THE QUEEN v CORONER MARIA DOOGAN;
ex parte PETER LUCAS-SMITH & ORS

THE QUEEN v CORONER MARIA DOOGAN & ORS; ex parte AUSTRALIAN CAPITAL TERRITORY [2005] ACTSC 74 (5 August 2005)

COURTS AND TRIBUNALS – Coronial inquiry – application for prohibition on ground of apprehended bias – relevant principles – significance of jurisdictional limits and hybrid nature of inquiry – ostensibly independent investigator not appointed by Coroner but engaged by department – danger of blurring boundaries between judicial and executive arms of government.

Coroners Act 1997 (ACT), s 53, 18(1), 12, 54(2), 58, 19, 52(2), 52(4), 55, 59
Coroners Act 1956 (ACT) - repealed
Supreme Court Act 1933 (ACT), s 13, 37E(2)(a)(ii),
Coroners Act 1980 (NSW), s 15
Courts Administration Act 1993 (SA)
Parliamentary Privileges Act 1987 (Cwth)

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
R v Watson; Ex parte Armstrong (1976) 136 CLR 248 (3 August 1976)
Annetts v McCann (1990) 170 CLR 596
The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70
Harmsworth v The State Coroner (1989) VR 989
March v E & MH Stramare Pty Ltd (1991) 171 CLR 506
Musumeci v Attorney-General of New South Wales (2003) 57 NSWLR 193
Maksimovich v Walsh (1985) 4 NSWLR 318
Mirror Newspapers Ltd v Waller (1985) 1 NSWLR 1
Barbosa v Di Meglio [1999] NSW CA 307
Scott v Numurkah Corporation (1954) 91 CLR 300
Browne v Dunn (1893) 6 R 67
R v Doogan: Ex parte Lucas-Smith & Ors (No 1) [2004] ACTSC 91 (17 September 2004)
Fingleton v Christian Ivanoff Pty Ltd (1976) 14 SASR 530
Lyle v Christian Ivanoff Pty Ltd (1977) 16 SASR 476
R v Moss ex parte Mancini (1982) 29 SASR 385
Re JRL; Ex parte CJL (1986) 161 CLR 342
Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150
Fox v Percy (2003) 214 CLR 118

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7) [2003] FCA 893
Firman v Lasry [2000] VSC 240
Galea v Galea (1990) 19 NSWLR 263
Subramanian v The Queen [2004] HCA 51
R v Puddick [1865] 4 F 497
McCullough (1982) 6 A Crim R 274
Vella (1990) 47 A Crim R 119
Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria (2001) 207 CLR 72
Vakauta v Kelly (1989) 167 CLR 568
Johnson & Johnson (2000) 201 CLR 488
GIO v Glasscock (1991) 13 MVR 521
ASIC v Rich [2004] NSWSC 970
R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13
Fagan v Crimes Compensation Tribunal (1982) 150 CLR 666
Broken Hill Pty Ltd v National Companies and Securities Commission (1986) 61 ALJR 124
Commonwealth of Australia v Human Rights and Equal Opportunity Commission (1998) 76 FCR 513
Bienstein v Bienstein (2003) 195 ALR 225

No SC 697, 698 of 2004

Judges: Higgins CJ, Crispin and Bennett JJ
Supreme Court of the ACT
Date: 5 August 2005

IN THE SUPREME COURT OF THE)
) No SC 697 of 2004
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN: **THE QUEEN**

AND: **CORONER MARIA DOOGAN**
Respondent

EX PARTE: **PETER LUCAS-SMITH, MICHAEL CASTLE, ANTHONY GRAHAM, IAN BENNETT, RICHARD McCRAE, ODILE ARMAN, PETER NEWHAM, RICHARD HAYES and VIVIEN RAFFAELE**
Prosecutors

O R D E R

Judge: Higgins CJ, Crispin and Bennett JJ

Date: 5 August 2005

Place: Canberra

THE COURT ORDERS THAT:

1. 1. the order nisi be discharged.

IN THE SUPREME COURT OF THE)
) No SC 698 of 2004
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN: **THE QUEEN**

AND: **CORONER MARIA DOOGAN**
1st Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS
2nd Respondent
PETER LUCAS-SMITH
3rd Respondent
MICHAEL CASTLE
4th Respondent
RICHARD McCRAE
5th Respondent
ODILE ARMAN
6th Respondent
PETER NEWHAM
7th Respondent
IAN BENNETT
8th Respondent
ANTHONY GRAHAM
9th Respondent
RICHARD HAYES
10th Respondent
VIVIEN RAFFAELE
11th Respondent

EX PARTE: **AUSTRALIAN CAPITAL TERRITORY**
Prosecutor

O R D E R

Judges: Higgins CJ, Crispin and Bennett JJ

Date: 5 August 2005

Place: Canberra

THE COURT ORDERS THAT:

1. the order nisi be discharged.

THE COURT:

1. In each of these matters, which were heard together, the prosecutors seek an order prohibiting the first respondent from further conducting a coronial inquiry into the fires that spread from bushland into areas of Canberra on 18 January 2003, causing widespread damage and the tragic deaths of four people.

2. Inquests were also conducted into the deaths of Douglas Fraser, Peter Brabason-Brooke, Allison Tenner and Dorothy (Dotty) McGrath, but interim findings made pursuant to s 53 of the *Coroners Act 1997* (ACT) have not been challenged.

3. The inquiry was formally opened on 16 June 2003, and in the ensuing 16 months received numerous reports and other documents as well as hearing 94 witnesses and generating a transcript totalling 7,802 pages.

4. On 11 October 2004 the first respondent was asked to disqualify herself on the ground of apprehended bias. The application, which was supported by written submissions, was based upon allegations concerning certain acts and statements of the first respondent, but also raised issues as to the conduct of Mr Lex Lasry QC, who had been senior counsel assisting her at the inquiry. Mr Lasry asked for some time to consider those issues and the application was adjourned. On 19 October 2004, Mr Burnside QC appeared with Ms Neskovcin to make submissions as counsel assisting the first respondent and after some hours of legal argument the first respondent considered the applications but dismissed them.

5. On 20 October 2004, following ex parte applications to this court, Crispin J made orders nisi requiring the first respondent to show cause why she should not be prohibited from hearing or otherwise proceeding with the inquests or the inquiry, and an order that the inquiry be stayed until further order of the court.

6. Pursuant to s 13 of the *Supreme Court Act 1933* (ACT), Crispin J ordered that the jurisdiction of the Court in the matter should be exercised by a Full Court. That order not only recognized the importance of the issues raised but also avoids the potential delay which could arise if a party, dissatisfied with a ruling at first instance, wished to appeal to the Court of Appeal (see s 37E(2)(a)(ii), *Supreme Court Act*).

7. The prosecutors in each case now seek to have those orders made absolute. It is important to put the applications into a temporal context; the hearing being conducted by the first respondent is still at the stage of the taking of evidence. No submissions have yet been made to the first respondent and no decisions taken as to the issues to be determined or relevant evidence going to those issues, let alone findings made by her.

The apprehended bias ground of disqualification

8. The ground for disqualification that is often referred to as one of "apprehended bias" is rooted in fundamental principles of natural justice. It was described by the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ at [6] in the following terms:

> *Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror) . . . , the governing principle is that, subject to qualifications relating to waiver . . ., a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.*

9. The *Ebner* test reflects the importance of maintaining public confidence in the administration of justice and its capacity to ensure that cases are decided impartially. As Barwick CJ, Gibbs, Stephen and Mason JJ explained in the earlier case of *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 (3 August 1976) at 263:

> *It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably*

> *apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision. To repeat the words of Lord Denning MR … "Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"* (citation omitted).

10. It cannot be doubted that the principles of natural justice apply to coronial proceedings and prohibition is available to prevent their breach: *Annetts v McCann* (1990) 170 CLR 596. Nonetheless, in *The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 the High Court, in a unanimous judgment, affirmed that the principle will be applicable only when it is "firmly established" that a suspicion may reasonably be engendered in the minds of those who come before the tribunal, or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. See also *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 per Gaudron and McHugh JJ at 100.

11. In *Ebner v The Official Trustee in Bankruptcy*, Gleeson CJ, McHugh, Gummow and Hayne JJ went on to explain at [8], that the application of the principle requires two steps; first, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and second, the articulation of a logical connection between that matter and the feared deviation from the course of deciding the case on its merits. Hence, the significance of the facts and circumstances from which it is suggested that an apprehension of bias might arise must be assessed by reference to the question or questions that the judicial officer is required to decide.

12. In litigation *inter partes* the nature of the questions that the judicial officer is required to determine can generally be found in the pleadings, but coronial inquiries have no pleadings and, strictly speaking, no parties. The task of a coroner is not to determine whether anyone is entitled to some legal remedy, is liable to another or is guilty of an

offence. The Coroner's task is to inquire into the matters specified in the relevant section of the *Coroners Act 1997* ("the Act") and make, if possible, the required findings and any comments that may be appropriate. Thus, if an application raising questions of apprehended bias is made before the coroner has handed down his or her report or at least foreshadowed specific findings, it may be more difficult to determine the potential relevance of particular rulings or comments made during the course of the proceedings.

13. In the present case, the evidence adduced at the inquiry included expert opinions relating to a wide range of issues, and at one point counsel assisting the coroner disseminated a memorandum annexing an "issues list" which, it was suggested, the first respondent would be invited to adopt "in effect, as terms of reference for the balance of the inquest". It is, of course, entirely appropriate for counsel assisting a coroner to advise parties who have been given leave to appear at the inquiry of issues which he or she has identified as potentially relevant to the questions which the inquiry is to address. The coroner may choose to accept or reject those issues as appropriate and to determine that other issues are relevant. It may become apparent for example, that an issue identified in the list early in the proceedings was no longer relevant at the conclusion of the evidence. However, a coroner is not free to enlarge his or her own jurisdiction by the adoption of terms of reference, and at least some of the issues so identified clearly fell outside the scope of the jurisdiction conferred by the Act. The list was apparently discussed during a directions hearing before the first respondent, but the evidence does not reveal that she agreed to determine all of the issues so identified. Mr Burnside, who again appeared with Ms Neskovcin to oppose both applications in this Court, submitted that an intention to do so could not be inferred.

