time of the exercise of the power, and the Minister adopts them at the time, the reasons are a more reliable guide to what the Minister considered or read prior to the decision;

(e) It is appropriate to infer that a Minister reads a briefing note with which he or she is provided, where that briefing note is intended to provide the Minister with sufficient information to make the decision;

(f) Handwriting or marks or circles or underlining by the Minister may be persuasive.[198]

[215] There are some significant differences between the facts in *Stambe* and the situation here. In *Stambe* the extent of the Minister's involvement in the process was limited to his signing and dating of the briefing note. The reasons were prepared by departmental officers and lawyers well after the decision. As is explained below, here the Deputy Premier had a significant involvement in the decision-making process.

[216] Here, the joint applicants submit that:

(a) the call-in decision was precipitated by 61 representations;

(b) but the call-in decision does not suggest any kind of identification, understanding or evaluation of substantial and clearly articulated arguments in the representations opposing the call-in decision that were before the Deputy Premier;

(c) by failing to do so, the Deputy Premier fell into error;

(d) the irresistible inference, in all of the circumstances, is that the Deputy Premier simply ignored the representations.

[217] The Council make similar submissions. They say that the Minister was required to personally consider the contents of the 61 representations which ran to 738 pages. The Council contends that the Minister was required to read all of the representations and to grapple with their content, and there is no evidence that he did so. The Council discount the fact that the Minister expressly says: "*after considering all the representations, I have decided to call in the application …*".

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198 (2019) 364 ALR 513 at [71]-[74].

They say that is a mere assertion in general terms and does not show that, in fact, he did so.[199]

[218] They implicitly criticise the department's attempt to summarise the representations in 7 ½ pages but do not identify any specific failing of the summary, except that the summary "*divorced many of the arguments from their context*".[200] The Council allege a paucity of reasons (see the fourth ground) and his acceptance of the department's draft and inadequate reasons. I will consider the Council's submissions in more detail below.

Consideration of the Representations?

[219] Did the Deputy Premier ignore the representations? The Deputy Premier did not give evidence.[201] However, the evidence that the Deputy Premier considered the representations is compelling:[202]

(a) all of the 61 representations were annexed to a briefing note to the Deputy Premier prepared by Paul Beutel, a public servant whose position was Manager in Development Assessment; the briefing note was approved by Christopher Aston of the Planning Group and was endorsed by the Director-General, Damien Walker;

(b) the briefing note also annexed a detailed "*Assessment Report - Determination of call in*" which included a 12-page summary of all of the representations and a detailed analysis of those representations;

(c) that 12-page summary included references to a *Preliminary Assessment Report* dated November 2021;

(d) the representations raised an additional issue (beyond the issues raised in the Preliminary Assessment Report) that supported a call-in, namely potential impacts on the proposed SEQ Intermodal Terminal to be delivered as part of the Inland Rail project;

(e) the briefing note was signed by the Deputy Premier, which confirmed that he noted: "*the attached Assessment Report (Attachment 2) prepared by the Department of State Development, Infrastructure, Local Government and Planning (the department) that provides copies of all representations made on the proposed call in notice as well as the department's complete and accurate summary of those representations*";

(f) the briefing note, signed by the Deputy Premier, explicitly stated as the "*Key Issues*":

(i) the fact that 61 representations were received with respect to the proposed call-in notice (annexed as Schedule 1 to Attachment 2);

(ii) the Deputy Premier was now required to consider any representations made during the representation period before deciding whether to call in the application pursuant to section 102(4) of the *Planning Act*;

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199 Council submissions at [13].
200 Council submissions at [12].
201 That was a feature also present in *Stambe v Minister for Health* (2019) 364 ALR 513.
202 Deputy Premier's submissions at [115].

(iii) the department had prepared the Assessment Report at Attachment 2, which included copies of all representations received, as well as a complete and accurate summary of those representations;

(iv) the Assessment Report sets out the department's assessment that the representations did not raise additional facts, evidence or other material that would alter the department's recommendations about the reasons for issuing the proposed call in notice, including the state interests giving rise to the issuing of the proposed call in notice.

(g) the Deputy Premier gave lengthy reasons for deciding to call-in the Wanless application which recited that the Deputy Premier had received copies of those 61 representations as well as the department's summary of the representations received;

(h) the Deputy Premier's reasons explicitly recorded that: "*The material I was provided with included a summary of the potential state interests that this development involves or is likely to involve, together with discretionary grounds relevant to the decision whether to issue the call in notice.* ***I have had regard to the material*** *in determining that the application involves, or is likely to involve, a state interest and in deciding to exercise my power to issue this call in notice*." [emphasis added]

(i) The Deputy Premier's reasons included a heading '*Documents considered*' and, beneath that heading the Deputy Premier stated: "*In forming my decision to call in the development application, I had regard to the following material: Documents Departmental briefing note (Reference: MBN22/37) and attachments, including:*

- *departmental briefing note (MBN21/1567) and attachments, signed 29 November 2021;*
- *signed proposed call in notice dated 29 November 2021;*
- *Assessment Report prepared by the department, including schedules;*
- *draft call in notice;*
- *draft correspondence to the council, applicant, the referral agency and submitters enclosing the call in notice*."

(j) the Deputy Premier's reasons for the call-in included the statement that: "*The representations raised an additional matter that provides evidence to support giving a call in notice, namely potential impacts to the proposed SEQ Intermodal Terminal to be delivered as part of the Inland Rail project*";

(k) as the Deputy Premier's submissions point out, the representations raised a raft of issues in relation to environmental matters, assessment of the need for waste activities and community concern – which the Deputy Premier must be referring to when he stated: "*involves complex and significant environmental issues associated with the potential rehabilitation of mining voids and the environmental impacts of waste activities*" and the "*environmental and amenity impacts of the proposed development*".

[220] That evidence makes it clear that the Deputy Premier did consider the representations. The Deputy Premier's reasons explicitly recorded that: "*I have had regard to the material*" in circumstances where, in its context, the expression 'the material' must refer to the briefing note – a document that included the representations as well as a summary of the representations. And, if there were any doubt, the content of the reasons expressly refers to two broad issues raised by the representations, namely environmental issues and the Inland Rail project.

[221] Therefore, the evidence is that the Deputy Premier did consider the representations.

The Reply Argument

[222] In their reply submissions the joint applicants contend that the Deputy Premier has misconstrued the joint applicant's submissions.[203] The joint applicants contend that, in fact, the applicants' case is that the Deputy Premier failed to discharge his statutory function by failing to "*read, identify, understand and evaluate*"[204] substantial and clearly articulated representations arising from the representations. The Council make a similar submission.[205]

[223] The joint applicants contend that:

(a) by imposing a condition on the exercise of the call-in power to consider the representations in s 102(4), Parliament required the Minister to grapple with or evaluate substantial and clearly articulated representations that clearly arose on the materials;[206]

(b) if s 102(4) of the *Planning Act* were construed so that the Minister could ignore or skim read the representations opposing the call-in decision, it would render the statutory entitlement to make representations inutile and collide with the obvious purpose of s 102;

(c) there is no evidence that the Minister performed his statutory task with respect to any of the substantial and clearly articulated representations opposing the call in;

(d) the nature, form and content of the representations were not such as to absolve him from considering clearly articulated opinions within them;

(e) the Deputy Premier and Wanless can only point to statements that the Minister "*considered*" the representations or "*had regard to*" them;

(f) but statements to that effect are not determinative;

(g) that is particularly so where the Department provided the Deputy Premier with a pre-prepared set of reasons (which was unaltered by the Deputy Premier) that stated that he "*considered*" and "*had regard to*" the representations before he had even seen them;

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203 The joint applicants' reply submissions at [53].

204 The expression "*read, identify, understand and evaluate*" is the expression used by Kiefel CJ, Keane, Gordon, and Steward JJ in *Plaintiff M1-2021 v Minister for Home Affairs* [2022] HCA 17 at [24] – quoted above.

205 See the Council's submissions at [12], [13].

206 The Council's submissions at [13] speak of there being no evidence that the Minister actually read the representations and grappled with their contents.

(h) as the Deputy Premier was required to set out findings on material questions of fact and refer to evidence or other material on which those findings were based, a reviewing court can generally expect to see consideration of the representations reflected in the reasons given;

(i) if they were not reflected in the reasons, there is an inference that the Minister did not consider the representations to be material, contrary to his statutory task;

(j) if the Deputy Premier had in fact considered those clearly articulated representations but omitted to include them in his reasons, he could have given evidence that he did consider them. He has not. It should be inferred that his evidence would not have assisted him.[207]

[224] There are a number of problems with those contentions.

[225] *First*, whilst it is true that in *Plaintiff M1-2021 v Minister for Home Affairs* the High Court used the expression "*read, identify, understand and evaluate*", care needs to be taken not to use those words, or other similar words as a formula. As the quotation above demonstrates, the High Court warned against using a formula of words.[208] Here, of course, the joint applicants concentrate on the word 'evaluate'. That use of the formula here elevates the requirement of the legislation, that the Minister 'consider' the representations, to a requirement that the Minister 'consider and evaluate' each representation. This court's task is not to re-write the legislation.

[226] *Second*, as the High Court has pointed out, the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate.

[227] *Third*, as the High Court also observed in *Plaintiff M1-2021 v Minister for Home Affairs* the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. Those bounds of rationality and reasonableness are governed by the legislative and factual context.

[228] Here, the legislative context is that within a relatively short period of time - 20 business days after the end of the representation period - the Minister may call-in an application by giving a call-in notice to four categories of people.[209] The call-in notice must state that the Minister is calling-in the application, the reasons for the call-in, including the State interest giving rise to the call-in, and the point from which the process must restart.[210] As explained above, the Minister need only consider that the application affects an economic or environmental interest of the State, or a part of the State, or a Planning Act purpose. Thus, the discretion to be exercised by the Minister involves a weighing exercise. Is there a State interest which justifies the exercise of the call-in power?

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207 The joint applicants reply submissions at [54]-[58].
208 See the quote above from *Plaintiff M1-2021 v Minister for Home Affairs* [2022] HCA 17 at [26].
209 See the discussion of the third stage above (*Threshold Issue, The Statutory Context*).
210 *Planning Act 2016* s 103(3).

[229] In that legislative context, it is important to note that, whilst the Minister's call-in notice must state the reasons for the call-in, including the State interest giving rise to the call-in, the legislation does not require that Minister's reasons "*grapple with or evaluate*" the representations.[211] A Minister, having considered each of the representations, was perfectly entitled to dismiss each representation as not being of sufficient weight to counter a specified State interest. Thus, it is going too far to require the Deputy Premier to "*grapple with or evaluate*" the intelligible representations.

[230] The joint applicants' concept of requiring the Minister to "*grapple with or evaluate*" the representations is a different, more onerous requirement than the ordinary literal requirement of the legislation that the Minister "*consider*" the representations. Similarly, the joint applicants' reliance on expressions such as 'brought to mind and evaluated',[212] 'engage with',[213] and 'identified, understood or evaluated'.[214] In each case the formula of words used distracts from the focus of this legislation.

[231] *Fourth*, the factual context is also important. Applications such as Wanless' application can attract significant public interest. Here, 61 representations were made to the Deputy Premier. In other contexts, many less or many more representations might be made. Parliament can hardly have intended that the relevant Minister had an obligation to "*grapple with or evaluate*" each of an open-ended number of representations, and to do so within 20 business days. The obligation was to consider the representations, and to do so within the bounds of rationality and reasonableness.