14. Nonetheless, there seemed to have been at least some confusion as to the extent of jurisdiction conferred upon the first respondent. Both Mr Burnside and Mr Tracey QC, who appeared with Messrs Lakatos and McCarthy for the prosecutor ("the ACT"), in matter SC 698 of 2004, initially suggested that the Act conferred jurisdiction upon a coroner to inquire, not only into the cause and origin of the fire, but also into the circumstances in which it occurred. The ensuing argument also suggested some confusion as to the effect of certain provisions of the Act. Whilst all counsel ultimately accepted that the jurisdiction to conduct coronial inquiries is more limited than was initially suggested, it may be appropriate to begin by explaining the limited focus of the Act and the effect of the relevant provisions.

The relevant statutory duties and powers

15. The Act is generally concerned with the resolution of relatively straightforward questions such as "what was the cause of this death?" or "what caused this fire?". It does not provide a general mechanism for an open ended inquiry into the merits of government policy, the performance of government agencies or private institutions, or the conduct of individuals, even if apparently related in some way to the circumstances in which the death or fire occurred. Specific provisions of the Act confer jurisdiction on coroners to enquire into stipulated questions, require them to make certain findings, and empower them to make comments. The nature and extent of the powers conferred by these provisions will be considered in turn.

The jurisdiction to inquire

16. The scope of any judicial inquiry must obviously be determined by the nature and extent of the jurisdiction being exercised. The jurisdiction to conduct inquiries in relation to fires is conferred by s 18(1) of the Act which is in the following terms:

> *A coroner shall hold an inquiry into the cause and origin of a fire that has destroyed or damaged property, if –*
>
> *(a) requested to do so by the Attorney-General; or*
>
> *(b) the coroner is of the opinion that an inquiry into the cause and origin of the fire should be held.*

17. Section 12 also provides that:

> *(1) (1) A coroner has the functions and jurisdiction given by this Act or any other Territory law.*
>
> (2) (2) *Except as otherwise provided by this Act, a coroner also has all the functions and jurisdiction that were vested in a coroner immediately before the commencement of the* Coroners Act 1956.

18. For present purposes it is unnecessary to canvass the legislative history prior to the *Coroners Act 1956* (ACT) – repealed, though it was ably expounded by Mr Glissan QC, who appeared with Messrs Walker, Whybrow, Craddock, Pike and Watts for the prosecutors in matter SC 697 of 2004. It is common ground that no different or expanded view of the jurisdiction relevant to the inquiry in question was derived from these provisions.

19. Hence, it is now accepted on all sides that the jurisdiction of the coroner is limited by the terms of s 18(1) of the Act to the conduct of an inquiry into the cause and origin of a fire that has destroyed or damaged property. Whilst this proposition may seem relatively clear, two questions arise: first, what is meant by "the fire"; and, second, what is meant by "the cause and origin" of such a fire?

20. If the concept of "the fire" were to be interpreted narrowly, the jurisdiction might be confined to determining whether the initial ignition was due to arson or was caused by

some accident or natural phenomenon such as a lightning strike. The most obvious impediment to such a construction is that, unlike a death, a fire is not a one-off event but a process that develops over time. The process may have been initiated by a single event such as ignition due to a lightning strike or, as in the present case, by ignition due to lightning strikes at four separate places. However, when the concept of causation is applied to a process that has developed over a period of several days, it must extend beyond such origins to embrace those factors that had a causal effect on the development or continuance of the process. It would be quite unrealistic to regard a fire that had travelled long distances and/or burnt out vast areas of bushland as coextensive with a fire that had been smouldering on the end of a cigarette when negligently thrown from a car window and, then to dismiss from consideration any intervening or contributing events.

21. In any event, the meaning of a statutory provision of uncertain scope is not to be found by relentless adherence to semantic or philosophical argument, but by attempting to deduce the intention of the legislature. An inquiry into a fire may be sought by the owner or occupier of destroyed or damaged property and a coroner who is of the opinion that an inquiry should not be held is obliged to provide any such person with written notice of his or her opinion and the grounds upon which it is based. Furthermore, s 54(2) of the Act provides that when such an inquiry has been held, the coroner shall, on request of the owner of the property damaged or destroyed by the fire, make a copy of his or her findings available to the owner.

22. For these reasons, we are satisfied that the term, “the fire”, in s 18 of the Act should be construed to mean the fire that caused the damage to property rather than merely the initial ignition from which that fire ultimately developed. In the present case, it was open to the coroner to inquire into “the cause and origin” of the fire that swept

through parts of Canberra causing the deaths of four people and immense damage to property on 18 January 2003, and to consider all of the factors that might reasonably be regarded as having been causative of the entire process of that fire.

23. The phrase "cause and origin" is not a hendiadys. A coroner is required to inquire into two separate concepts. The word "origin" means, of course, the source or beginning, and in the context of a fire it clearly refers to the starting point. Hence, the origin or origins of the fire can usually be identified with some confidence. In the present case, the origins of the fire would have been the locations of the lightning strikes that ignited each of the four fires that later converged into the overall conflagration.

24. More difficult issues arise in relation to the concept of causation. Many different factors may have contributed to the development of a fire or fires over a period of some days, and a coroner may be required to inquire into a range of potentially causal facts and circumstances. Furthermore, each factor may in turn have been caused by a combination of other factors and there may be debate about the extent to which an apparent chain of causation may be traced. As Nathan J pointed out in *Harmsworth v The State Coroner* (1989) VR 989 at 996, the issue of causation has vexed philosophers and judges since Socrates was obliged to drink hemlock and, even in relation to statutory provisions such as that contained in s 18(1), questions inevitably arise as to whether particular factors are too remote to be regarded as having been causative of the fire, as it developed, in any real sense.

25. To take but one example, it may be thought that the thickness of the vegetation at the site where the fire commenced had some causal relevance and, if the first respondent came to that view, then she would clearly be entitled to make a finding to that effect. However, that observation may evoke other questions. Why was the vegetation in

that state? Was there some failure on the part of a government agency to detect its growth and embark upon fuel reduction measures? If so, was this attributable to lack of resources, public policy related to conservation of the natural environment and/or other considerations? The answers to those questions could, in turn, evoke yet others. How much does the ACT Government spend on the construction of fire breaks and other fuel reduction measures in and around Canberra? Is that amount of money appropriate having regard to the Government's competing responsibilities such as those relating to the provision of adequate funds for education, public health facilities and law and order? As a matter of public policy, has an appropriate balance been struck between the need to protect housing on the fringes of Canberra and the need to ensure that the surrounding bushland is maintained in its natural state? If not, is that because the legislature has been misled as to the relative importance of wilderness areas?

26. Even further questions could be asked. Should people have been permitted to build houses in the areas in question? Should the New South Wales Government have taken measures to prevent fires spreading from forest or bushland into the Territory? Should the ACT building code have required houses constructed in those areas to incorporate various features designed to ameliorate the danger posed by potential bushfires? Should fire crews have been deployed in one suburb in preference to another? Did some occupants contribute to the danger and/or the damage by failing to remove flammable materials from their yards?

27. Each of these questions could, of course, lead to yet others and, ultimately to a virtually infinite chain of causation. Yet the scope for judicial inquiry pursuant to s 18(1) must be limited. Whilst none of these suggested issues could be said to be irrelevant, they are somewhat remote from the concept of the cause and origin of the

fire, and any adequate investigation of them would involve not only substantial time and expense, but also delving into areas of public policy that are properly the prerogative of an elected government rather than a coroner or, indeed, any other judicial officer.

28. Section 18(1) does not authorise the coroner to conduct a wide-ranging inquiry akin to that of a Royal Commission, with a view to exploring any suggestion of a causal link, however tenuous, between some act, omission or circumstance and the cause or non-mitigation of the fire. As Nathan J said in *Harmsworth v The State Coroner*, such discursive investigations might never end and hence never arrive at the findings actually required by the Act. It would also be difficult to contain such inquiries within reasonable bounds whilst at the same time ensuring due fairness. Once evidence of a particular issue were admitted, those who feared that such evidence might form the basis for adverse comments concerning their conduct would inevitably wish to challenge it and to call other evidence to rebut or qualify it. Yet the admission of further evidence might raise further issues and hence generate applications for still more evidence to be called. Thus, a coroner might be constantly torn between the need to contain the scope of the inquiry and the need to ensure that all interested parties were treated fairly. More fundamentally, the section does not confer jurisdiction to conduct inquiries of that scope.

29. A line must be drawn at some point beyond which, even if relevant, factors which come to light will be considered too remote from the event to be regarded as causative. The point where such a line is to be drawn must be determined not by the application of some concrete rule, but by what is described as the “common sense” test of causation affirmed by the High Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506. The application of that test will obviously

depend upon the circumstances of the case and, in the context of a coronial inquiry, it may be influenced by the limited scope of the inquiry which, as we have mentioned, does not extend to the resolution of collateral issues relating to compensation or the attribution of blame.

30. The case of *Harmsworth v The State Coroner* (supra) illustrates the point. The coroner was enquiring into the deaths of prisoners in a cell block fire. At 995, Nathan J observed:

> *The enquiry must be relevant, in the legal sense to the death or fire, this brings into focus the concept of "remoteness". Of course the prisoners would not have died, if they had not been in prison. The sociological factors which related to the causes of their imprisonment could not be remotely relevant.*

and (at 996):

> *Such discursive investigations are not envisaged nor empowered by the Act. They are not within jurisdictional power.*

To investigate the management structure might have been relevant if confined to:

> *investigating why the management structure at Pentridge was incapable of responding to a request from the Reception Prison for fire equipment"* (997).

31. There will, of course, be many cases in which the issue of causation will necessarily involve an examination of a person's conduct. A coroner conducting an inquest into the death of a person may be obliged to consider whether the death was attributable to accident or homicide. If reasonable grounds emerge for a belief that a person has committed murder, manslaughter or some other indictable offence the coroner will be required by s 58 of the Act to inform the Director of Public Prosecutions by written notice and the inquest will be adjourned. If that situation does not arise, the coroner will be obliged to make findings as to the nature of the acts and/or omissions that caused the death, even if they reflect adversely on the reputation of one or more people involved in the relevant incident. Hence, a coroner might well hear evidence

suggesting that a cyclist's death had been caused not merely by a collision with a motor vehicle, but also by the antecedent conduct of the driver of that vehicle in failing to stop at a stop sign adjacent to an intersection. However, the limited jurisdiction conferred by s 18(1) would not authorise the coroner to inquire into any perceived failures in relation to general policy relating to the siting of stop signs or the enforcement of traffic regulations. The particular siting and design of the relevant intersection may be a different matter. The application of the common sense test of causation will normally exclude a quest to apportion blame or a wide-ranging investigation into antecedent policies and practices.