[232] *Fifth*, the submissions of the joint applicants impose a burden on the Deputy Premier that is not justified by the legislation. That is clear from the paragraph [57] of the joint applicant's submissions in reply:

> As the Deputy Premier was required to set out findings on material questions of fact and refer to evidence or other material on which those findings were based, a reviewing court can generally expect to see consideration of the representations reflected in the reasons given. If they were not, there is an inference that the Minister did not consider the representations to be material, contrary to his statutory task. [citations omitted]

[233] In my view, the *Planning Act* did not require the Deputy Premier to go further than to consider the representations, and then exercise a discretion, and state the reasons for the exercise of that discretion. The Deputy Premier was not required by the legislation to 'set out findings' or to 'refer to evidence or other material on which those findings were based' or to record the Deputy Premier's 'consideration of the representations reflected in the reasons given'. The legislation does not require that, and the authorities cited do not go that far.[215]

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211 The joint applicants appear to submit to the contrary: see, for example, the joint applicant's submissions in reply at [56].

212 The joint applicant's submissions in reply at [61(a)].

213 The joint applicant's submissions in reply at [61(c)].

214 The joint applicant's submissions in reply at [62]. Note that, in a similar vein, the Council say the Deputy Premier was required to "*grappled with* [the] *contents*" of the representations: Council's representations at [13].

215 As it happens, though, the reasons do actually provide reasons as well as findings on material questions and evidence or other material.

[234] The authorities relied on are s 27B of the *Acts Interpretation Act 1954* and *DQM18*.[216] I have some doubt that the Minister's call-in of an application is susceptible to the requirements of s 27B. The reference to "*a tribunal, authority, body or person making a decision*" appears to be aimed at judicial and quasi-judicial tribunals and bodies that are required to determine factual questions. The section's reference to "*findings on material questions of fact*" and to "*the evidence or other material on which those findings were based*" makes it clear that the section is targeted at judicial and quasi-judicial decision-makers, and those involved in a fact-finding exercise, rather that Ministers exercising a statutory discretion – with no associated fact-finding exercise.

[235] A further problem is that the Minister's obligation under the legislation to state the reasons for exercising the discretion to call-in does not encompass a requirement for any "*findings on material questions of fact*". In other words, as it happens in this legislative context, there are no material questions of fact.

[236] The correct approach, in my view, is that the content of the statutory duty defines the statutory standard that a written statement of reasons must meet to fulfil it.[217] In any event, this issue was not fully argued but certainly, some caution is needed to ensure that s 27B is not used to re-write Part 6 of the *Planning Act*.

[237] The immigration legislation considered in *DQM18* required the Minister to determine whether there was, raised by the representation, a sufficient "*other reason*" to revoke the visa cancellation. It was a factual question in contradistinction to the Minister's call-in power which is largely discretionary. Again, caution is needed before importing considerations that arise under a different legislative scheme.

[238] *Sixth*, the joint applicants make some criticisms of the assessment report contained in the briefing note.[218] Those criticisms might be relevant if the task of this course were to undertake a merits review.

Council's Submissions

[239] The Council's submissions support those of the joint applicants. However, the Council made additional submissions that were supported by the joint applicants.

[240] The Council's submissions can be summarised in this way:

(a) In *Minister for Aboriginal Affairs v Peko-Wallsend Limited*,[219] Gibbs CJ accepted that the Minister, in the circumstances of that case, was not obliged 'to read himself all the relevant papers' and that it 'would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department', but also made it clear that the summary must 'bring to his attention' all material facts 'which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial';

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216 (2020) 278 FCR 529 at [28] and [35].

217 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [43].

218 The joint applicant's submissions in reply at [65]. Note that the briefing note and its attachments were cited by the Deputy Premier as the factual basis for his discretion.

219 (1986) 162 CLR 246 (at 30 - 31)

(b) In *Carrascalao v Minister for Immigration and Border Protection*[220] the Full Court of the Federal Court of Australia held that, despite the personal nature of the power, the Minister was entitled to obtain assistance from departmental officers and members of his private staff, including have them prepare summaries of information for review by him. There are, however, qualifications to that proposition:

(i) any such summary which is materially deficient may give rise to an inference that the decision-making process was not properly conducted by the Minister;

(ii) the use of a departmental summary may not be appropriate when what is sought to be summarised is a substantive argument (as opposed to an assertion of fact);

(iii) attempts to summarise material of this kind may be fraught, because the manner of the summary may cause some of the substantive force which the document may otherwise have had to be lost; and

(iv) the Minister's entitlement to have regard to a summary or submission prepared by his Department must take into account any statement or indication in such a document which advises the Minister of the need for him or her personally to consider relevant information in a document which is summarised;

(c) the ministerial briefing note expressed an opinion that the 61 representations received during the representation period 'did not raise additional facts, evidence or other material that would alter the department's recommendations about the reasons for issuing the proposed call-in notice';

(d) but that is the opinion or conclusion of the department;

(e) the decision to be made under s.103(1) was to be made personally by the Minister;

(f) the Minister was personally required to consider the contents of the 61 representations, which ran to 738 pages;

(g) some of the representations contained detailed arguments against the call-in, and some contained detailed technical evidence on environmental issues and the need for the proposed development;

(h) yet the department attempted to summarise all of this in a series of bullet points over 7½ pages, which divorced many of the arguments from their context.

[241] The problem becomes clear when one focuses on the part of the submission set out in subparagraph (f) above. That part of the submission is unreasonable and unrealistic. Would the same obligation arise if there were 161 representations running to 7000 pages? The point is that, as the High Court stated in *Plaintiff M1-2021 v Minister for Home Affairs,* the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. That is why *Minister for Aboriginal Affairs v Peko-Wallsend*

220 (2017) 252 FCR 352 at [61]-

Limited is authority for the proposition that the Minister, in the circumstances of that case, was not obliged to personally read all the relevant papers. It is also why it may be reasonable for the Minister to rely on a summary of the relevant facts furnished by the officers of his department. It is also why *Carrascalao v Minister for Immigration and Border Protection* is authority for the proposition that, despite the personal nature of the power, the Minister was entitled to obtain assistance from departmental officers and members of his private staff, including have them prepare summaries of information for review by him.

[242] In reality, the Council and the joint applicants seek to require the Deputy Premier to personally consider every word of every representation and to 'grapple with', that is to analyse, every representation. The Act and the authorities do not require that. They require a genuine consideration of the substance of the representations within the bounds of rationality and reasonableness.

[243] As explained, the evidence is that the Deputy Premier did consider the representations. And the criticisms of the department's summary lack any detail or force. It will always be the case that a summary prepared by the department omits some detail and some context. That is the price paid for brevity. Importantly though, no substantive representations have been shown to have been omitted. No glaring omissions are identified. The summary is not incomplete or lacking in a substantive way.

Two Other Criticisms

[244] Another criticism is that the Deputy Premier accepted without change the draft call-in notice. The criticism lacks force. As the authorities acknowledge, the Minister is entitled to seek the assistance of the relevant public servants, some of whom may well have a high degree of expertise. Many of the Minister's decisions are likely to be consistent with the recommendations of the department.

[245] It is important to remember the legislative context. As explained above, the statutory framework presupposes that, before any representations are received, the Minister is already inclined to call-in the application. That means that the Minister comes to consider the representation having already formed a view that he or she is inclined to call-in. That is why it is only natural that the Minister would consider the representations in order to see whether his view should change. That is why the department's analysis of the representations included:

(a) a statement to the effect that "*the representations did not raise additional facts, evidence or other material that alters the department's recommendations about: the state interests supporting the issuing of the proposed call-in notice; the reasons for issuing the proposed call-in notice…*";[221]

(b) a statement to the effect that "*the representations raised an additional matter that provides evidence to support the department's recommendation to issue a proposed call in notice, namely potential impacts to the proposed SEQ Intermodal Terminal to be delivered as part of the Inland Rail project*".[222]

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221 Agreed Bundle at 85 (part of the call-in notice).

222 Ibid. The Minister's reasons expressly adopt this point.

[246] Those aspects illustrate the reality that, under the legislation, the Minister does not come to decide the call-in from scratch. The Minister's obligation was to consider the representations. He plainly did that in order to form the view that the representations did not introduce any new matters that altered his view and the department's view, except the Inland Rail issue which favoured a call-in.

[247] A further criticism, made by the Council, is that "*the Minister did not appear to consider how the decision to call in the Wanless application advanced the purpose of the Planning Act specified in s.3 by 'providing opportunities for the community to be involved in making decisions': s.5(2)(b).*"

[248] It is unfair to pluck s 5(2)(b) out of the Act and to assert that the Minister's exercise of his call-in power has failed to advance a particular purpose in the Act. Section 5 of the *Planning Act* provides that:

> **5 Advancing purpose of Act**
>
> (1) An entity that performs a function under this Act must perform the function in a way that advances the purpose of this Act.
>
> (2) Advancing the purpose of this Act includes—
>
> (a) following ethical decision-making processes that—
>
> (i) take account of short and long-term environmental effects of development at local, regional, State and wider levels; and
>
> (ii) apply the precautionary principle, namely that the lack of full scientific certainty is not a reason for delaying taking a measure to prevent degradation of the environment if there are threats of serious or irreversible environmental damage; and
>
> (iii) seek to provide for equity between present and future generations; and
>
> (b) providing opportunities for the community to be involved in making decisions; and
>
> (c) promoting the sustainable use of renewable and non-renewable natural resources, including biological, energy, extractive, land and water resources that contribute to economic development through employment creation and wealth generation; and
>
> (d) valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition; and
>
> (e) conserving places of cultural heritage significance; and
>
> (f) providing for housing choice, diversity and affordability; and
>
> (g) encouraging investment, economic resilience and economic diversity; and

(h) supplying infrastructure in a coordinated, efficient and orderly way; and

(i) applying amenity, conservation, energy use, health and safety in the built environment in ways that are cost-effective and of public benefit; and

(j) avoiding, if practicable, or otherwise minimising the adverse environmental effects of development (climate change, urban congestion or declining human health, for example).

[249] Section 3 of the Act also states the purpose of the Act including to "*establish an efficient, effective, transparent, integrated, coordinated, and accountable system of land use planning (planning), development assessment and related matters that facilitates the achievement of ecological sustainability*."

[250] Section 4 provides that "*The system to facilitate the achievement of ecological sustainability includes… Ministerial powers to protect, or give effect to, the State's interests relating to planning and development assessment*."

[251] In that context, it is myopic to fix on one of the many purposes of the Act and to assert that a particular decision fails to achieve one of the purposes. A person who, for example, brings proceedings to prosecute another person for an offence under the *Planning Act*,[223] is unlikely to achieve or further the purpose of the Act of valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition, or conserving places of cultural heritage significance, or providing for housing choice, diversity and affordability.

[252] The Act has a multitude of provisions which, together, are designed to achieve the Acts' various purposes. A person who performs a function under this Act must perform the function in a way that advances the purposes of the Act. But that does not mean that the person must accomplish the impossible task of performing the function in a way that, at once, advances all the purposes of the Act. After all, the various purposes of the Act are overlapping and, to some extent, involve possibly competing purposes.[224]

[253] In any event, the Minister's call-in powers under Division 3 of Part 6 expressly make provision for community involvement in decision-making by a process for representations and a requirement that the Minister consider those representations. In specifying such a regime Parliament can hardly be taken to be requiring a more extensive, or even a less extensive regime, than the regime specified by the Act.

Conclusion

[254] For those reasons I find that the Deputy Premier did consider the representations.

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223 See, for example s 174 of the Act.