32. We should, perhaps, mention that it was suggested in argument that other coroners had, from time to time, conducted inquests or inquiries that ranged far beyond issues relating to the manner and cause of a death or the cause and origin of a fire. However, the present applications do not raise any issue as to the legality of the approach adopted in such proceedings and it would be inappropriate for us to make any comment about them other than to observe that, even if the relevant provisions of the Act have previously been overlooked, they nonetheless impose legal constraints on the jurisdiction that may be exercised by coroners in this Territory. The position may be different in other jurisdictions where the comparable provisions confer broader powers. For example, s 15 of the *Coroners Act 1980* (NSW) formerly authorised coroners to enquire, not only into the cause and origin of fires, but also into the circumstances in which they occurred, though it was recently amended to bring it into line with s 18(1) of the Territory enactment. Whilst judicial decisions concerning the scope of coronial inquiries in such jurisdictions may nonetheless be of some value, their effect must obviously be considered in the context of the statutory provisions applicable to the inquiries in question.

33. We might also mention that s 19 of the Act provides that the Chief Coroner shall, if requested to do so by the Attorney-General, cause an inquiry to be held into the cause and origin of a "disaster". It was not contended that this section should be interpreted as precluding the exercise of jurisdiction under s 18 where the "fire" in question has given rise to a "disaster" and we accept that it was not intended to have such an effect. The sections simply have a different focus because the concept of a disaster is obviously wider than that of a fire.

34. For present purposes, it is neither necessary nor appropriate for us to go through either the so-called "issues list" or the evidence adduced before the first respondent with a view to making rulings as to the apparent relevance of each of the issues so identified. It is generally for the first respondent to determine whether any particular factor could be regarded as sufficiently proximate to fall within the concept of the "cause and origin" of the fires in question, so that she may enquire into it. Whilst it does appear that counsel assisting were intent on pursuing a range of issues extending well beyond even the most expansive conceptions of causation, no objection was taken and the first respondent's attention was apparently not drawn to the limited nature of the jurisdiction conferred by s 18(1). The issues list merely reflected the range of issues which counsel assisting intended to submit should be dealt with by the first respondent, and the mere admission of evidence that appears to canvass a range of issues extending beyond those specified in s 18(1) does not demonstrate any error of jurisdiction. Indeed, a liberal approach to the potential relevance of evidence may sometimes be appropriate, particularly in the early stages of an inquiry when the coroner is still seeking to identify what issues are likely to arise.

35. Accordingly, we will address the potential relevance of issues raised at the inquiry only to the extent necessary to deal with particular arguments that have been

advanced in support of the contention that the first respondent should be prohibited from proceeding with the inquiry on the ground of apprehended bias.

The duty to make findings

36. Section 52(2) of the Act provides that "a coroner holding an inquiry shall find, if possible -

> *(a) the cause and origin of the fire or disaster; and*
>
> *(b) the circumstances in which the fire or disaster occurred."*

37. The requirement to find, if possible, not only the cause and origin of the fire but also the circumstances in which it occurred, is not augmented by any conferral of jurisdiction to inquire into such circumstances. The section only requires the coroner to make such findings to the extent permitted by the evidence adduced at the inquiry conducted under s 18(1), seen as relevant in the legal sense, to the "cause and origin of the fire".

38. It is clear, both from the language in which this provision is expressed and from the fact that the power must be exercised in relation to an inquiry under s 18(1), that the "circumstances" to which the provision is directed are circumstances that are related to the cause and origin of the fire.

39. Mr Burnside actually submitted that there was no real difference between the concepts of the "cause and origin" of a fire and the circumstances in which it occurred. We do not agree. The word "circumstances" has a wide meaning and the concept referred to in s 52(2)(b) of the Act is broader than that referred to in s 52(2)(a) of the Act. Nonetheless, the word must be construed by reference to the statutory context within which it appears. A coroner is not authorised to make findings in relation to any circumstances arising from the fire, but only in relation to the circumstances in which the fire occurred. The distinction between a cause and a

circumstance may essentially be one of degree. For example, had the fires reached Canberra eight days later, the deployment of fire fighting units could conceivably have been hampered by additional traffic due to Australia Day celebrations. It would have been somewhat fanciful to regard the celebration of such an anniversary as a "cause" of the fire but it might well have been a circumstance that could have been alluded to in the findings.

40. In essence, it is for the first respondent to determine whether any particular factor should be regarded as a relevant circumstance and whether the evidence is sufficient to enable her to make any finding about it.

The right to make comments

41. Subsection 52(4) also provides that a coroner "may comment on any matter connected with the death, fire or disaster including public health or safety or the administration of justice." Comments may obviously extend beyond the scope of "findings". The latter term refers to judicial satisfaction that facts have been proven to the requisite standard or that legal principles have been established. The former refers to observations about the relevant issues, and may extend to recommendations intended to reduce the risk of similar fires, deaths or disasters occurring in the future. However, conferral of the power to make comments does not enlarge the scope of the coroner's jurisdiction to conduct an inquiry. As Nathan J said, albeit in a somewhat different context, in *Harmsworth v The State Coroner* at 996:

> *The power to comment, arises as a consequence of the obligation to make findings. . . . It is not free-ranging. . . . The powers to comment … are inextricably connected with, but not independent of the power to enquire into a death or fire for the purposes of making findings. They are not separate or distinct sources of power enabling a coroner to enquire for the sole or dominant reason of making comment or recommendation. It arises as a consequence of the exercise of a coroner's prime function, that is to make "findings". . . .*

42. If a coroner decides to pursue this course, he or she is subject to the requirement in s 55 of the Act that any party who may be adversely affected by such a comment be given due warning that it may be made, as well as the opportunity to make a written statement in relation to the comment, or make a submission to the coroner in relation to the proposed comment.

43. Again, it is for the first respondent to determine whether any comments should be made in the light of the evidence adduced at the inquiry.

The nature and evolution of the inquiry

44. The submissions made in support of the present applications must also be considered by reference to the nature of the inquiry. In *Musumeci v Attorney-General of New South Wales* (2003) 57 NSWLR 193 at 199, Ipp JA said:

> *I think it sufficient to note, firstly, that it is a hybrid process containing both adversarial and inquisitorial elements. Secondly, coroners exercise judicial power, notwithstanding the executive nature of their functions. Thirdly, the proceedings in the Coroner's Court involve the administration of justice:* see R v South London Coroner; ex parte Thompson *(1982) 126 Sol J 625 (cited in* Annetts v McCann (*at 616) by Toohey J):* Fairfax Publications Pty Ltd v Abernethy *[1999] NSWSC 826, per Adams J:* Maksimovich v Walsh *(at 327-328 per Kirby P and at 337 per Samuels JA:* Mirror Newspapers Ltd v Waller *(1985) 1 NSWLR at 6:* Herron v Attorney-General (NSW) *(1987) 8 NSWLR 601, per Kirby P at 608).*
>
> *The nature of an inquest differs from that of a fundamentally investigatory process such as a Royal Commission.*

45. Whilst these observations are generally true, it is important to bear in mind that the coroner's duties will almost always involve some initial investigation and that, in the case of bushfires that have covered large areas and caused substantial damage, may involve a substantial investigatory phase in which little, if any, scope for the exercise of judicial power may arise. As Samuels JA said in *Maksimovich v Walsh* (1985) 4 NSWLR 318 at 342, a coroner does not commence an inquest or inquiry without any knowledge of the facts but must be aware of the nature of the material to be put before him or her and the inferences which he or she may be invited to draw from it. Hence, as his Honour added, the procedure is inquisitorial to a degree, but much inhibited by the overriding influence of the adversarial model.

46. It cannot be doubted that a coroner has a duty to act judicially in resolving the various issues that arise for determination: see, for example, *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1 at 6. However, his or her awareness of those issues may emerge only gradually as the investigatory stage of the inquiry unfolds. It may be

some time before the coroner can make sensible judgments as to who should be granted leave to be represented at the subsequent inquiry. The hypothetical lay observer must be taken to be aware of this general process from an investigatory to a curial phase and to understand that a coroner may be obliged to undertake some investigations and duties at an earlier stage of the proceedings without consultation with parties who might conceivably be interested. It would be absurd to imagine that a coroner could not view the scene of a fatal accident and make decisions about the release of the body until all issues related to the death had been identified, an inquiry formally convened and parties who may be affected by those findings given the opportunity to make submissions. It is true, of course, that an apprehension of bias may arise even at the investigatory phase of an inquiry, whether due to some expression of prejudgment or otherwise, but many grounds of complaint commonly relied upon to support applications of this kind in relation to other proceedings will obviously be inapplicable.

47. It is also true that, as the predominantly investigative stage of the inquiry progresses and issues are identified, it may become apparent that some or all of the information that has been obtained during that investigative phase should be revealed to the parties. Whilst the Coroner may not be bound by the rules of evidence, the ensuing inquiry will have to be conducted in accordance with the principles of natural justice. Those principles require due disclosure of information that may be relevant to the resolution of issues of concern to the parties in question.

48. Even when the inquiry has been formally convened and evidence is being adduced, the coroner may still be engaged in an investigation of potential issues, the scope of which will not have been defined by pleadings. Issues may continue to arise and be progressively clarified and refined. Hence, any allegation that a remark or statement

by the coroner may have given rise to an apprehension of bias must be considered, not only in the context of the relevant jurisdictional limits, but also by reference to the extent to which the relevant issue has been crystallised or remains inchoate.