224 For example, the purpose of valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition, and conserving places of cultural heritage significance, and providing for housing choice, diversity and affordability, and encouraging investment, economic resilience and economic diversity, may all pull in different directions.

THIRD GROUND: UNREASONABLE DECISION

[255] The third attack on the Minister's call-in decision is that the decision was an improper exercise of power because it was legally unreasonable and/or irrational.

The Principles

[256] As the joint applicants explained, a decision will be legally unreasonable if either the outcome or the decision-making process lacks an intelligible justification.[225] Legal unreasonableness is invariably fact dependent and requires a careful evaluation of the evidence.[226]

[257] The joint applicants contended that consistency in decision making is fundamental to the standard of legal reasonableness and rationality. However, the authority cited for that proposition, a passage from the reasons of French CJ in *Minister for Immigration v Li* is not so confined:

> As Professor Galligan wrote in 1986 in *Discretionary Powers: A Legal Study of Official Discretion*, the requirement that officials exercising discretion comply with the canons of rationality means, inter alia, that their decisions must be reached by reasoning which is intelligible and reasonable and directed towards and related intelligibly to the purposes of the power. Those canons also attract requirements of impartiality and "*a certain continuity and consistency in making decisions*". They were reflected in the powers of the English Court of Chancery to control public bodies "*if they proceed to exercise their powers in an unreasonable manner; whether induced to do so from improper motives or from error of judgment*". They were acknowledged in the earliest years of this Court.[227] [footnotes omitted]

[258] French CJ continued:

> The rationality required by "*the rules of reason*" is an essential element of lawfulness in decision-making. A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power. It falls outside the framework of rationality provided by the statute. To that framework, defined by the subject matter, scope and purpose of the statute conferring the discretion, there may be added specific requirements of a procedural or substantive character.[228]

[259] Thus, read fully and properly, it is doubtful that His Honour's point was that consistency was "*fundamental to the standard of legal reasonableness and rationality*".[229] Rather, His Honour's point was that decisions must be reached by reasoning which is intelligible and reasonable, and that will attract elements of continuity and consistency. In any event, the context was different. In *Minister for Immigration v Li* the dispute was whether the Migration Review Tribunal had

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225 *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [19]-[20]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [23]-[31], [76] and [88]-[113].

226 *SZVFW* (2018) 264 CLR 54 at [84].

227 [2013] 249 CLR 332 at [25].

228 [2013] 249 CLR 332 at [26].

229 Joint applicant's submissions at [64].

unreasonably refused an adjournment. The need for consistency in tribunal decisions is easily understood. That is not the case for a Minister's call-in power which is discretionary and requires the Minister to consider the representations and to have regard to the 'State interest', a concept which has a subjective element.

[260] The joint applicants also rely on *Dilatte v MacTiernan*.[230] In that case, after considering the classic statement of Lord Green MR in *Associated Provincial Picture Houses Limited v Wednesbury Corporation*,[231] and the High Court cases that followed Wednesbury,[232] Malcolm CJ said:

> The doctrine of ultra vires may be invoked in a range of circumstances, including where the decision maker has failed to take into account a relevant consideration or has taken into account an irrelevant consideration…
>
> These cases are aspects of unreasonableness because they lead to inconsistent and capricious decisions, although decisions by local authorities are not binding precedents and each application must be considered on its own merits…Decisions in other cases, and the consequences of the decisions in them may be relevant and may be taken into account. [citations omitted][233]

[261] Then, His Honour explained that both the local authority and the Minister, on appeal from the local authority, reached conclusions on issues which were inconsistent with the decision of the former Minister and the merits of the previous appeal. His Honour noted, and implicitly accepted a submission by counsel for the applicants that the inconsistent exercise of a decision-making power without more may involve the decision being unreasonable in the *Wednesbury* sense.[234] His Honour accepted that inconsistency has the potential of bringing the decision making process into disrepute because it suggests that the decision is arbitrary, rather than one made in accordance with a disciplined approach reflecting the application of sound town planning principles and consistent with commonly accepted notions of justice.[235]

[262] Malcolm CJ then explained the problem with inconsistency in town planning decisions:

> [62] The determination whether there has been inconsistency between successive decisions depends upon a comparison of the circumstances in each case and, in particular, to those relevant to each decision. The comparison obviously involves questions of fact and degree. The test is that ordinarily there would need to be "*a similarity, if not a virtual duplication of circumstances and conditions to establish the basis for a complaint of inconsistency*": *Progress Properties Ltd v Woollahra Municipal Council* (1969) 18 LGRA 166 at 171 per Else-Mitchell J. Decisions by a council with

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230 [2002] WASCA 100 at [61]-[67].

231 [1948] 1 KB 223 at 229.

232 *Swan Hill Corporation v Bradbury* (1937) 36 CLR 746; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504 – 505; *Council of the City of Parramatta v Pestell* (1972) 128 CLR 305 at 327; *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 41 – 42.

233 [2002] WASCA 100 at [57], [58] (Malcolm CJ, with whom Wallwork J and White AuJ agreed).

234 [2002] WASCA 100 at [60].

235 [2002] WASCA 100 at [61].

> respect to planning applications made by the same applicant in respect of the same land should ordinarily be consistent. For example, it is not open to a planning authority simply to change its mind about the merits of a particular application and withdraw a consent or approval previously made and communicated, even if the consent or approval has not been acted upon by the applicant: *Northcott Pike & Associates Pty Ltd v Berri District Council* (1984) 55 LGRA 119 at 123 – 4 per Cox J.
>
> [63] Concurrent or alternative applications, by the same landowner in respect of the same land with a common sub-stratum of development factors, should also be dealt with consistently, both for the sake of "*consistency from the council's point of view and to ensure justice from the applicant's point of view*": *GA & LH Properties Pty Ltd v Bankstown Municipal Council* (1967) 13 LGRA 344 at 349 per Hardie J. A council may be entitled to review a decision once made if, in hindsight, the earlier decision involved a serious and important mistake or error: *Consolidated Realties Pty Ltd v Baulkham Shire Council* (1964) 10 LGRA 120 at 122 – 123.

[263] The point of that (rather laboured) excursion into the reasons of the Chief Justice, is to illustrate three points. *First*, inconsistency may, and only 'may', involve the decision being unreasonable in the *Wednesbury* sense. Much depends on the circumstances. *Second*, the facts of *Dilatte v MacTiernan* are significantly distant from this case because in *Dilatte* the impugned town planning decision was a decision by the Minister on appeal from a second variation. That decision of the Minister was inconsistent with the Minister's decision on the first variation, concerning the same property. *Third*, importantly, in *Dilatte* the decision in question was whether to approve a variation to a development. The decision was not, and did not have the character of, a Minister's call-in decision where consistency in decision-making has little relevance.[236]

[264] The joint applicants also rely on the reasons of the Full Court of the Federal Court in the immigration case of *Minister for Home Affairs v Brown*:

> The question of the right of a non-citizen to remain in the country is of importance to the Australian community and will generally be of deep importance to the non-citizen and to his or her family and immediate community. The prospect or potentiality of repeated decisions concerning that right, unquelled by a full review by the independent review tribunal, leads to a lack of certainty and a potential for inconsistency incompatible with the prescriptive nature of the relevant provisions of the *Migration Act*. Consistency of decision-making can be seen as part of a standard of rationality. Whilst consistency can be seen as part, or an ingredient, of rationality and justice, it is not a hallmark of either. Consistency is not required in all circumstances. But in matters of visa status and deportation "*which so profoundly affect the interests of the* [person] *and his* [or her] *family and which are of relevance to the community at large, inconsistency born of*

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236 See the discussion above concerning the nature of the Minister's discretion. See, for example, THRESHOLD ISSUE: RULES OF PROCEDURAL FAIRNESS – The Statutory Context and Some Features of the Call-in Regime (third point).

> *the application of differing standards and values should be reduced as far as it is possible to do so*".[237] [citations omitted]

[265] The last part of that quotation is relied on by the joint applicants.[238] However, that part of the quotation rather illustrates the problems. Inconsistency is spoken of as a product of the vice of an application of differing standards and values. The court is distinctly not applying a formula or fixed standard or subscribing to consistency for its own sake – that is why the Full Court speaks of reducing the application of differing standards and values "*as far as it is possible to do so*". And, it is to be expected that the relevant Minister will apply differing standards and values to that of the Minister's predecessor. After all, the call-in decision is a personal decision to be arrived at by the Minister with the Minister required to state the reasons for the proposed call-in, including the State interest giving rise to the call-in.

[266] Therefore, even in the different context of immigration cases, it is far too simplistic to adopt the position that consistency is fundamental to the standard of legal reasonableness and rationality. Consistency is not required in all circumstances. The correct focus is whether either the outcome, or the decision-making process, lacks an intelligible justification. As Bond J explained in *Australia Pacific LNG Pty Ltd & Ors v The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport*, as a general proposition, judicial review on the grounds of unreasonableness is concerned with:

> (1) the rebuttable presumption that the valid exercise of administrative power is conditioned on the repository of the power exercising it within the bounds of legal reasonableness, and (2) the discernment of the ambit of those bounds in the particular case, having regard to the scope, purpose and objects of the statutory source of power.[239]

[267] Therefore, I do not accept the joint applicants' submission that it was incumbent on the Deputy Premier, in exercising his call-in power under the *Planning Act*, to act consistently, or to at least provide an intelligible justification for why substantially similar applications were treated differently.[240]

[268] The joint applicants submit that the Deputy Premier's decision was arrived at by reference to a legally unreasonable or irrational process by failing to provide any evident or intelligible justification for his decision to treat the Wanless Application inconsistently.[241] Stripped of the double negative, the effect of that submission is to repeat the earlier submission that the Deputy Premier was obliged to act consistently. The legislation does not require that.

Unreasonableness?

[269] The call-in notice is some seven pages long. On page 2, after identifying what constitutes a State interest under the Act, the Deputy Premier says that he considers

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237 (2020) 275 FCR 188 at [113].

238 Submissions of the joint applicants at [65]: "*inconsistency born of the application of differing standards and values should be reduced as far as is possible to do so*".

239 [2019] QSC 124.

240 Submissions of the joint applicants at [66]. As to the second aspect see above at FIRST GROUND: APPREHENDED BIAS, Failure to Call-in Indistinguishable Applications.

241 Submissions of the joint applicants at [70].

that the proposed development involves, or is likely to involve, economic or environmental interests of the State or a part of the State. The Deputy Premier then sets out the particular economic interests he relies on:

- The applicant states that the proposed development includes the redevelopment of disused mining voids that will create economic opportunities for the area.

- The call in request identifies that the project includes a $200M capital investment to establish a new resource recovery facility on the site and will initially create 300 jobs during the construction phase, with an additional 50 ongoing permanent jobs from the commencement of the operation of the site.

- The call in request identifies that the site and proposed development represent an opportunity to create economic development and to establish a market leading recycling facility.

- *ShapingSEQ* identifies the site, along with surrounding land as being with the Ebenezer major enterprise and industrial area Regional Economic Cluster and these areas are intended to advance the economy and drive greater levels of local employment.

- Representations received identify the potential for the development of the SEQ Intermodal Terminal for the Inland Rail project in the vicinity of the site. The Inland Rail project will support significant local employment and generate a significant increase in Gross State Product.