49. It may also be necessary to take into account the stage at which the conduct said to have given rise to such an apprehension occurred. There are cases in which it may be clear that an apprehension of bias, once formed, could not be assuaged by the subsequent course of proceedings but much depends upon the circumstances. As Priestley JA said in *Barbosa v Di Meglio* [1999] NSW CA 307 at [78]:

> *Incidents may occur in the course of the proceedings which create such an apprehension of bias as will be incurable notwithstanding subsequent irreproachable behaviour on the part of the judge. Sometimes light will be cast on happenings in the course of proceedings, not of such a clear cut character, but causing the beginning of apprehension, by the opinions and findings stated in the judge's reasons for judgment. The light cast may lead to the extinction or confirmation of the earlier inchoate apprehension.*

50. Furthermore, it will obviously be necessary for anyone raising an allegation of apprehended bias to show, whether by reference to notices under s 55 of the Act or otherwise, that there is at least a risk, which cannot be considered fanciful, that the Coroner may proceed so as to decide the issue to which the allegations relate: see *Annetts v McCann* (1990) 170 CLR 596. In the present case the prosecutors have sought to overcome this problem by arguing that, as a matter of general principle, if grounds for an apprehension of bias have arisen, it does not matter whether the particular issues in relation to which the relevant conduct occurred are ultimately determined by the Coroner, because his or her approach to the entire proceedings will have been tainted. Whilst that is possible, much will depend upon the circumstances. In many cases, the very fact that the Coroner did not regard the issue as one that should be determined at the inquest or inquiry will be sufficient to dispel any adverse inference that might otherwise have arisen from the conduct alleged. To take an

obvious example, no adverse inference could be drawn from a coroner's refusal to permit expert witnesses to be called in relation to an issue that he or she had concluded did not arise for determination in the proceedings.

The circumstances said to be suggestive of bias

51. In each case the prosecutors contend that an apprehension of bias arises from a series of acts and decisions which, as Mr Glissan put it, reveals that from the inception of the inquiry, the conduct of the first respondent and counsel assisting her was directed to finding people responsible for failing to extinguish the bushfires or warning the community of them, rather than determining their cause and origin. The factors relied upon by the prosecutors in the two cases are not entirely co-extensive but there is substantial concurrence and, in each case it is contended that, even if no one factor would itself provide a ground for such an apprehension, the cumulative effect is compelling.

52. On the other hand, each must be considered in the context of the matters to which we have already referred, and the cumulative effect weighed with due recognition of the length of the inquiry and volume of evidence adduced. Even a series of acts and decisions may seem less indicative of an underlying attitude if understood as consisting of comparatively isolated incidents in a hearing spanning 85 days and generating 7,802 pages of transcript. With this note of caution, we will deal with them sequentially.

The view of the scene

53. The prosecutors contend that the first incident which might have contributed to such an apprehension was the first respondent's decision to view some of the affected areas with three members of the team assisting her, Mr Lasry, Ms Cronan, and Ms Drew, along with four potential expert witnesses, Mr Phillip Cheney, Mr Trevor Roche, Mr Sean Cheney and Mr Peter Hutchings. The view was conducted on 20 August 2003, obviously for the purpose of enabling the Coroner to gain an appreciation of the terrain, and hence better understand the evidence to be adduced at subsequent hearings. It was conceded that it was reasonable for her to have inspected the relevant areas, but objection was taken to the fact that she had done so came to light when counsel suggested that such a view should be undertaken. The gravamen of the complaint was that she was accompanied not only by members of the legal team assigned to assist her but also by potential expert witnesses, including Mr Cheney, and that she did not inform others who might be or become interested, that she intended to participate in a view of the affected areas.

54. These complaints may be readily dismissed. It was entirely appropriate for the first respondent to undertake a view as part of her initial investigation, and equally appropriate for her to take one or more experts with her so that the relevant areas could be identified and the significance of particular observations fully appreciated. It was unnecessary for her to inform any parties who had then been given leave to appear at the subsequent hearings. Such parties were free to inspect the relevant areas themselves and at least some counsel did so. They could also suggest that additional areas be visited by the coroner.

55. It is true that the prosecutors and other participants did not have the opportunity to make submissions about what areas should be visited, or to suggest that particular

attention be paid to certain aspects of the terrain and vegetation, but since the first respondent had arranged for the attendance of experts, that may have been quite unnecessary. In any event, a failure to consult many people who may have been or may have become interested in the outcome of the inquiry about a view conducted at this early stage could not, in our view, provide any ground for an apprehension of bias.

56. It is also true, as Dixon CJ, Webb, Kitto and Taylor JJ stated in *Scott v Numurkah Corporation* (1954) 91 CLR 300 at 313, that it is not permissible for a judge to gather anything in the nature of extraneous evidence and apply it in the determination of the issues unless the facts are openly ventilated and exposed to the criticism of the parties. However, this principle does not prevent a coroner from conducting a view of the relevant scene at the investigative phase of his or her inquiry without first informing the parties, though it may well require subsequent disclosure of any information thereby obtained which might be relevant to the interests of parties given leave to appear.

57. The position may have been quite different had the first respondent been presiding over litigation *inter partes* or even, perhaps, if the view had been undertaken at a much later stage in the proceedings when the issues had been clarified, the evidence had commenced, the interested parties clearly identified and the investigatory phase had given way to the curial phase. In that event, the parties given leave to be represented at the inquiry may have had a reasonable expectation that they would at least be given notice of any fact finding expedition that might be undertaken, especially if expert witnesses likely to give contentious evidence were to be invited to accompany the first respondent. However, such considerations did not arise.

The production of the notes of the view

58. Mr Phillip Cheney took some notes during the course of the view and counsel assisting subsequently asked him to provide a typed copy. Mr Cheney duly produced a six-page document, referring to the various locations that had been visited and expressing various opinions relating to such issues as the difficulties that would have confronted firefighters in attempting to control the fire in the prevailing conditions.

59. That document contained notes of various things which Mr Cheney had apparently told the first respondent during the course of the view which, it is submitted, were of critical importance to the opinion the first respondent will be required to form of the conduct of the prosecutors and others who were not present at the view. At one point he mentioned the difficulty of fire suppression and the need for local knowledge. He later expressed the opinion at a second location that it would have been "impossible to hold the upslope spread" of the fire. At a third point he discussed the tactic apparently employed on 8 January 2003 of holding a small portion of the perimeter on the back of the fire. He later expressed the opinion to the first respondent that the mounds of rollover drains in the vicinity of the Webbs Ridge trail were too high and likely to damage fire-fighting tankers. There was apparently a subsequent discussion in an area on Wombat Road concerning the difficulty of fire suppression during the course of which Mr Cheney apparently expressed the view that the use of chainsaws and other measures for safely fighting the fire in that area may have been beyond the skills possessed by volunteer firefighters.

60. The potential significance of these opinions was quickly appreciated by senior counsel assisting the Coroner who, in a memorandum dated 22 August 2003, said that the views of Mr Cheney, whom he described as "the Coroner's witness", would be "at odds with the views of ESB". (The latter initials apparently referred to the

Emergency Services Bureau.) He subsequently added that " . . . there may be more contention about Dr [sic] Cheney's evidence than was first thought . . .".

61. The existence of this document was not initially disclosed to counsel for the parties who had been granted leave to appear at the inquiry and the prosecutors contended that Mr Cheney subsequently gave evidence that was in some respects inconsistent with what he had apparently told the first respondent during the course of the view. Furthermore, propositions were put to several witnesses that were also inconsistent with opinions recorded in the document. The respondents complained that the failure to disclose the notes or reveal that the first respondent had viewed the relevant areas meant that their counsel remained unaware of the inconsistencies and were unable to make objections or otherwise make forensic use of the assertions in the notes. It is submitted that this amounted to a denial of procedural fairness, made all the more significant by a ruling by the first respondent that the rule in *Browne v Dunn* (1893) 6 R 67 would be applied.

62. In answer to these contentions, Mr Burnside submitted that the opinions expressed to the first respondent during the course of the view had been generally reflected in Mr Cheney's subsequent reports, copies of which had been duly provided to the interested parties.

63. This contention was challenged by counsel for the prosecutors who maintained that at least some important aspects had been omitted. Mr Glissan cited the example of a passage in Mr Cheney's report entitled "Origin and Development of the Bushfires that spread into the ACT" in which Mr Cheney referred to the rate at which a "mineral earth line" could be constructed by a six-person team, but did not include the words of caution expressed in his notes. He also referred to comments qualifying the general proposition, repeatedly raised by counsel assisting, that fire usually behaves in the

most benign manner on the first night and that there is usually a good opportunity to attack it directly over the course of that night. He pointed out that, in examining Mr Graham who had been the operations manager of the Emergency Services Bureau, counsel assisting had suggested that the decision making process on the night of 8 January 2003 had been negligent. Ms Arman, who had been the incident controller at the relevant area on that night, had been the subject of some implied criticism for having decided to withdraw the team of firefighters because of the escalating danger to their lives. She had also been asked whether with the benefit of hindsight she should have kept her team in the area to fight the fire overnight. Mr Glissan submitted that the "hindsight" which Ms Arman had been invited to apply in addressing this question should have included knowledge of those observations made by Mr Cheney during the course of the view, and that both she and Mr Graham had been treated unfairly by having the observations withheld from them. Somewhat similar criticisms were made of the manner in which another officer, Mr McCrae, had also been cross-examined.

64. It does appear that at least some comments made by Mr Cheney during the course of the view were not reproduced in his subsequent reports and it is unfortunate that the witnesses to whom Mr Glissan referred were not aware of all of the opinions that had been expressed during the course of the view. However, the sequence of events propounded by Mr Glissan provide little support for his contention that a lay observer could have formed an apprehension of bias. The contention seems to have been predicated upon a number of unstated assumptions, namely that the first respondent had recalled the particular observations in the document said to be inconsistent with particular questions put to witnesses, that she had compared the notes written on 22 August 2003 with the subsequent reports and transcripts of the oral evidence to

ascertain whether there were any discrepancies, that she had concluded that they were relevant to issues she was required to determine and of some real significance, and that she must have realised that it would not be fair to such witnesses if she did not intervene by mentioning those observations during the course of their evidence. There is no obvious reason to make any of these assumptions. Further, the first respondent stated during the course of the inquiry that she would only take into consideration evidence at the hearing. Mr Cheney was an apparently reputable expert engaged by the Australian Capital Territory to advise the first respondent. There is no reason to suppose that she regarded the comments made during the course of the field trip as reflecting anything more than his first impressions upon viewing the relevant areas, or that she doubted that his reports accurately reflected the opinions he had formed after having had the opportunity for more mature consideration.