[270] Similarly, the Deputy Premier sets out the environmental interests he relies on:

> The application involves complex and significant environmental issues associated with potential rehabilitation of mining voids and the environmental impacts of waste activities.
>
> - Specifically, the material relevant to the application raises the following significant issues:
>
> - the application of the planning framework to the rehabilitation and reuse of existing mining voids
>
> - the role of waste facilities, such as the proposed development, in contributing to, or enhancing, recycling in Queensland
>
> - the environmental and amenity impacts of the proposed development.
>
> - The site is subject to planning scheme provisions and a temporary local planning instrument (TLPI) which contemplate that mining voids will be filled and rehabilitated to allow for possible future use in this location. The State Planning Policy, which is made to protect or give effect to state interests, is also concerned with ensuring this type of development is compatible with surrounding land uses.

- The importance of appropriate regulation of waste activities in this location is reflected in the continuing application of a TLPI to this site, currently TLPI No. 1 of 2021 – Resource Recovery and Waste Activity Regulation which regulates applications for new or expanded waste activities including for the current site, to protect existing and planned sensitive receiving uses from adverse impacts for waste activities.

[271] There is no reason for thinking that the reasoning is irrational or lacks intelligible justification. Different people may make different decisions or may offer a different reasoning. That is not sufficient. This is not a review on the merits.[242]

[272] Then, on pages 3 and 4 of the call-in notice, the Deputy Premier sets out 12 reasons why he has decided to call-in the application. Those reasons are:

1. I consider that the proposed development involves, or is likely to involve, the state interests set out above.

2. The application is for the development of a resource recovery facility and associated landfill activities that involve the filling of existing mining voids on the site.

3. The application involves complex and significant environmental issues associated with the potential rehabilitation of mining voids and the environmental impacts of waste activities.

4. The call in request asserts that the project includes a $200M capital investment to establish a new resource recovery facility on the site and will initially create 300 jobs during the construction phase, with an additional 50 ongoing permanent jobs from the commencement of the operation of the site.

5. The importance of appropriate assessment of waste activities in this location is reflected in the planning instruments including TLPI No. 2 of 2020 (Waste Activity Regulation) which is applicable to this application.

6. On 10 December 2021, I made a new TLPI (Temporary Local Planning Instrument No. 1 of 2021 – Resource Recovery and Waste Activity Regulation) which is applicable to the Ebenezer area and the site. This TLPI will be taken into consideration in the assessment of the application.

7. In November 2021, the Council of Mayors South East Queensland (CoMSEQ) released the South East Queensland Waste Management Plan 2021. This plan sets a path forward for collaboration across South East Queensland councils to jointly address waste management and long-term infrastructure planning.

8. I am informed that there are three Planning and Environment Court appeals which relate to proposed landfill developments in the Ipswich City Council local government area. These appeals are awaiting judgment.

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242 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 654; *Francis v Crime and Corruption Commission* [2015] QCA 218 at [33].

9. Further, I am informed that:

    a. this application is the subject of a current Planning and Environment Court appeal

    b. there were 60 properly made submissions for the application

    c. there are in excess of 50 submitter co-respondents.

10. This indicates the level of complexity associated with the assessment of waste activities in this area and the significant community concern.

11. The representations raised an additional matter that provides evidence to support giving a call in notice, namely potential impacts to the proposed SEQ Intermodal Terminal to be delivered as part of the Inland Rail project.

12. In accordance with the *Human Rights Act 2019*, I have considered and given proper consideration to the human rights relevant to my decision whether to issue this call in notice. I have been provided with a human rights assessment document prepared by the department to assist my consideration. Based on this, I have determined that my decision to issue this call in notice is compatible with human rights.

[273] Those reasons are rationally capable of supporting the decision.[243] The reasons comprise an intelligible justification for the decision.[244]

[274] In fact, none of the applicants sought to pick apart the 12 reasons. The principal attack on the reasons was the allegation of compelling evidence of substantial similarities between the Wanless Application and the previous applications in the same Council area – an aspect already considered above.

[275] The joint applicants submit that the similarities between the Wanless application and the earlier applications were brought to the Deputy Premier's attention in representations that he was required to consider. The joint applicants complain that the call-in decision makes no mention of those similarities or why the Wanless application was to be treated differently.[245]

[276] For the reasons already explained, it is doubtful that the Wanless application can be characterised as materially indistinguishable from the earlier applications.[246] And, the evidence does not establish the extent to which the Wanless application was similar to the prior applications. But, even if it were accepted that the applications were similar or materially indistinguishable, and even if the Minister were the same person, that does not take the joint applicants very far. It is an error in approach to

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243 Reason 12 (which addresses human rights) is not really a reason for the exercise of the discretion, and so my reference to the reasons should be read as a reference to reasons 1 to 11.

244 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [47].

245 Joint applicant's submissions at [68]. This argument is similar to earlier arguments made by the joint applicants – but in a different context.

246 In fact, as the joint applicants point out, the Council had requested that the earlier applications be called-in but asked that the Wanless application not be called-in on the basis of the view taken in the earlier applications that the (then) Minister did not believe a State interest was involved and because of its smaller scale.

read the legislative regime as requiring the Minister to provide an analysis which answers or resolves each of the arguments put in the representations, or even arguments that are prominent in the representations.

[277] *First*, s 103(3) of the *Planning Act* requires that the call-in notice must state that the Minister is calling-in the application, the reasons for the call-in, including the State interest giving rise to the call-in, and the point from which the process must restart.[247] The legislation does not require that the Minister do more than those three things. As explained, the legislation does not require an analysis or, a 'grappling with', or even an acknowledgment of any particular representation or argument.

[278] *Second*, the Minister's discretion to call-in is not confined. No criteria or standard need be met. All that is necessary is that the Minister state the reasons for the call-in, and the State interest – which itself has a subjective element. Thus, a Minister may be presented with 10 arguments against a call-in, may decide that a separate 11th argument justifies the call-in. In other words, the legislation does not require that the Minister's reasons have any particular connection or link with the representations.

[279] *Third*, the idea that the Minister must deal with an argument in the representations, raises an impracticality. Why is it, for example, that the Minister should deal with the similarities between the Wanless application and the earlier applications? Possibly it is because the joint applicants, or some or all of the representators, attached some importance to those similarities. Other representors may attach importance to other arguments within the representations. The point is that a value judgment at play in assessing the importance or otherwise of the various representations to the Minister. Certainly, the Minister is required to consider the representations. However, having considered them, the Minister is perfectly entitled to make his own value judgment in deciding that, for another rational reason the Minister has decided to call-in the application.

[280] *Fourth,* as it happens, the Deputy Premier's reasons do record the other applications and the P&E appeals associated with those applications. The Deputy Premier's reasons also record "*the level of complexity associated with the assessment of waste activities in this area and the significant community concern*". Those are some of the reasons for the call-in.

[281] *Fifth*, if the court were to require the Minister's reasons to deal with, or to grapple with the arguments in the representations, or the more prominent of those arguments, the likelihood is that the court would be conduct a merits review, or a de facto merits review, of the Minister's decision.[248] And, the focus would cease to be on the vital issue, which is whether the reasons are rationally capable of supporting the decision.

[282] For those reasons, I find that the Deputy Premier's exercise of his call-in power was not legally unreasonable and/or irrational.

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247 *Planning Act 2016* s 103(3).

248 As Wanless' submissions make clear at [152(c)]: "*This is a completely unworkable suggestion which would impose an undue burden on decision-makers far beyond anything required by the authorities on unreasonableness and/or irrationality grounds of review*."

FOURTH GROUND: NO REASONS

The Principles

[283] The joint applicants submit that:

(a) s 103(3) of the *Planning Act* obliges the Minister to state the "*reasons for the call in*";

(b) the call-in decision fails to do so;

(c) instead, the Deputy Premier's decision and reason lists a number of anodyne matters which do no more than describe features of the Wanless project.[249]

[284] The Deputy Premier's submissions contend that the relevant principles are derived from s 27B of the *Acts Interpretation Act 1954* (Qld) and *Minister for Immigration and Multicultural Affairs v Yusuf*.[250] The former is discussed above[251] and requires that the tribunal, authority body or person set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based. As stated above, it is doubtful that s 27B applies.

[285] In *Yusuf* the High Court considered s 430(1)(c) of the *Migration Act 1958 (C'th)* which required the Refugee Review Tribunal, in making its decision on a review of a protection visa decision, to prepare a written statement setting out the findings on any material questions of fact.

[286] None of that is particularly helpful in a context where the decision being criticised is a discretion of a Minister to call-in an application and the Minister's obligation is to state the reasons for the call in, including the State interest giving rise to the call in. As explained, a Tribunal's obligation will not be the same as a Minister's obligation to state the reasons for the exercise of a statutory discretion.

[287] There is force in Wanless' submission that the reasons of an administrative decision maker are "*meant to inform*"; they are "*not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed*". They are to be read as a whole.[252] Of course, any shortcomings in the expression of the reasons does not involve jurisdictional error and thus s 231 of the *Planning Act* excludes any right of review on this ground.[253]

The Reasons

[288] The Deputy Premier's reasons for the call-in can be summarized as follows: [254]

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249 Joint applicants' submissions at [72].

250 (2001) 206 CLR 323 at [68].

251 SECOND GROUND: FAILURE TO CONSIDER REPRESENTATIONS, The Reply Argument.

252 Wanless submissions at [155] citing *Minister for Immigration and Ethnic Affairs* v *Wu Shan Liang* (1996) 185 CLR 259 at 272 and *Politis v Federal Commissioner of Taxation* (1988) 16 ALD 707 at 708.

253 Wanless submissions at [158]. See later discussion of this topic in the section: FIFTH GROUND: HUMAN RIGHTS: a Further Obstacle.

254 The reasons are quoted in full above.

(a) The proposed development involves **economic** interests which the Deputy Premier considers are State interests, namely:

(i) redevelopment of disused mining voids that will create economic opportunities;

(ii) a $200M capital investment to establish a new resource recovery facility which will initially create 300 construction jobs and an additional 50 ongoing permanent jobs;

(iii) an opportunity to create economic development and to establish a market leading recycling facility;

(iv) The '*Shaping SEQ*' plan[255] identifies the site and surrounding land as being within the Ebenezer major enterprise and industrial area Regional Economic Cluster and these areas are intended to advance the economy and drive greater levels of local employment;

(v) there is potential for the development of the SEQ Intermodal Terminal for the Inland Rail project in the vicinity of the site which will support significant local employment and generate a significant increase in the Gross State Product.

(b) Similarly, the proposed development involves **environmental** interests which the Deputy Premier considers are State interests, namely:

(i) the application involves complex and significant environmental issues associated with potential rehabilitation of mining voids and the environmental impacts of waste activities;

(ii) there are significant issues as to the application of the planning framework to the rehabilitation and reuse of existing mining voids, the role of waste facilities, such as the proposed development, in contributing to, or enhancing, recycling in Queensland, and the environmental and amenity impacts of the proposed development;

(iii) certain planning scheme provisions and a temporary local planning instrument contemplate that mining voids will be filled and rehabilitated to allow for possible future use in this location;

(iv) a temporary local planning instrument protects existing and planned sensitive receiving uses from adverse impacts for waste activities.

(c) the development of a resource recovery facility and associated landfill activities that involves the filling of existing mining voids on the site, which involves complex and significant environmental issues associated with the potential rehabilitation of mining voids and the environmental impacts of waste activities.

(d) there is a South East Queensland perspective and significance in the appropriate assessment of waste activities in this location from and because of town planning instruments, the South East Queensland Waste Management Plan 2021, the various landfill P&E appeals, and the complexity associated

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255 *ShapingSEQ* is the regional plan for the South East Queensland (SEQ) region.

> with the assessment of waste activities in this area and the significant community concern.[256]

[289] The language of the reasons is the rather general language of policy rather than the language of precision. Nevertheless, those reasons qualify as reasons for the call-in. In fact, any one of those reasons on its own qualifies as a reason for the call-in. Read as a whole, the Deputy Premier has set out, in some detail, why he exercised the discretion to call-in the application. Certainly, it is wrong, in my view, to characterise those reasons as "*anodyne matters which do no more than describe features of the Wanless project*".[257]

[290] Incidentally, in two instances the Deputy Premier says in his reasons "*I am informed*…". In its context the Deputy Premier is plainly saying that he is informed of those facts and accepts those facts as true.

Path of Reasoning

[291] The joint applicants make this complaint about the reasons:

> Under the heading "*I am calling in this application for the following reasons*", the Deputy Premier described the proposed development and other incidental matters but he did not explain the path of reasoning to why the Wanless Application should be called in.

[292] The legislation does not require the Minister to 'explain the path of reasoning'. That is an incorrect approach. The correct approach is to appreciate that the content of the statutory duty defines the statutory standard that a written statement of reasons must meet to fulfil it.[258] Here, the statutory duty requires the Minister to state the reasons for the decision to call-in, including the State interest giving rise to the call-in.[259] He has done that.

[293] As Wanless points out, the call-in notice is to be provided within 20 business days after the end of the representation period. In that context, in which a large number of potentially lengthy representations might be made, it would be wrong to read the statute as contemplating reasons which descend to a high level of detail in responding to particular submissions. And it is necessary to read the Deputy Premier's reasons "*in a practical and common-sense manner and not with an eye keenly attuned to the perception of error*".[260]

[294] In any event, it is difficult to see what more is required. The Deputy Premier has, for example, decided to exercise his call-in discretion because there are complex and significant environmental issues and there is a wider South East Queensland perspective, as well significant community concern.[261] In so far as there is a path of

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256 Some aspects have been deleted in the interests of brevity.

257 Joint applicants' submissions at [72].

258 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [43].

259 *Planning Act 2016* s 103(3).

260 *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 at [76]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272; see Wanless submissions at [164].

261 Wanless neatly reduces the Deputy Premier's reasons to this: "*The reasons identify environmental complexity, possible economic impact, community concern and possible impact on infrastructure as*

reasoning, it is merely that, for those reasons, the Deputy Premier has decided to call-in the application.

Council Submissions

[295] The Council's submissions rely on the reasons of Bond J in *Willis v State of Queensland* to the effect that what is to be set out in the statement of reasons is the actual path of reasoning by which the tribunal arrived at the opinion it was required to form, and that that must be done in sufficient detail to enable the Court to discern whether the opinion does or does not involve any error of law.[262] However, in *Willis* Bond J was considering the adequacy of the reasons of a tribunal, that is the General Medical Assessment Tribunal under s 516(1) of the *Workers Compensation and Rehabilitation Act 2003*. That is a different legislative context.

[296] The Council then submit that the Deputy Premier's reasons do not even attempt to explain the bases upon which the Deputy Premier determined that the Wanless application was likely to involve State interests when comparable applications were determined not to involve any such interests.[263] The legislation does not require such a comparison. And the legislation requires that the relevant Minister, here a 'new' Minister, exercise what is, in effect, a personal discretion. The discretion involves the Minister's consideration as to whether the application affects an economic or environmental interest of the State, or a part of the State, or a Planning Act purpose. It is contrary to the Act to fetter the Minister's discretion by requiring the new or even the existing Minister to act consistently with the prior exercise of the discretion or to justify that Minister to justify a departure from a 'precedent' exercise of the discretion.

[297] There is also an odd feature here. As mentioned above, all parties agree that this project falls within the concept of the State interest. Thus, the Council complains that the Deputy Premier has failed to explain why the application involves a State interest in circumstances where it agrees there is a State interest. Possibly that confusion arises because the Council (and the applicants) took the view that the previous Minister had positively determined that no State interest was involved in the prior applications.

[298] The evidence does not go that far. As Wanless explained, what the previous Minister in fact said in correspondence was:

(a) "*I have formed the view that the development does not involve a state interest in a manner that warrants a call in…*";

(b) "*no state interests are affected by the proposed developments which warrant [the Minister's] involvement*";

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economic or environmental interests of the State." (Wanless submissions at [163]). Of course, various other aspects of the reasons might be highlighted by a 'potted' summary like this.

262 [2016] QSC 80 at [11(g)].

263 Council's submissions at [29].

(c) "*the exercise of ministerial call in powers… necessitates me to take the view, above and beyond determining that a state interest is affected, that the circumstances should also warrant the exercise of these powers*";

(d) "*my Department has advised me that that [sic] there are no grounds for a call-in and accordingly I will not exercise ministerial call-in powers at this time*".[264]

[299] The Council also quibbles about the extent of the capital investment, and the number of jobs likely to be created, the fact that the notice "*regurgitates*" the submissions made by Wanless, and the Deputy Premier's use of the word 'including' which suggests other reasons not identified.[265] Suffice it to say that the reasons must be read as a whole and in a practical and common-sense manner and not with an eye keenly attuned to the perception of error.

[300] For those reasons the fourth ground has not been made out.

FIFTH GROUND: HUMAN RIGHTS

Introduction

[301] The Ashworth parties are local residents of Ipswich. They were co-respondents to Wanless' appeal to the P&E Court. The Ashworth parties contend that the Deputy Premier's decision was infected by apprehended bias. They made submissions about that issue (First Ground). The Ashworth parties also adopted the joint applicants' submissions on the Second to Fourth Grounds. Those issues are considered above. The Ashworth parties also alleged breaches of their human rights. That issue, and the relevant submissions are addressed in this section as the Fifth Ground. On this issue, the Attorney-General intervened on behalf of the State. In doing so, the Attorney-General adopted and relied on a submission made by Wanless.

[302] It is common ground that the Deputy Premier is a public entity under s 9(1)(e) of the *Human Rights Act* and that, as a public entity, he has two obligations under s 58(1) of the *Human Rights Act*:

(a) not to act or make a decision in a way that is incompatible with human rights (the 'substantive limb' in s 58(1)(a)); and

(b) in making a decision, not to fail to give proper consideration to a relevant human right (the 'procedural limb' in s 58(1)(b)).[266]

[303] The substantive limb will be considered first.

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264 Wanless submissions at [165(d)]; Agreed bundle of documents, p 180, 185, 196 and again at 196.

265 The use of the word 'including' is used in relation to State interest, but not in relation to the reasons proper.

266 See the Attorney-General's submissions at [3], [4] which are consistent with the Ashworth submissions at [96]. See also *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, [128], [129].

Substantive Compatibility with Human Rights

[304] Section 58(1)(a) of the *Human Rights Act* provides that: "*It is unlawful for a public entity … to act or make a decision in a way that is not compatible with human rights*".

[305] The expression "*compatible with human rights*" is defined in s 8 of the *Human Rights Act*. It means either that the decision does not limit human rights or, to the extent that it does, those limits on human rights are nonetheless justified according to the test of proportionality set out in s 13 of the *Human Rights Act*.

[306] The Attorney-General submits, and it is accepted, that compatibility with human rights should be considered in three stages: engagement, limitation, and justification:

(a) **Engagement**: A measure will 'engage' a human right, if the right is 'relevant' or 'apparently limit[ed]'. 'The relevance may be that the right is interfered with (i.e. a negative effect) or promoted'. A human right can only be limited if it is engaged, but it is possible that a human right may be engaged but not limited (for example, property might be deprived so that the right in s 24(2) is 'engaged', but the deprivation may not arbitrary, so that the right is not in fact 'limited').

(b) **Limitation**: A measure will 'limit' a human right for the purposes of s 8 of the *Human Rights Act*, if it 'places limitations or restrictions on, or interferes with, the human rights of a person'. That necessarily involves considering whether the impact comes within the scope of the right. When determining scope, 'rights should be construed in the broadest possible way', by reference to the right's 'purpose and … underlying values'. Because '[t]he protection of human rights crosses borders', the scope of human rights may also be informed by international jurisprudence, including the jurisprudence of the Human Rights Committee (the treaty-monitoring body for the International Covenant on Civil and Political Rights (ICCPR)). Any recourse to international authority must take into account the particular legal and constitutional context in which those cases were decided.

(c) **Justification**: A limit will be 'justified' if it satisfies the proportionality test in s 13 of the *Human Rights Act*. It is at this stage that the overall protection of the right is narrowed to 'mitigat[e] any damage to society that may arise from upholding an individual's right.' It is important that this be done at the third stage using the transparent reasoning process set out in s 13.[267]

[307] It is also common ground that the applicants bear the onus of establishing a limit on human rights, including any internal limitations such as arbitrariness. Only then does the Deputy Premier have the onus of showing the limit was justified under s 13 of the *Human Rights Act*.[268] That said, in *Owen-D'Arcy v Chief Executive,*

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267 See *Sabet v Medical Practitioners Board (Vic)* (2008) 20 VR 414, 431 [108]-[109]; *Baker v DPP (Vic)* [2017] VSCA 58; (2017) 270 A Crim R 318, 331 [56]; *Thompson v Minogue* [2021] VSCA 358, [96]; see also *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, [132].

268 See the Attorney-General's submissions at [8] which are consistent with the Ashworth submissions at [102], [103].

Queensland Corrective Services[269] Martin J accepted the views of Richards J in *Thompson v Minogue*[270] to the effect that the burden of establishing that a limit on a human right is justified or proportionate rests with the relevant public authority. The standard of justification is stringent. The evidence required to prove that a limit on a human right is justified, having regard to the matters set out in the equivalent of s 13(2) of the *Human Rights Act*, should be "*cogent and persuasive*".[271]

What Human Rights were Engaged?

[308] The Ashworth parties submit that the Deputy Premier's call-in decision under s 103 of the *Planning Act* was required to be exercised in a way that is compatible with any the following relevant human rights;

(a) section 23 – right to participate in public life;

(b) section 24 – right to property; and

(c) section 31 – right to a fair hearing.

[309] The Deputy Premier states at paragraph 12 of his reasons:

> "In accordance with the Human Rights Act 2019, I have considered and given proper consideration to the human rights relevant to my decision whether to issue the call in notice. I have been provided with a human rights assessment document prepared by the department to assist my consideration. Based on this, I have determined that my decision to issue the call in notice is compatible with human rights."

[310] The referenced Human Rights Assessment (the 'HR Assessment') identifies the relevant human rights as follows: sections 16, 19, 21, 24, 25, 26 and 29 of the *Human Rights Act* and goes on to consider whether those rights are limited and, if so, whether the limitation is compatible with human rights.[272] The HR Assessment concludes that the proposed call-in is compatible with human rights. The Ashworth parties contend to the contrary. They argue that the Deputy Premier acted in a way that is incompatible with three human rights, namely the right to participate in public life, the right to property and the right to a fair hearing (the 'substantive limb'). The Ashworth parties' complaints that the Deputy Premier failed to take into account those same three rights (the 'procedural limb') will be considered later in this section.

Taking Part in Public Life

[311] Section 23 of the *Human Rights Act* provides as follows:

> (1) Every person in Queensland has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives.

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269 [2021] QSC 273, [133].
270 [2021] VSC 56 at [80].
271 [2021] QSC 273, [133] applying [2021] VSC 56 at [80].
272 See the discussion below concerning the 'procedural limb'.

> (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
>
> (a) to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and
>
> (b) to have access, on general terms of equality, to the public service and to public office.