65. Counsel for the prosecutors also submitted that the first respondent had displayed an apparent reluctance to produce these notes and records of earlier meetings which will be referred to later in this judgment. In fact, Mr Glissan suggested that obtaining copies of the notes had been like "pulling teeth".

66. On 27 April 2004 counsel for Mr Lucas-Smith, Mr Walker, suggested that the first respondent view the scene of the fires. She responded by saying that she had already seen much of the relevant areas. Mr Walker then asked her if she would be willing to provide some indication of the particular areas that she had seen. She told him that she would have that information provided to him.

67. The first respondent subsequently produced a two-page document identifying the areas inspected on the view. The document appears to consist substantially of extracts from the notes prepared by Mr Cheney.

68. On the 24 May 2004, the following exchange ensued:

> *MR WALKER: Your Worship has indicated that you have already undertaken a view. You have kindly indicated to me where you went. But apparently, your Worship, there was some notes of what you were told about various things at various places. Your Worship, in my submission insofar as that conversation related to matters directly relevant- I assume you only took notes of things relevant -*
>
> *THE CORONER: I didn't take any notes at all, Mr Walker. They weren't my notes.*
>
> *MR WALKER: I see. Your Worship, if that be the case, the application still lies that if your Worship is able to indicate in broad summary terms what you were told in the course of that view, I would respectfully request that your Worship make that known because it may be - I note Mr Cheney was on the view - that he says something about a particular area which might be disputed. I am not trying to pry or be unduly personal, but it is possible that a man such as Mr Cheney who has been called to give evidence may well have made statements to your Worship which are in fact material to the matters which are before you. In my submission, insofar as your Worship is able, it would be appropriate, with respect, that that information be made available.*

69. The first respondent deferred ruling on this application to permit Mr Lasry to be heard on the issue and on the following day he made oral submissions which included the statement that:

> *. . . insofar as there was conversation of a more formal nature . . . it was primarily about where we were and being pointed out to us where the fire was in particular places and so on.*

70. Mr Glissan submitted that these comments were either attributable to a lapse in memory or a deliberate attempt to mislead other counsel as to what had actually taken place during the course of the field trip. The remarks were certainly inaccurate but we see no reason to suppose that they were deliberately misleading. In any event, the real point that counsel for the prosecutors sought to make was that the first respondent had permitted the comments to remain uncorrected when, it was submitted, she must have known that they were incorrect.

71. Arguments of this kind are usually worthy of little, if any weight, though much obviously depends upon the importance of the error. Judges and magistrates cannot

be expected to intervene immediately in order to correct every misstatement made by counsel. They may be preoccupied with the essential issues and simply overlook the inaccuracy of the remark. Even if they appreciate that a misstatement has occurred, they may regard it as relatively unimportant or they may simply let it pass, perhaps with the intention of correcting any misapprehension in the subsequent reasons for judgment. In some cases an insistence on immediately correcting every minor error would require such constant intervention that there might be a risk of distracting counsel from the real thrust of their submissions.

72. Counsel for the prosecutors sought to gain some support for their contentions of bias by pointing out that the first respondent had later made the following remarks to counsel seeking access to any notes of conversations:

> *. . . you seem to think that there were other notes provided. I am not obliged to provide any information such as that, if it did exist.*

73. These comments were made less than four weeks after her Worship (to use the form of address then applicable to coroners) had apparently gone through the notes to extract information concerning the areas that had been visited. Counsel for the prosecutors pointed out that in agreeing to produce a record of those places, the first respondent had said that she did not think that counsel really needed the "dialogue". They submitted that the contents of the document had clearly been "cut and pasted" from the document containing the notes, subject only to the substitution therein of the word "viewed" for the word "indicated". It was argued that in these circumstances she must have known that the document contained other notes, and the implicit suggestion that there was some doubt about their existence was potentially misleading. Furthermore, it was suggested that a lay observer might have been left with a suspicion that the change of wording had been intended to conceal the fact that

witnesses had "indicated" specific matters to the first respondent during the course of the field trip.

74. We accept that the first respondent's remarks might have justified some concern if the phrase "other notes" had alluded to notes "other than those relating to specific locations" contained in the six page document produced by Mr Cheney. However, there is no obvious reason to construe her Worship's remarks in that manner. The words "other notes" are followed by the word "provided", and that suggests that her Worship may have thought that counsel had in mind the existence of another set of notes that had been separately provided on another occasion. In an inquiry of this complexity it was, of course, entirely possible that Mr Cheney and/or other experts had provided further notes to those assisting the Coroner and that they had not come to her attention. We are not satisfied that the remark offered any reasonable ground for suspicion that the first respondent intended to mislead counsel, rather than merely indicating that, even if any further notes had been provided to those assisting her, she was not under any obligation to produce them.

75. The full six-page document referring to the view was finally produced on 9 September 2004 after proceedings in this court. Counsel for the respondents submitted that it was only then that statements of opinion apparently capable of providing some answer to criticisms made of the prosecutors were revealed.

76. Whilst acknowledging that the evidence to be adduced at the inquiry has not yet been completed, and that the proceedings have not reached a stage at which notices may have been sent out warning of possible adverse findings, it was submitted that the overall sequence of events had been disturbing. The prosecutors suggested that a lay observer would have been concerned to find that a judicial officer had, in effect, personally edited a statement prepared by an important witness in the case, and even

more concerned to find that potentially exculpatory evidence had been withheld until it had become clear that production would be compelled by order of a superior court. Furthermore, the apprehension excited by these events would have been exacerbated by statements suggesting that all that had been omitted were matters of general conversation relating to the location of the areas visited when in fact, those statements had been quite incorrect.

77. However, these contentions must be considered in context. More than eight months had elapsed between the view of the affected areas and Mr Walker's request for an indication of the particular areas inspected, and it was entirely understandable that the first respondent resorted to the only notes apparently taken of the view. It is difficult to see how the document she produced could be seen as anything but a reasonable response to the request that had been made. The notes from which the material was extracted had not constituted a comprehensive account of Mr Cheney's expert opinions, but merely recorded places visited and things said and done during the course of the view. It is true that, in referring to the notes for the purpose of producing a record of the areas visited, the first respondent may have been reminded of things that Mr Cheney said during the course of the view, but she would have known that Mr Cheney had already given some evidence and was likely to produce further reports and/or give additional evidence in the future and she had stated that she would not consider material that was not in evidence. There is no reason to suspect that the first respondent had recognised that the document contained some crucial fact or opinion that would not be revealed by Mr Cheney's evidence. Furthermore, given the nature of the proceedings, the first respondent would obviously have depended upon those assisting her to disseminate copies of relevant documents and she had been repeatedly assured that this duty had been responsibly discharged. For example,

on 28 April 2004 she had heard Mr Lasry respond to a request for copies of any notes made by another witness by stating that he and his colleagues had been "punctilious" in ensuring that copies of any relevant contemporaneous notes were duly provided.

78. The apprehended bias test does not involve imputing to the hypothetical lay observer a propensity to draw the most sinister implications from every ruling or adopt the least favourable interpretation of every judicial comment. It is more likely that a benign implication or interpretation would be adopted. As we have already mentioned, grounds for such a reasonable apprehension must be "firmly established". In the present case, even if the first respondent's statements had been sufficient to cause what Priestley J described in *Barbosa v DiMeglio* as "the beginning of apprehension", there is no reason to suppose that the future conduct of proceedings would not have assuaged any such apprehension. Many of the submissions made on behalf of the prosecutors clearly reflect their concern that they may be at risk of adverse findings in relation to certain issues. However, no notices have been issued warning them that such findings are contemplated and, having regard to the jurisdictional limits imposed by the Coroners Act, it is by no means certain that all or any of those issues would be open to determination, let alone in a manner that would reflect adversely upon their reputations. There is also no reason to suppose that potentially relevant information would by then have been withheld from persons to whom notices warning that an adverse finding was contemplated.

79. Furthermore, the complete document has since been disclosed and if, contrary to our impression, it does provide some important evidence that had not previously been revealed, then that can be drawn to the first respondent's attention before the inquiry is closed.

The suggestion that Mr Cheney and Mr Roche were independent investigators

80. On 26 August 2004 the first respondent refused an application for the production of certain documents, stating that the nature of the request suggested that counsel were seeking something upon which to base an attack on the credit of Mr Cheney and Mr Roche. She added, " . . . both of these persons have been appointed by me in accordance with the provisions of s 59 of the *Coroners Act* to assist with the investigation and were appointed as independent and impartial experts".

81. Section 59 provides as follows:

> *(1) A coroner may, by instrument, appoint a person to assist him or her in the investigation of any matter relating to an inquest or inquiry.*
>
> *(2) An investigator appointed under subsection (1) shall—*
>
> *(a) inquire into; and*
>
> *(b) report in writing to the coroner on;*
>
> *any matter referred to the investigator by the coroner by his or her instrument of appointment.*
>
> *(3) The instrument of appointment of an investigator shall specify—*
>
> *(a) particulars of the subject matter into which the investigator is to inquire and report; and*
>
> *(b) the conditions (if any) to which his or her appointment is subject; and*
>
> *(c) the remuneration (if any) to which he or she is entitled to receive.*
>
> *(4) An investigator who is a public servant is not entitled to be paid remuneration under subsection (3).*
>
> *(5) The coroner holding the inquest or inquiry in relation to which the investigations are made shall have regard to the report of the investigator and shall give it such weight as the coroner thinks fit.*

82. As Whitlam J found in *R v Doogan: Ex parte Lucas-Smith* & Ors (No 1) [2004] ACTSC 91 (17 September 2004) at [16], neither Mr Cheney nor Mr Roche had been appointed as an investigator under s 59 of the Act. On the contrary, each had been

engaged by the ACT Government pursuant to a contract and, in Mr Cheney's case, the other party to the contract had been his employer, the CSIRO, rather than him personally. The contract required the provision of an "independent expert witness" to the inquest.

83. Mr Burnside submitted that, despite the contrary finding by Whitlam J, we should accept that Mr Cheney and Mr Roche had been validly appointed under s 59. Mr Burnside maintained that the finding made by Whitlam J had been substantially attributable to the Director of Public Prosecution's failure to contest the issue and that it should not preclude a further consideration of the relevant legal issues. Whilst, as his Honour had pointed out, Mr Roche and Mr Cheney had not been appointed directly by the Coroner, they had been appointed by an instrument and there was nothing in the section to prevent their appointment by the ACT Government acting for this purpose as the Coroner's agent.