[312] The Ashworth parties say that they took up the opportunity to make representations to the Deputy Premier in respect of the proposed call-in and that, therefore, it is relevant to consider whether in making representations to the Deputy Premier, the Ashworth parties had the opportunity to participate in public life 'without discrimination' and 'on terms of general equality' with other persons making representations.[273]

[313] The relevant inquiry is whether the Ashworth parties had the opportunity, without discrimination, to participate in the conduct of public affairs. In my view they plainly did. The call-in process required the Deputy Premier to seek representations and to consider those representations.[274] On 29 November 2021 he invited representations. And then, up to and including 21 December 2021 he received 61 representations, which he then considered. Rather than limiting the applicants' opportunity to participate in the conduct of public affairs, the process afforded the representees, including the Ashworth parties, with an opportunity to participate in public affairs. It was the opportunity afforded by the legislation. There were no limits on that opportunity.

[314] The core of the Ashworth parties' complaint is that the rights of the Ashworth parties to participate in public life was limited in that Wanless, through the lobbyists it had engaged, was able to gain more favourable access to the Deputy Premier's office and to public servants during the representation period. But this complaint is without foundation given my earlier finding that no lobbying took place, let alone lobbying that might be said to comprise an effort to influence the Deputy Premier's decision-making or to influence the relevant public servants so that they might influence the Deputy Premier.

[315] But, even assuming that Anacta did lobby the Deputy Premier or his office, I do not accept that Wanless' lawful engagement of Anacta limited the rights of the Ashworth parties to participate in public life. Lobbying by Anacta may enhance Wanless' prospects of persuading the Deputy Premier to make the decision it desires. But the mere enhancement of Wanless' prospects through lobbying does not limit the Ashworth parties' opportunity to participate in the conduct of public affairs. The human right is a right to participate. It is not a right to, or a guarantee of, an equal voice or equality of bargaining power. And, of course, the right to participate in public affairs is not a right to a specific outcome from that participation.[275]

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273 Ashworth parties' submissions at [111].

274 *Planning Act 2016* s 102.

275 Explanatory note, *Human Rights Bill 2018 (Qld)* 21 referred to in the Attorney-General's submissions at [20].

[316] To return to the words of s 23, the representors are entitled to participate in the conduct of public affairs 'without discrimination'. The expression 'discrimination' is defined in schedule 1 of the *Human Rights Act* as including direct or indirect discrimination within the meaning of the *Anti-Discrimination Act 1991*. That Act defines discrimination as being discrimination on the basis of an attribute such as age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality.

[317] The definition of 'discrimination' in the *Human Rights Act* is inclusive. That is consistent with the ACT equivalent, but contrasts with the Victorian and New Zealand equivalents which contain exhaustive definitions.[276] The Attorney-General argued that the approach taken by Canadian courts in relation to s 15(1) of the *Canadian Charter of Rights and Freedoms* should be adopted in Queensland. The Canadian Charter also contains an inclusive definition of 'discrimination' in s 15(1).[277] The Supreme Court of Canada has held that only an 'analogous ground' of discrimination will fall within the protection.[278]

[318] In my view that is the correct approach. The legislature, in choosing to tie the definition of 'discrimination' to the definition in the *Anti-Discrimination Act 1991* in a non-exclusory way, must be taken to have left the door open for an analogous grounds of discrimination. In other words, in linking the definition of 'discrimination' to the definition of the same concept in the *Anti-Discrimination Act,* but not directly adopting that definition, it is reasonable to infer that Parliament intended for the definition to be read as allowing an analogous ground of discrimination.

[319] In their reply submissions the Ashworth parties contended for a "*more expansive definition*" of discrimination in the *Human Rights Act.* But the content and breadth of that more expansive definition was not identified. It is difficult to subscribe to a more capacious definition without knowing the borders, or at least roughly where those borders might be. Certainly, it would be difficult to argue that Parliament contemplated that 'discrimination' merely required differential treatment.[279] Even in common usage the concept of discrimination involves making a distinction, as in to discriminate against a minority.[280]

[320] In my view, Parliament's use of the legislative device of defining the term 'discrimination' as including the concept of discrimination in the *Anti-Discrimination Act* means that these principles apply. *First*, the use of the word 'includes' means that the incorporation of the definition of 'discrimination' in the *Anti-Discrimination Act* is not intended to be exhaustive.[281] *Second*, conduct

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276 *Human Rights Act 2004 (ACT)*; *Charter of Human Rights Act Responsibilities Act 2006 (Vic)*; *New Zealand Bill of Rights Act 1990 (NZ)*; Attorney-General's submissions at [25]-[29].

277 The wording of s 15(1) of the Canadian Charter is slightly different to s 23 of the Queensland Human Rights Act. Section 15(1) of the Canadian provision provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination.

278 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

279 See *Rasmussen v Denmark* [1984] ECHR 17; (1984) 7 EHRR 371; *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, at 181.

280 See, for example, the definition of 'discriminate' in the *Macquarie Concise Dictionary*, 3rd ed.

281 Note that the drafting of the definitions in the Schedule 1 Dictionary in the *Human Rights Act 2019* uses both devices of 'means' and 'includes' in other definitions to indicate whether or not it is to be

qualifying as 'discrimination', by applying the ordinary use of that word, but beyond the definition of 'discrimination' in the *Anti-Discrimination Act*, may be comprehended. *Third*, to say that the concept of 'discrimination' includes various matters is a way of giving at least some meaning to the term; the concept of 'discrimination' cannot have some meaning independent of the meaning that it is given by the legislation.[282]

[321] Applying those principles, there is nothing in the present facts to suggest that the Ashworth parties' entitlement to participate in the conduct of public affairs was impaired by some act of discrimination. There is no evidence of any discrimination based on any attribute in s 7 of the *Anti-Discrimination Act 1991*, or any analogous attribute.[283]

[322] In their reply submissions, the Ashworth parties contended that there were differential opportunities enjoyed in the representation process based on 'political belief or activity', which, in this case, was founded on a political association. I reject that submission. There is no evidence to support such a contention.

[323] Wanless was the applicant. It asked the Deputy Premier to call-in the application. The Deputy Premier, as required by the legislation, gave notice, called for representations and considered those representations, including representations by the Ashworth parties. Wanless as the applicant and the Ashworth parties as representors had different roles in the process. That is a consequence of the legislative regime. It is not discrimination. In any event, the evidence does not establish that Wanless received preferential treatment, or that some representations were treated more favourably than others, or that some representations were treated other than on their merits, or that political associations were considered at all. I am therefore not satisfied that the Deputy Premier's exercise of his statutory call-in power occurred in a discriminatory manner.[284]

[324] There is also no validity in the Ashworth parties' contention that they did not have equal access to the public service, contrary to s 23(2)(b) of the *Human Rights Act*. The right that s 23(2)(b) addresses is a right to join the public service, not a right to communicate with a public servant. This finding is consistent with the equivalent right in art 25(c) of the *International Covenant on Civil and Political Rights* which, as the Attorney-General submitted, deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions and was intended to prevent privileged groups from monopolizing public service, in the sense of monopolising the composition of the public service.

Right to Property

[325] Section 24 of the *Human Rights Act* provides:

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exhaustive. A court should be slow to depart from the pattern thus established: *Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation* (1979) 24 ALR 658 at 660; Pearce, *Statutory Interpretation in Australia*, 9th ed at [6.8].

282 These principles have been extracted from Pearce, *Statutory Interpretation in Australia*, 9th ed at [6.8].

283 See the Attorney-General's submissions at [25]-[29].

284 Cf Ashworth parties' submissions at [40].

24 **Property rights**

(1) All persons have the right to own property alone or in association with others.

(2) A person must not be arbitrarily deprived of the person's property.

[326] The Ashworth parties' say that, applying a liberal interpretation of the concept of 'property' in s 24,[285] their rights in the Wanless P&E appeal should be regarded as a chose in action and the effect of the call-in is to extinguish that chose in action. They contend that the Deputy Premier's decision to call in the application deprived them of property in the form of a statutory right to elect to be a co-respondent and participate as a party in an appeal, pursuant to s 229(1)(b)(iv) of the *Planning Act*. Thus, it is contended that the property rights of the Ashworth parties have been limited by the call-in which has the effect of terminating the P&E appeal.

[327] Accepting that the term 'property' in s 24 should be construed liberally and beneficially to encompass economic interests,[286] I am satissfied (as the Attorney-General submitted) even a liberal and beneficial interpretation does not convert something that is not property into property. I am therefore not satisfied that the statutory right to take part in an appeal under s 229 of the *Planning Act* is a form of property.

[328] The general definition of 'property' in schedule 1 to the *Acts Interpretation Act 1954* provides as follows:

> ***property*** means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action.

[329] The statutory right here does not qualify as "*real or personal property*" or as a chose in action. In *Cummings v Claremont Petroleum NL* the High Court said:

> A right to appeal may be a substantive right, but it is another question whether such a right has the character of property. Some rights created by statute can constitute property, but a right to appeal does not have the character of property merely because it is the creature of statute.[287]

[330] Here, the interest underlying the statutory right to take part in an appeal under s 229 is not a property interest such as a debt or an interest in real property.

[331] Consistent with this finding, I accept the Attorney-General's submission that, in spite of the liberal interpretation of the concept of property in s 24, the values underlying the right to property in the *Human Rights Act* are the need to ensure that human beings can supply themselves with food and otherwise support themselves. The right is thought to be a strategic human right, a right that protects other rights but also valuable in itself as a component of human dignity.[288] Personal property

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285 See the Ashworth submissions in reply at [42], [43].

286 *PJB v Melbourne Health* (2011) 39 VR 373, 395 [87]; Attorney-General's submissions at [38].

287 (1996) 185 CLR 124, at 133.

288 Rhoda E Howard-Hassmann, *Reconsidering the Right to Own Property* (2013) 12(1) Journal of Human Rights 180, 181.

such as food, clothing and housing is at the core of the right,[289] as it 'lies closer to the core of human dignity'.[290] The Ashworth parties' dignity, and their ability to enjoy other human rights, are not at stake in deciding whether the statutory right in s 229 of the Planning Act is a form of property.

[332] For those reasons, the statutory right of the Ashworth parties under s 229 of the *Planning Act* does not amount to 'property' for the purposes of s 24 of the *Human Rights Act*.

[333] Even if that conclusion is wrong, the Ashworth parties bear the onus of demonstrating that the call-in deprived them of property in an arbitrary way.[291] That onus has not been discharged. The Deputy Premier has acted in accordance with the call-in regime in the *Planning Act*. That statutory regime can hardly be described as arbitrary.[292]

Right to a Fair Hearing

[334] Section 31 of the *Human Rights Act* provides:

> 31 **Fair hearing**
>
> (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
>
> (2) …

[335] The Ashworth parties submit that:

(a) The Ashworth parties were all parties to the Wanless appeal, being a civil proceeding in the P&E Court;

(b) The effect of the call-in decision was to discontinue that proceeding, thereby limiting their right to have the appeal determined by an independent and impartial court after a fair hearing;

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289 There was much discussion among the drafters of the *Universal Declaration of Human Rights* about this right. They disagreed over whether property should refer only to personal property and, if so, what personal property meant, as opposed to a more expansive meaning of property: Rhoda E Howard-Hassmann, supra, at 181.

290 See the *travaux préparatoires* for article 17 of the *Universal Declaration of Human Rights*; Rhoda E Howard-Hassmann supra, at 180, 181; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999) at 140-156. Alfredsson has commented that the final version of article 17 belies the controversy it has caused, both prior to and subsequent to its adoption: Gudmundur Alfredsson on article 17 in '*The Universal Declaration of Human Rights: A Commentary*' (Ed. Eide, 1992) at 255. Regardless of the controversy, it is plain that essential needs such as food, clothing and housing are at the core of the right.