84. We are unable to accept these submissions. The issue had been fairly raised in the proceedings before Whitlam J and the Director, apparently with full knowledge of the facts, had not opposed the making of the relevant finding and had not subsequently appealed against it. Even if no estoppel strictly arises, we can see no reason to permit the Director to reopen this issue now.

85. In any event, we are unable to see any reason to doubt the correctness of his Honour's decision. We accept that there is nothing in the section to prevent funding being made available by means of collateral contracts between experts appointed under s 59 and/or their employers and the ACT Government, but the section does seem to require that the appointment be made by the Coroner personally. It is, in our view, highly unlikely that the legislature intended to permit coroners to delegate the appointment of "independent" experts to the ACT Government when the latter is

frequently represented as a party in such proceedings and often has an interest in outcomes that may be influenced by the evidence that such witnesses may give.

86. However, the mere fact that the first respondent was mistaken about the nature of their appointment does not justify a finding of apprehended bias.

87. Mr Tracey's primary submissions appeared to involve an explicit allegation that the first respondent's statement had been intentionally misleading, though in his address in reply he disavowed any such contention. He indicated that the real point upon which his client relied was that the statement may have created a suspicion of such an intention in the mind of the reasonable lay observer. We do not accept either proposition.

88. The proceedings before the first respondent were complex and protracted, and she had the assistance of a legal team including junior and senior counsel. There is no reason to suppose that she would have personally drafted or inspected the documents under which Mr Cheney or Mr Roche were engaged or had any clear recollection of whether she had actually signed any instruments of appointment some twelve months or more earlier, even if she had turned her mind to the procedural requirements of the section. Furthermore, the evidence suggests that Mr Cheney and Mr Roche had acted as if they were investigators acting on instructions from counsel assisting the first respondent. Indeed, that is the subject of complaint from the prosecutors in both cases. We see no reason to doubt that the first respondent had assumed that they had been validly appointed to perform the role they had apparently adopted and, since it is s 59 that authorises such appointments, that they had been appointed under that section. The hypothetical lay observer, aware of the relevant facts, would have had no reason to suspect that the statement had not been made honestly or to otherwise entertain any doubt as to the first respondent's integrity.

89. Nonetheless, the confusion that arose in this manner is disturbing. The first respondent was clearly misled as to the engagement of expert witnesses called to give potentially crucial evidence, and had the error not been discovered she might have acceded to the oft-repeated suggestions of counsel assisting that she accept the reliability of their evidence was enhanced by their perceived independence. In that event a subsequent challenge to any conclusions based on that evidence may have succeeded in circumstances that could have been avoided.

90. This confusion clearly reflects what appears to be an increasing tendency for the boundaries between the courts and the executive to become blurred. Courts are not, of course, part of the public service. The courts as a group constitute one of the three arms of government, the others being the legislature and the executive. The role of the courts is to see that justice is done according to law, and that frequently requires them to stand between the citizen and the other arms of government. Public confidence in the ability of courts to dispense justice in a fair and impartial manner is largely dependent upon continuing recognition of their independence. There are obvious indications of such independence, including the fact that jurisdiction must be exercised according to law rather than government policy, and that judges and magistrates generally enjoy guaranteed tenure of office. On the other hand, there are some grounds for concern that, at least at an administrative level, courts in some jurisdictions may be seen as mere sub-branches of a public service department. The treatment of courts in that manner may be administratively convenient but, as the former Chief Justice of Victoria has recently warned, any perception that courts are part of the executive would be inconsistent with due recognition of their fundamental role and underlying independence. Indeed, due recognition of that principle has led to magistrates who were also officers of the Executive being regarded as disqualified

from hearing any matter concerning the Executive. See *Fingleton v Christian Ivanoff Pty Ltd* (1976) 14 SASR 530, *Lyle v Christian Ivanoff Pty Ltd* (1977) 16 SASR 476, *R v Moss ex parte Mancini* (1982) 29 SASR 385.

91. We recognise that some who are more familiar with the culture and ethos of the public service rather than the social policy considerations relating to the essential requirement for the perceived independence of the courts may think that, so long as their essential independence is in fact maintained, some risk of confusion is a small price to pay for assumed gains in administrative efficiency. However, such views reflect a failure to understand the fundamental importance of maintaining public confidence in the independence of the judiciary, and hence in their capacity to decide any dispute fairly and impartially, even if that means standing between the individual and the state. The oft-repeated aphorism that justice must not only be done but must manifestly be seen to be done is particularly apposite in such cases. Furthermore, applications of this kind actually turn on issues of perception and, as we have mentioned, the test is a relatively undemanding one. It is for this reason that the administration of courts is in many instances now independent of the executive government (see eg *Courts Administration Act 1993* (SA)).

92. An apprehension of bias may easily arise when, as appears to have occurred in this case, a judicial officer has been led to believe that an expert witness has been independently appointed to assist the court when, in fact, he or she has been engaged by the ACT Government and that entity has also been granted leave to be represented as an interested party to the proceedings. It may be understandable that departmental officers accustomed to treating courts as a sub-branch of their department may have failed to appreciate the impression that could be created in this manner. However, s 59 of the Act was clearly intended to permit coroners to engage investigators who

would be independent of any of the interested parties, and whose opinions could not therefore be called into question on the grounds that they may have been influenced by competing loyalties. A lay observer could well become apprehensive on learning that a coroner had treated a person as an independent investigator when, in fact, he or she had been engaged by one of the interested parties.

93. Despite Mr Burnside's able submissions to the contrary, this was clearly a matter of potential concern in the present case and, if the evidence given by Mr Cheney and Mr Roche had generally favoured the ACT Government, a finding of apprehended bias may well have been inescapable. However, that was not the case. On the contrary, Mr Tracey's submissions clearly reflected concern that aspects of their evidence was critical of Government employees and/or agencies. It is true, of course, that a party who has engaged experts may itself come to feel that it has suffered from subconscious bias due to them "bending over backwards" to be fair, but it will, of course, have been largely responsible for the situation that has led to any such psychological inclination. In any event, Mr Tracey did not raise any such contention. Nor did it lie comfortably with the ACT Government that, having created a situation of potential conflict, it then sought to complain of it.

94. It was unfortunate that those assisting the first respondent had not accurately informed her of the manner in which Mr Cheney and Mr Roche had been engaged, and that even counsel for the ACT Government had felt obliged to express concern that confusion about the nature of their appointments may have undermined public confidence in the impartiality of the first respondent. Nonetheless, whilst we have carefully weighed the competing arguments, we have ultimately been unable to accept that the statement reflecting her apparent belief that they had been appointed under s 59 of the Act provides an adequate ground for an apprehension of bias.

The inclusion of Mr Cheney and Mr Roche in "the team"

95. Further issues arose from the perceived incorporation of Mr Cheney and Mr Roche into the team assisting the first respondent and their participation in subsequent meetings that she attended. Whilst, as mentioned earlier, we see no reason to suppose that a lay observer would have doubted that the first respondent had been genuinely mistaken about the nature of their appointments and met with them in good faith, an apprehension of bias does not arise only when an absence of good faith can be demonstrated. It may arise due to facts and circumstances that could not justify any criticism of the judicial officer in question, such as when a party to the proceedings unexpectedly calls a potentially crucial witness who proves to be a relative or friend of the judge or magistrate. In the present case, it was submitted that, even if unconcerned about any misunderstanding as the nature of their appointment, a lay observer might have seen their apparent incorporation into the team of people assisting the first respondent, as well as private meetings with them and counsel, as creating a situation in which she might be predisposed to rely unduly upon their opinions. That risk could be seen as having been exacerbated by the fact that issues likely to arise at the inquiry and even matters of tactics had been discussed at those meetings. It was contended that a lay observer could reasonably think that these circumstances may have unduly enhanced their credibility in the eyes of the first respondent, and hence apprehend that relevant issues might not be resolved impartially because, as Brennan J said in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 370, "the judge will not be able, however conscientiously she tries, to remove from her mind the impermissible effect of the discussions she had in chambers . . . ".

96. Mr Burnside made a number of submissions in answer to these contentions. He argued that since the first respondent had been engaged in an investigation, it had

been entirely appropriate for her to attend meetings with people whom she regarded as members of the investigative "team". Whilst Mr Cheney and Mr Roche had been called to give expert evidence at the inquiry, they had been appointed as investigators under s 59 of the Act and, even if there had been some defect in their appointment, the first respondent clearly believed that they had been so appointed. The meetings did not have a tactical focus but related to matters that required investigation and possible avenues of investigation. Furthermore, it was submitted, even if the conversations could be said to have strayed into the area of tactics, that part of the conversation reflected nothing more than a concern to ensure that the evidence was adduced in a logical sequence, and that the inquiry was generally conducted in an efficient manner designed to elicit the truth, not to build a case against any individuals.

97. These arguments were not wholly convincing. Whilst the first respondent had obviously been engaged in an investigation, the lay observer must be taken to recognise that an investigation is only one part of the hybrid process involved in a coronial inquiry of this nature. A coroner must take care to ensure that the nature of his or her participation in the investigation does not provide grounds for an apprehension of bias in the curial phrase. Some comments, such as those made by Mr Lasry on 28 July 2003 proposing that the "top people" be interviewed last when "locked in", clearly suggested a tactical approach. Despite Mr Burnside's submissions to the contrary, we think that a lay observer could well form an apprehension of bias upon learning that a coroner had participated in meetings of a tactical nature. Whilst the investigative aspect of a coronial inquiry may require a coroner to undertake responsibilities extending beyond the normal judicial role, he or she is nonetheless a judicial officer and an apparent endorsement of a tactical approach to the evidence could cause considerable apprehension.

98. We accept that, as matter of general principle, an apprehension of bias could not arise merely by reason of a coroner pursuing a course authorised by statute or which she apparently believed had been so authorised. However, s 59 of the Act provides for the appointment of independent investigators, as opposed to expert witnesses. Whilst the section does not preclude the appointment of experts as investigators, it is by no means clear that it was intended to sanction private consultations with people whom the coroner anticipates being called to give expert evidence. An investigator is required by s 59(2) of the Act to inquire into and report in writing on relevant matters before the inquiry, and the coroner is required by s 59(5) to have regard to the report, and to give it such weight as he or she thinks fit. Some discussion about the matters to be investigated may obviously be required, but it is generally undesirable that the coroner participate personally in those discussions, especially when the investigator is a potential expert witness and, if the coroner is assisted by counsel, it should usually be unnecessary. Even if the section were to be construed as authorising some personal consultation with the coroner, it could not be taken to dispel any possibility of an apprehension of bias arising from private discussions in which the investigator communicated expert opinions relevant to matters that the coroner was required to determine.

99. There are sound reasons for coroners to avoid having private meetings with people who are to give expert evidence in inquests or inquiries, even if those people have been appointed as investigators under s 59 of the Act. As scientists of various disciplines have observed, when even the most eminent experts attempt to provide proof for preconceived views rather than merely attempting to see what conclusions can be drawn from the available data, there will be at least some risk that they will be subconsciously misled. The incorporation of experts into a “team” apparently led by

counsel seeking to achieve a particular result may tend to create such a risk. If, in addition, the coroner is present at meetings when things are said that are suggestive of a shared aim to achieve such a result, then the risk may be heightened by the expert's perception that the coroner has lent his or her imprimatur to the approach. Conversely, incorporation of the expert into the team and his or her participation in meetings with the coroner may create a degree of familiarity that may subtly influence the coroner's appraisal of the evidence given by that expert in comparison with competing evidence by other experts. Furthermore, even if the coroner is confident of his or her ability to avoid being influenced in this manner, even subconsciously, a lay observer with no personal knowledge of the coroner, might not share that confidence.

100. On the contrary, we think that a lay observer might well apprehend that a coroner might not bring an unbiased mind to the resolution of issues which require him or her to choose between conflicting expert opinions when one side is supported by experts who have not only been accepted as part of the team assisting the coroner, but have had private meetings with the coroner herself.

101. However, the lay observer should not be presumed to form such apprehensions without considering the nature of the issue to be determined and the manner in which the opinion of the experts might be likely to impinge upon the decision. In the present case these matters cannot be identified at this stage of the inquiry. The evidence has not been completed and the first respondent has not issued any notices warning people of any contemplated findings. It cannot be assumed that any disputed opinion proffered by Mr Cheney or Mr Roche is likely to influence the first respondent's findings as to the cause and origin of the fire, or that any findings or comments are likely to be based upon any disputed evidence either of them may have given.

102. Furthermore, there are other factors that must be taken into account. The notes did not suggest that the meetings had been intended to have a tactical focus or that the first respondent had attended them in the expectation that tactical issues would be discussed. The meetings occurred at an early stage of the proceedings, and the decisive issue is not what apprehension a lay observer might have formed if aware of the notes at that stage but, rather what apprehension such a person might have formed in October 2004 when the present applications were made. During the intervening period the Chief Minister and some senior public servants presumably alluded to by the phrase "top people" had been called to give evidence and neither they nor their counsel had complained that they had been treated unfairly, whether by the manner in which statements had been taken from them or the manner in which they had been questioned in the witness box. The prosecutors made no attempt to prove that the suggested approach of interviewing such people last had, in fact, been implemented.

103. We accept that counsel for the prosecutors faced a difficult dilemma. A litigant who has reasonable grounds for seeking prerogative relief based upon apprehension of bias will be expected to act promptly. They will not be permitted to allow the proceedings to continue in the hope that they may be resolved in his or her favour and then apply for such relief should that hope not be fulfilled. On the other hand, a litigant who does raise the relevant issues promptly may find that application dismissed as premature if the facts reveal only contingent grounds for apprehension. Nonetheless, we are not satisfied that a fair minded lay observer would have formed an apprehension of bias at this stage of the proceedings rather than waiting to see whether future developments tended to confirm or dispel any tentative concern.

Responses to applications for access to documents relating to expert reports

104. On 25 August 2004 counsel for the prosecutors sought an order requiring counsel assisting the first respondent to produce documents relating to the preparation of expert reports by Mr Roche and Mr Cheney. The oral arguments of counsel were augmented by written submissions that included reference to relevant authorities. The first respondent reserved judgment overnight but subsequently rejected the application, observing that it gave every appearance of discovery and in many respects appeared to be a "fishing expedition" without substance. She also said that the nature of the submissions had left her with the impression that counsel for the prosecutors had been seeking to impugn the integrity of the inquiry and of counsel assisting and that she rejected any such suggestion as being without foundation.

105. Mr Tracey submitted that these comments had clearly been inappropriate. He pointed out that in *R v Doogan: Ex parte Lucas-Smith (No 1)*, Whitlam J had observed at [7] that the outline of submissions prepared by counsel for the prosecutors as well as the oral submissions made in amplication had been models of clarity. His Honour had stated that the first respondent should have been greatly assisted by the exposition of the principles regarding access to documents surrounding an expert's report and, in particular, by the reproduction of passages from three Federal Court judgments. On the other hand, he felt bound to say that the submissions made by junior counsel assisting were, on the whole, "unhelpful and calculated to lead the (first) respondent into error". His Honour later added at [16], that he had not seen any material to suggest that anyone acting for the prosecutors had impugned the integrity of the inquest or inquiry or of counsel assisting the first respondent.

106. Like his Honour, we are unable to see anything in the submissions of the prosecutors that suggested that they were seeking to impugn the integrity of the inquiry or of

counsel assisting the first respondent. Furthermore, we accept that his Honour was correct in his judgment as to the competing merits of the submissions and as to the need for the production of the documents in question. However, we are unable to see how the first respondent's comments could provide any ground for an apprehension of bias. In any lengthy case it is possible for counsel to trawl through the transcript in the hope of finding some judicial remark that, viewed in hindsight and with the aid of only a transcript, can be seen to have been misconceived or otherwise inappropriate. The discovery of such remarks may demonstrate that the judge or magistrate is not infallible, but it will not usually provide any basis for concern that he or she may not bring an impartial mind to the resolution of the issues in the case. Much will obviously depend upon the nature of the remarks and the circumstances in which they were made but in the present case we are unable to accept that the remarks cited offer any support for the prosecutors' contentions.

Notes of conferences in June and July 2003

107. The prosecutors also complained that notes of the meetings attended by Mr Cheney and/or Mr Roche had been withheld from them by the first respondent and counsel assisting her.

108. During the course of delivering her decision on the production of those documents on 26 August 2004, the first respondent stated that:

> *I am not in possession of any relevant evidence which I am withholding from counsel, nor to my knowledge is counsel assisting me.*

109. It was submitted that a lay observer would have been entitled to think that the first respondent must have realised that this statement had been untrue because the balance of the material contained in the document had included evidence that was clearly relevant to the issues that she was required to determine.

110. There are, however, two difficulties with this submission. First, it seems clear from other passages in the transcript that her Worship regarded the reports tendered during the course of the inquiry and the oral evidence given by the witnesses as "evidence", in contra-distinction to notes and other preparatory material. Second, it is by no means clear that a lay observer would have had any reason to assume that her Worship must have regarded the identified portions as "relevant" to the issues before her or, even if relevant, as having any real significance having regard to the other evidence provided in the reports.

111. On 9 September 2004, following proceedings in this Court, three folders of documents were provided to the prosecutors, including an edited version of the notes of a meeting on 28 July 2003. On 10 September 2004 Mr Whybrow complained that the notes had been edited, and on 14 September 2004 he returned to the theme, seeking access to the whole unedited document. Mr Lasry said that he did not know whether it would be provided but that he would make some enquiries. Ms Cronan, who was junior counsel assisting the first respondent, raised the issue again on 16 September 2004, referring to the edited version already produced and indicating that she would produce a third set of notes, but that this would again be in "a masked form" so that only those parts that related to Mr Cheney's involvement would be made available to the parties.

112. On 17 September 2004 Whitlam J delivered judgment in *R v Doogan: Ex parte Lucas-Smith* (No 1), [2004] ACTSC 91 rejecting any suggestion that the application for access to documents available to or produced by the expert witnesses in question had been a "fishing expedition". His Honour went on to explain that the very fact that a coroner is not bound to observe the rules of evidence is an important reason for a cross-examiner to be given generous access to such material.

113. On 20 September 2004 the first respondent referred to the notes that junior counsel had produced four days earlier and said that the passages that had been blanked out did not relate to the category of documents that had been requested and had nothing to do with instructions that had been given to Mr Cheney in relation to preparation of reports. Nonetheless, on the following day Mr Whybrow sought access to the excised portions of notes of the conferences on 4 June 2003 and 28 July 2003 on the basis that they related to a conference attended by both the first respondent and Mr Cheney. In response, the first respondent indicated that Mr Whybrow could see the notes but counsel assisting her objected to any copies being made. When counsel for the ACT Government requested access to the notes for himself and other parties, the first respondent told him that she did not want them taken out of the room or copied. She subsequently agreed to permit counsel to copy them for the purpose of taking instructions subject to undertakings not to further copy them or divulge their contents.

114. Mr Glissan described this as a "cloak and dagger" procedure which, he maintained, suggested some sensitivity on the part of both the first respondent and counsel assisting her in relation to these notes. No other document provided for the purpose of the inquiry had been produced to counsel only on the condition that such undertakings were given. Whilst the notes themselves had been in point form and were amenable to different and perhaps innocuous interpretations, the evident reluctance to produce them or, when produced, to have them copied was likely, it was submitted, to make a lay observer suspicious that the first respondent may have been concerned about what they might have revealed. It was further suggested that suspicion would have been heightened by the fact that the notes revealed that, even before the inquiry had formally opened, a tactical approach had been adopted

involving the collection and presentation of evidence to support particular views, rather than facilitate an objective and impartial inquiry.

115. We have examined the notes with due care and can readily appreciate that a person whose sensitivity to potential criticism had been heightened by public comments, adverse press reports and cross-examination at the inquiry, might have seen some of the recorded comments as consistent with, if not indicative of, the emergence of a "party line". However, the hypothetical lay observer must be taken to have viewed the relevant events in a fair and objective manner and without any predisposition to construe terse and obviously incomplete notes by reference to pre-existing anxieties. Such an observer must also be taken to recognise that counsel assisting a coroner is likely to form at least tentative impressions as to where the truth may lie and to form strategies that to some extent reflect those impressions. Neither their reluctance to reveal those strategies, nor a coroner's reluctance to compel them to do so are necessarily indicative of bias.