291 Arbitrariness in this context means capricious, unpredictable or unjust and also unreasonable in the sense of not being proportionate to a legitimate aim sought: *PJB v Melbourne Health* (2011) 39 VR 373 at [85].

292 Wanless make this point at [194] of their submissions.

(c) It is difficult to imagine a more extreme limitation on their rights given that the decision of the Deputy Premier had the effect of unilaterally extinguishing their appeal rights retrospectively;

(d) The HR Assessment does not consider or properly consider s 31 of the *Human Rights Act*;

(e) The Deputy Premier failed to turn his mind to s 31 of the *Human Rights Act* and give it proper consideration;

(f) It follows that the procedural limb in s 58 of the *Human Rights Act* has been contravened;

(g) Even if the Deputy Premier had considered s 31 of the *Human Rights Act*, there is no doubt that the call-in decision (and the consequential discontinuance) limits the Ashworth parties' human rights under s 31 of the *Human Rights Act* in a radical way;

(h) A strong justification would be required for the imposition of such a limitation;

(i) The Deputy Premier therefore bears the onus of showing that the limitation arising from the exercise of the call-in power is compatible with human rights;

(j) The Deputy Premier has simply failed to discharge this onus;

(k) In the circumstances, it is contended that even if the Deputy Premier had given proper consideration to the Ashworth parties' right to a fair hearing, he has failed to demonstrate by cogent evidence that the limitation on that right is compatible with their human rights; and

(l) Section 58 of the *Human Rights Act* has therefore been contravened.[293]

[336] In response, the Attorney-General relies on the House of Lords decision in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions.*[294] The issue in Alconbury was similar to the issue here, namely whether the powers of the Secretary of State under the *Town and Country Planning Act 1990 (UK)* to 'call in' a development application or to 'recover' an appeal were compatible with the right of access to the courts under article 6 of the *European Convention on Human Rights.*[295] The UK planning legislation provided for development applications to be decided by local governments, with a right of appeal to an inspector. In exceptional cases involving major development proposals, the Secretary of State had power under s 77 of the Act to call in the application to be decided by the Secretary of State instead of the local government, as well as a power under sch 6 [3] of the Act to 'recover' an appeal underway before an inspector.

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293 This is a paraphrasing of paragraphs [120]-[125] of the Ashworth parties' submissions.

294 [2003] 2 AC 295, 308, 309, 324 and 343.

295 Article 6 of the *European Convention on Human Rights* is similar but not identical to s 31: "*Right to a fair trial 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*."

[337] The Attorney-General's submissions have usefully summarised the House of Lords' reasoning, and its application of the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights as follows:[296]

(a) When the Secretary of State determines a development application following a call-in notice or when he determines an appeal he has 'recovered', he is not himself an independent and impartial tribunal.[297]

(b) However, the decisions made by the Secretary of State following a call-in or recovery were not incompatible with article 6(1) of the *European Convention on Human Rights*, provided those decisions are subject to review by an independent and impartial tribunal which has full jurisdiction to deal with the case as the nature of the decision required.[298]

(c) In this context, 'full jurisdiction' does not require a review on the merits. 'What is required … is that there should be a sufficient review of the legality of the decisions and of the procedures followed'.[299]

(d) More than that is not required. Indeed, as Lord Nolan pointed out:

> "…the decisions made by the Secretary of State will often have acute social, economic and environmental implications. A degree of central control is essential to the orderly use and development of town and country. Parliament has entrusted the requisite degree of control to the Secretary of State, and it is to Parliament which he must account for his exercise of it. To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic."[300]

(e) To similar effect, Lord Hoffmann said:

> "In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them … Town and country planning or road construction, in which every decision is in some respects different, are archetypal examples. In such cases Parliament may delegate the decision-making power to local democratically elected bodies or to ministers of the Crown responsible to Parliament. In that way the democratic principle is preserved … There is no conflict between human rights and the democratic principle … There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals."[301]

(f) The power of the High Court in judicial review proceedings to review the legality of the decision and the procedures followed is sufficient to ensure compatibility with article 6(1).[302]

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296 The Attorney-General's submissions on *Alconbury* are gratefully acknowledged and adopted here.
297 [2003] 2 AC 295 at 318.
298 [2003] 2 AC 295 at 318.
299 [2003] 2 AC 295 at 320, 323, 330, 339, 350 & 362.
300 [2003] 2 AC 295 at 323.
301 [2003] 2 AC 295 at 325.
302 [2003] 2 AC 295 at 321, 334.

(g) Accordingly, the call-in and recovery powers of the Secretary of State are not incompatible with article 6(1) of the *European Convention on Human Rights*.

[338] That reasoning applies here. And, coincidentally, this hard-fought litigation is compelling evidence of the availability of a review of the legality of the Deputy Premier's call-in decision – consistent with factor (f) above.

[339] In their reply submissions the Ashworth parties contended that *Alconbury* served only to demonstrate the importance of considering a right to a fair trial in the context of a ministerial call-in.[303] I do not agree. *Alconbury* establishes an important principle in the balancing of an individual's human rights and the broader community interests with economic and environmental implications. For the same reason, it is not significant that there are some factual distinctions between *Alconbury* and this case.

[340] It is not the case that the authority of *Alconbury* can be discarded because s 31 and Article 6 are substantively different.[304] A comparison of the two provisions, side-by-side, illustrates their commonality and common heritage:

Section 31(1), *Human Rights Act*	Article 6(1), *European Convention on Human Rights*
Fair hearing (heading)	**Right to a fair trial** (heading)
A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.	In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…

[341] It can be seen that the right given by s 31(1) is not substantially different from the right given by Article 6 of the *European Convention on Human Rights.* In particular, there is no substantive difference in the condition under which the right applies – civil or criminal proceedings. Both provisions require a "*fair and public hearing*". The right given under the Queensland Act is to have the proceeding decided by a "*competent, independent and impartial court or tribunal*". The right given under the European Convention is to have the proceeding decided by "*an independent and impartial tribunal established by law*". The European provision requires a hearing within a reasonable time. The Queensland provision is silent about that.

[342] The differences, that is Queensland's additional requirement of a 'competent' tribunal[305] and the European requirement of a hearing within a reasonable time,[306] are not material differences which would justify distinguishing the point of principle

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303 Ashworth reply submissions at [45].

304 The Ashworth parties make this distinction in their reply submissions at [46].

305 More likely than not 'competence' is assumed as part of the UK's requirement of "*an independent and impartial tribunal established by law*".

306 The Queensland provision refers to a hearing of a 'court or tribunal' whereas the European provision is limited to 'tribunal'. The difference is not material because a court is likely to be comprehended by the expression 'tribunal'.

in *Alconbury*. Similar considerations apply to the differences in the respective planning schemes.

[343] It follows that the Ashworth parties have not established that their rights under s 23, 24 and 31(1) were limited.

Justified Limitation?

[344] Section 13 of the *Human Rights Act* provides as follows:

> **13 Human rights may be limited**
>
> (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
>
> (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
>
> (a) the nature of the human right;
>
> (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
>
> (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
>
> (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
>
> (e) the importance of the purpose of the limitation;
>
> (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
>
> (g) the balance between the matters mentioned in paragraphs (e) and (f).

[345] Therefore, even if the Deputy Premier's call-in decision limited the rights of the Ashworth parties, the question that s 13 of the *Human Rights Act* poses is whether those limitations comprise reasonable limits that can be demonstratively justified in a free and democratic society based on human dignity, equality and freedom. Of course, not every limit on human rights effected by a call-in decision will be reasonable and justified. Much depends on the rights limited and the features and circumstances of the call-in decision.

[346] In deciding whether a limit on a human right is reasonable and justifiable, s 13(2) requires a consideration of the following relevant factors:

(a) The nature of the three human rights identified and discussed above[307] are significant, but, as regards the property right, this case does not involve core personal property such as food, clothing, and housing;

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307 The right to take part in public life (s 23) the right to property (s 24) and the right to a fair hearing (s 31(1)).

(b) Any limits on those human rights arising from the Deputy Premier's exercise of the call-in power is focussed on the State interest and has the effect of altering the decision-maker from the Council to the Minister who is answerable to Parliament;

(c) The change in decision-maker is designed to achieve the purpose of serving the State interest;

(d) There is no alternative method of achieving that purpose of serving the State interest;

(e) The exercise of the call-in power achieves a reasonable balance between the scope of matters left to the Minister's decision and the scope of control possessed by the courts over the exercise of his discretionary power;[308]

[347] For those reasons, even if the Deputy Premier's call-in decision limited the rights of the Ashworth parties, there is a cogent and persuasive basis for concluding that the limits were reasonable and justified.

Conclusions on Substantive Compatibility

[348] I therefore find that:

(a) the call-in decision did not limit the Ashworth parties' opportunity to participate in public life 'without discrimination' (s 23);

(b) the statutory right to elect to be a co-respondent and participate as a party in an appeal pursuant to s 229(1)(b)(iv) of the *Planning Act* does not constitute property, and it has not been demonstrated that the call-in deprived the Ashworth parties of their property in an arbitrary way (s 24); and

(c) the exercise of the call-in power by the Deputy Premier is compatible with the Ashworth parties right to a fair hearing (s 31).

Procedural Complaints

[349] The 'procedural limb' in s 58(1)(b) of the *Human Rights Act* provides that: "*It is unlawful for a public entity …(b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.*"

[350] Subsection 58(5) of the *Human Rights Act* provides that:

> For subsection (1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to—
>
> (a) identifying the human rights that may be affected by the decision; and
>
> (b) considering whether the decision would be compatible with human rights.

[351] Again, the Queensland Parliament has utilised the legislative device of defining a term by reference to what it includes. The absence of an exclusive definition makes

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308 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 351-2. Some of these factors were identified by the *Assessment under Human Rights Act 2019* which is Schedule 2 to the Briefing Note.

it relevant and help to consider three Victorian cases have discussed what 'proper consideration' requires of the public entity. It is important to note that these cases pre-date the Queensland *Human Rights Act* and that the equivalent Human Rights legislation in Victoria does not include an equivalent to s 58(5).

[352] *First*, in *Castles v Secretary, Department of Justice*[309] Emerton J explained the concept of giving 'proper consideration' to human rights in this way:

> [185] The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a "common or garden" activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the "correct" rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> [186] While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

[353] *Second*, in *Bare v Independent Broad-Based Anti-Corruption Commission*[310] the Victorian Court of Appeal quoted and accepted those views of Emerton J in *Castles*.

[354] *Third*, the approach in Castles was again endorsed by the Victorian Court of Appeal in *HJ v Independent Broad-based Anti-Corruption Commission*:

> "For a decision-maker to give 'proper' consideration to a relevant human right in compliance with s 38(1) of the Charter, he or she must: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications for the affected person; (3) identify the countervailing interests or obligations; and (4) balance

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309 (2010) 28 VR 141 at [185]-[186]

310 (2015) 48 VR 129 at [52], [146], [276]-[279] and [535]. All three judges of appeal quoted paragraphs [185] and [186] from *Castles* with evident approval.

> competing private and public interests as part of the exercise of justification."[311]

[355] In Queensland, though, the 2019 legislation has given more guidance. Section 58(5) of the *Human Rights Act* specifies that 'proper consideration' at least requires the decision-maker to both identify the human rights that may be affected by the decision and to consider whether the decision would be compatible with human rights. However, both those tasks need to be approached in a common sense and practical manner. In *Owen-Darcy v Chief Executive, Queensland Corrective Services* Martin J said:

> The identification of the relevant human rights is an exercise that must be approached in a common sense and practical manner. Decisionmakers like Ms Newman are not expected to achieve the level of consideration that might be hoped for in a decision given by a judge. On this point, I agree with what Emerton J said in *Castles*… [His Honour then quoted the passages from Castles extracted above.][312]

[356] It follows that, in Queensland 'proper consideration' at least requires the decision-maker to, in a common sense and practical manner, both identify the human rights that may be affected by the decision and to consider whether the decision would be compatible with human rights.[313]

The Deputy Premier's Consideration of Human Rights

[357] As explained, the Deputy Premier's call-in decision expressly refers to his proper consideration of the human rights relevant to his decision whether to issue the call-in notice. The Deputy Premier expressly referred to the HR Assessment assisting with his consideration and his determination that his call-in decision was compatible with human rights.[314]

[358] The HR Assessment considered by the Deputy Premier, recognised that a call-in decision would mean that the appeal to the P&E Court would be discontinued, and that this may have an impact on the human rights of the submitter co-respondents in that appeal. The HR Assessment acknowledged that the parties to the appeal would no longer have the opportunity to be heard in Court which may limit their freedom of expression under s 21 of the *Human Rights Act* but concluded that any limit on freedom of expression was proportionate under s 13 for the following reasons:

> • the decision involves restarting the development assessment process at the confirmation period, meaning that the application will be required to undergo public notification. This has the effect of enhancing the human right of freedom of expression because the submitters will have an opportunity to comment further on the development application if called in

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311 (2021) 64 VR 270 at [155].

312 [2021] QSC 273 at [137].

313 In that respect, the position in Queensland may vary from that in Victoria where the view expressed in *Castles* was that proper consideration need not involve formally identifying the "correct" rights: see *Owen-Darcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [136].

314 The Deputy Premier was entitled to seek and obtain the advice of relevant public servants: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at 340.

> • the purpose of the potential limitation is to protect or give effect to state interests (Economic and environmental interests of the State or part of the State as explained in the assessment report)
>
> • this purpose is significant and recognised as such under the *Planning Act 2016*
>
> • there are no less restrictive ways to achieve the purpose.

[359] The HR Assessment also considered the impact of a decision to call in the application on human rights related to environmental impacts (ss 16, 19, 25, 26 and 29), as well as the property interests at stake in the development application (s 24).

Identification and Consideration

[360] For the reasons that follow, I am satisfied that the Deputy Premier correctly identified the human rights that might have been affected by the call-in decision and correctly considered whether the call-in decision would be compatible with human rights.

[361] *First*, for the reasons explained above, the call-in decision did not limit the Ashworth parties' opportunity to participate in public life 'without discrimination'. There was, therefore, no need for the Deputy Premier to identify that human right as one that may be affected by the call-in decision.

[362] *Second*, the exercise of the call-in power by the Deputy Premier is compatible with the Ashworth parties right to a fair hearing. The Deputy Premier was not required to identify that right as one that may be affected by the call-in decision. For completeness, whilst the HR Assessment did not expressly tackle the right to a fair hearing under s 31, the HR Assessment did address the call-in decision's impact on the opportunity to be heard in court which, it was thought, may limit freedom of expression under s 21 of the *Human Rights Act*, but that limitation was thought to be proportionate because of right to be heard that might be afforded by the new process.

[363] *Third*, the statutory rights to participate in a P&E appeal does not constitute property, even if it did, it has not been demonstrated that the call-in deprived the Ashworth parties of their property in an arbitrary way.

[364] Further, the HR Assessment took the view that property rights were affected:

> If this [i.e. the call-in] occurs, the property rights, both of Wanless (and its individual employees) and any submitters may be potentially limited in that the Minister would be stepping in to determine whether or not the development may proceed.
>
> [and later]
>
> Any potential limitation on property rights is reasonable and justifiable in the circumstances, because:

- as noted above, the restarting point of the development assessment process at the confirmation period means that the application will be required to undergo public notification

- the purpose of the potential limitation is to protect or give effect to state interests (economic and environmental interests of the State or part of the State as explained in the assessment report);

- this purpose is significant and recognised as such under the *Planning Act 2016*

- there are no less restrictive ways to achieve the purpose.

[365] And so, whilst the Deputy Premier need not have identified and considered the rights given by s 23, 24 and 31 of the Human Rights Act, because those rights were not affected by the proposed call-in decision, the Deputy Premier did in fact identify and consider the potential impact on the right to property under s 24.

[366] I am not satisfied that there is any basis for a finding that, in making the call-in decision, the Deputy Premier failed to give proper consideration to a human right relevant to the decision. I therefore find that the Deputy Premier has not breached the 'procedural limb' in s 58(1)(b) of the *Human Rights Act*.

The Piggyback Provisions

[367] The Attorney-General submits, and I accept, that s 59(5) of the *Human Rights Act* makes plain, the applicants may seek relief or remedy on a ground of unlawfulness arising under s 58 only under the 'piggyback clause' in s 59. Section 59(2) permits a person to seek relief or a remedy for unlawfulness arising under s 58, but only if the condition in s 59(1) is met, that is, "*if the person may seek any relief or remedy*" in relation to the same decision on a ground of unlawfulness arising "*other than because of s 58*". In other words, the 'piggyback' clause permits an applicant to seek relief for a breach of s 58 only where the applicant has at least one 'independent ground', unrelated to s 58, for alleging that the impugned act or decision was unlawful.[315]

[368] Here, the Ashworth parties satisfied the 'piggyback' requirements by relying also on the other four grounds of challenge to the Deputy Premier's call-in decision. However, they also contended that, in some circumstances, the failure to consider properly, or to consider at all, those human rights that are relevant to the call-in decision provides a separate judicial review ground.[316] I reject that contention. It is inconsistent with the plain words of s 59. As the Attorney-General submits, an applicant who establishes a breach of s 58 is limited to the 'relief or remedy' to which they would have been entitled for the independent ground. The obvious purpose of s 59 is to safeguard against an increase in litigation.[317] And, as Tate JA observed in *Bare v Independent Broad-Based Anti-Corruption Commission*[318] these provisions were intended to have a normative effect on the conduct of public

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315 See also *Owen-Darcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [100].
316 Ashworth parties' reply submissions at [23].
317 *Queensland, Parliamentary Debates, Legislative Assembly*, 31 October 2018, 3185-6
318 (2015) 48 VR 129 at [299].

authorities.[319] The intention was to change behaviour, not to provide an additional weapon.

A Further Obstacle?

[369] That rationale is relevant to a further argument raised by Wanless and adopted by the Attorney-General. Wanless and the Attorney-General submitted that s 231 of the *Planning Act* precluded any relief under s 59 of the *Human Rights Act*.

[370] Section 231 of the Planning Act provides:

> 231 **Non-appealable decisions and matters**
>
> (1) Subject to this chapter, section 316(2), schedule 1 and the P&E Court Act, **unless the Supreme Court decides a decision or other matter under this Act is affected by jurisdictional error, the decision or matter is non-appealable.**
>
> (2) The *Judicial Review Act 1991*, part 5 applies to the decision or matter to the extent it is affected by jurisdictional error.
>
> (3) A person who, but for subsection (1) could have made an application
>
> under the *Judicial Review Act 1991* in relation to the decision or matter, may apply under part 4 of that Act for a statement of reasons in relation to the decision or matter.
>
> (4) In this section—
>
> **decision** includes—
>
> (a) conduct engaged in for the purpose of making a decision; and
>
> (b) other conduct that relates to the making of a decision; and
>
> (c) the making of a decision or the failure to make a decision; and
>
> (d) a purported decision; and
>
> (e) a deemed refusal.
>
> **non-appealable**, for a decision or matter, means the decision or matter—
>
> (a) is final and conclusive; and
>
> (b) may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way under the *Judicial Review Act 1991* or otherwise, whether by the Supreme Court, another court, any tribunal or another entity; and

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319 See also *Castles v Secretary, Department of Justice* (2010) 28 VR 141 at [185]-[186] (quoted above).

(c) is not subject to any declaratory, injunctive or other order of the Supreme Court, another court, any tribunal or another entity on any ground.

[emphasis added]

[371] The evident purpose of s 231 is to oust the jurisdiction of courts and tribunals, except for those specific proceedings that are specified, and except for those proceedings where the Supreme Court decides that the relevant decision is affected by jurisdictional error. Of course, privative clauses like s 231 should be narrowly construed.[320] It is presumed that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies.[321]

[372] In Victoria it is a matter of some controversy as to whether a breach of the Victorian equivalent of s 58(1) the *Human Rights Act*[322] is a jurisdictional error. In *Bare v Independent Broad-Based Anti-Corruption Commission*[323] Warren CJ found that a breach of the Victorian equivalent of s 58(1) did not amount to jurisdictional error. Her Honour decided that there was no indication that it was the intention of the legislature in drafting the Act, including the equivalent of s 58(1), that a decision by a public authority that did not properly consider a human right, or that breached a human right would be invalid. However, the other two members of the Victorian Court of Appeal, Tate JA and Santamaria JA, both offered some detailed observations but found it unnecessary to decide the issue and left it unresolved.[324]

[373] In Queensland, however, the controversy has been quelled by s 58(6) of the *Human Rights Act* which provides that:

To remove any doubt, it is declared that—

(a) an act or decision of a public entity is not invalid merely because, by doing the act or making the decision, the entity contravenes subsection (1); and

(b) a person does not commit an offence against this Act or another Act merely because the person acts or makes a decision in contravention of subsection (1).

[374] And so, the legislative intention in Queensland is clear. On the one hand, s 58(1) provides that it is unlawful for a public entity to act or make a decision in a way that is not compatible with human rights, or to fail to give proper consideration to a

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320 *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 at [100]; citing *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 631 and a number of other cases.

321 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. By the same token, it is appreciated that the *Human Rights Act* is to be read liberally as it allows for the vindication of human rights: *Goode v Common Equity Housing Ltd* [2014] VSC 585 at [25].

322 Section 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

323 (2015) 48 VR 129 at [100].

324 (2015) 48 VR 129 at [378]-[397] (Tate JA) and [496], [600] and [617]-[626] (Santamaria JA).

human right relevant to the decision. On the other hand, the unlawfulness[325] does not make the decision invalid (or even an offence).

[375] In my view, the Attorney-General's submissions are correct that s 58(6) makes it clear that a breach of s 58(1) amounts to a non-jurisdictional error.[326]

[376] Thus, even if there were a breach of s 58 of the *Human Rights Act*, s 59 presents an obstacle to the applications. Section 231 of the Planning Act is a further obstacle because it bars non-jurisdictional errors such as those based on s 58(1) of the *Human Rights Act.*

[377] It is understandable that the outcome may not be a palatable one for the Ashworth parties. They are local residents who were participating in the P&E process. No doubt they had invested time, energy and expense in that proceeding. The Minister's call-in put a halt to that process and imposed a new, largely discretionary process. However, that has come about as a consequence of the law, which expressly reserves those powers to the Minister. The Minister is responsible to Parliament – and ultimately the electors.

CONCLUSION

[378] For those reasons I refuse the applications.

[379] I will hear the parties on the appropriate form of orders and on costs.

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325 The use of the term 'unlawful' does not necessarily connote invalidity: that every invalid act is an 'unlawful' act does not entail that every unlawful act is invalid: *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 at [617].

326 Attorney-General's supplementary submissions at [19]. However, it is doubtful that one can go so far as to say that s 58(6) evinces an intention to allow for human rights review to be ousted by privative clauses in other Acts that apply to non-jurisdictional errors of law.