The role of counsel assisting in the preparation of expert reports

116. Mr Tracey submitted that a further source of potential concern to a lay observer was the involvement of counsel assisting the first respondent in the preparation of reports by Mr Cheney and Mr Roche.

117. Both Mr Tracey and Mr Glissan made submissions to the effect that neither Mr Roche nor Mr Cheney had proven to be objective and impartial experts, but rather advocates for particular views. Even in the absence of any interference by counsel in the preparation of reports, little weight may be attached to the evidence of an expert who has adopted an adversarial stance, if it is admitted at all: see *Hardy v Your Tabs Pty Ltd (in liq)* [2000] NSWCA 150 at [133] and *Fox v Percy* (2003) 214 CLR 118 at 167-168. In the present case, the adversarial stance adopted by Mr Roche and

Mr Cheney had been "compounded" by the intervention of lawyers assisting the coroner who had edited at least some portions of their reports.

118. Expert reports obtained with a view to being tendered in legal proceedings must, of course, comply with the rules of evidence so far as they are applicable. Hence, as Lindgren J said in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 7) [2003] FCA 893 at [19]:

> *Lawyers <u>should</u> be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed.*

119. Accordingly, the mere fact that some editing of the reports of Mr Roche and Mr Cheney occurred does not demonstrate any impropriety on the part of the lawyers in question or provide any valid ground for concern. It is true that the rules of evidence did not strictly bind the first respondent and that some latitude might have been permitted to statements in the reports that strayed to some extent beyond the bounds of admissibility. However, that consideration did not relieve those assisting the first respondent of their duty to ensure that the reports conveyed the author's opinions in a comprehensible manner, that the basis for those opinions was properly disclosed and that irrelevant matters were excluded. It has not been established that any of the lawyers assisting the first respondent sought to change passages in the reports conveying relevant opinions or information, so the prosecutors' complaints seem to have been based upon the editing of passages that were, at best, of marginal relevance.

120. For example, Mr Tracey relied heavily upon the deletion of the following passage that had been contained in a draft of one of Mr Cheney's reports:

> *Wilderness is an outdated 70s concept and it is dangerous. It is dangerous because in its pure form it prohibits proactive management in the area. It is elitist because it denies the elderly and infirm and at*

> *least some of the physically handicapped people access to areas of our natural heritage.*

121. Mr Tracey pointed out that, when challenged about this passage, Mr Cheney had told the cross-examiner that it had been "a good job" that Mr Tracey had not been given an earlier draft. He had been asked whether it had been "even hotter" and had replied, "Oh yes". Mr Tracey contended that the passage had obviously been deleted on the advice of counsel assisting the first respondent because it betrayed such an unreasonable opposition to the preservation of wilderness areas that it was bound to evoke cross-examination of the kind that in fact occurred, as well as undermine the credibility of his opinions that were critical of a failure to adopt more aggressive fuel management policies in relation to such areas.

122. We accept that knowledge of Mr Cheney's apparent abhorrence of what he described elsewhere as "wilderness in its pure form" and the limitations which he felt it imposed on proactive management of wilderness areas, may have provided counsel for the prosecutors with material on which he could be cross-examined with a view to suggesting that he had not approached the relevant issues with a sufficient understanding of the public interest in conserving such areas. However, there is nothing in the *Coroners Act* that, in our opinion, would have authorised the first respondent to have inquired into the balance struck between the public interest in fuel management and the public interest in maintaining wilderness areas, and the passage in question would have been relevant only as to Mr Cheney's credit. Whilst it is customary for experts to include curricula vitae, it is not customary to include statements of personal belief for the express purpose of providing a basis for others to attack their credibility. We can see no basis for any criticism of the lawyer who apparently concluded that the passage in question should be deleted.

123. Similar considerations apply to other passages apparently excised from earlier drafts of the report. In any event, it was not suggested that the first respondent had herself participated in the editing of any such report and, even if one or more of the lawyers assisting her had strayed beyond the bounds of propriety in this respect, that fact alone would not have provided any ground for an apprehension of bias on her part.

The selection of potential witnesses to be interviewed

124. A solicitor assisting the first respondent met with a number of people including Mr Cheney. Notes were prepared under the heading "interviews", involving two columns of names. When subsequently cross-examined about this document Mr Cheney agreed that most, if not all of the people listed in the second column had been interviewed by officers of the Australian Federal Police relating to issues of fuel management. He also agreed that a notation in the first column had referred to "PLS", which apparently was a reference to Mr Lucas-Smith. An "X" was placed next to these initials along with Mr McCrae's name. When it was put to Mr Cheney that he had understood that those two people were not going to be approached to give statements in relation to fuel management, he replied "apparently so".

125. Mr Lasry subsequently suggested that the "X" may have been placed beside the entries relating to Mr Lucas-Smith and Mr McCrae because the taking of statements from them had been allocated to the ACT Government Solicitor. Mr Glissan argued that this suggestion could not be sustained. It appears that he wished it to be inferred that it meant those witnesses were to be 'targeted'. Statements by Mr Lucas-Smith and Mr McCrae had been provided to counsel assisting the first respondent as early as October 2003, and a number of other officers whose names were in the second column of the list had also provided statements in that manner. Mr Glissan submitted that a decision had clearly been made not to interview Mr Lucas-Smith or Mr McCrae

as well as some other officers, yet when the hearing resumed on 16 February 2004, Mr Lucas-Smith had been the first witness called. Mr Glissan expressly invited us to infer that that class of witnesses had been "targeted". By way of contrast, he referred to an email sent by Mr Roche to junior counsel and a police officer assisting the inquiry on 23 November 2003, referring to another witness and stating that, "in the future and in the witness box, he could be a good ally for us".

126. Mr Glissan submitted that counsel assisting the first respondent had clearly been attempting to build a case through the evidence they adduced rather than merely seeking to establish what had occurred. He also referred to the observation in *Firman v Lasry* [2000] VSC 240 that, if the conduct of counsel assisting a Royal Commissioner appeared to have been partial, and the Royal Commissioner appeared to condone that conduct, then a lay observer might reasonably apprehend partiality on the part of the Commissioner. Mr Glissan maintained that these principles were apposite to the present case because the first respondent had declined to intervene or disassociate herself from the approach that had been taken by those assisting her. When questioned on the issue, she had dismissed the relevant portion of the notes as "a list of names" and suggested that counsel should ask the author of the document what the crosses meant. Mr Glissan submitted that this suggestion should be taken to have been disingenuous.

127. We are unable to accept any of these submissions. The issue seems to have been first raised more than eight months after the meeting in question, and then by questions put to Mr Cheney who had not made the notes. Mr Cheney's supposition that Mr Lucas-Smith and Mr McCrae were not to be asked to provide statements may or may not have been correct, but even if it was, there may have been some quite unexceptionable reason for that approach, such as knowledge that alternative arrangements had been

made or were to be made to ascertain what evidence those people could provide. In any event, the mere fact that one of the legal team assisting the first respondent had decided not to interview two witnesses does not provide any basis for the inference that Mr Glissan has invited us to draw. Furthermore, her Worship's comment that the question about the purpose of the notations should be addressed to the person that made them seems to have been entirely reasonable.

The rejection of maps

128. It was submitted by Mr Glissan that counsel assisting the first respondent had consistently maintained that a number of people, including several of the prosecutors, had failed to adequately warn Canberra residents of the approaching fires on 18 January 2003. Several of the prosecutors, including Mr McCrae who gave evidence on 16 April 2004, to the effect that the fire had progressed in a dramatic manner that could not reasonably have been predicted, and hence more timely warnings could not have been provided. Mr McCrae had relevant experience both in the suppression of bushfires and in the provision of mapping services. During the course of his evidence he produced a series of ten maps depicting the progression of the fires between the 8th January 2003 and 18th January 2003. His counsel then tendered the maps but counsel assisting the first respondent objected on the ground they may not have been consistent with maps earlier prepared by Mr Cheney. Some discussion then ensued during the course of which Mr Walker said that he did not understand Mr Cheney's maps "to be regarded as holy writ". He suggested that the maps prepared by Mr McCrae offered the best and clearest indication of the spread of the fire. The first respondent declined to accept them into evidence until counsel assisting had had an opportunity to compare them with the maps produced by Mr Cheney. Mr Walker expressed some bewilderment as to why a potential conflict

of expert evidence would warrant the rejection of the tender to which the first respondent replied:

> *No, that is not the issue. The issue is: if you wish this to be put in contest or to dispute the evidence that Mr Cheney has given, it took many hours of questioning of Mr Cheney to establish the basis of his projections. And I am saying that, for these maps to stand in the same position as Mr Cheney's maps, if that is what you intend, you will need to go through the same procedure with Mr McCrae. I do not believe that you could do that with one or two questions, Mr Walker.*

129. Mr Glissan submitted that the rejection of the evidence could not have been based upon any rule of evidence, even if such rules had applied to the inquiry. He went on to argue that it betrayed a reluctance to receive any material that was inconsistent with evidence given by Mr Cheney or that had been the subject of an objection by counsel assisting her.

130. Again, we are unable to accept these contentions. It was entirely understandable that the first respondent might have wished to know whether the admission of Mr McCrae's maps might have given rise to a conflict of evidence which she would have been required to resolve and, if so, whether there had been an adequate evidentiary basis to enable her to have accepted the alternative propositions propounded. Whilst the form of the objection taken by counsel assisting the first respondent clearly caused some confusion, the point raised by the first respondent herself about the need for an adequate evidentiary basis for the expert opinions reflected in the maps which Mr Walker tendered, seems to have been entirely valid. Furthermore, even if, as a matter of law, this consideration had not warranted the rejection or deferral of the tender, the approach taken does not provide any ground for an apprehension of bias.

131. A further issue arose on 3 June 2004 when Mr Whybrow made a request that Mr Cheney reproduce maps he had previously prepared and incorporate them in a

single document with a common scale so that an overall perspective could be made of the development of the fire front. Mr Lasry resisted this suggestion and the coroner indicated that she was not going to require Mr Cheney to produce another document. Subsequent evidence revealed that Mr Cheney had already prepared such a document and that it would have been available had the request been made to him directly. Mr Glissan submitted that the peremptory refusal of the request and the failure to even ask Mr Cheney whether such a map had already been prepared provided a further example of a desire to suppress material that was inconsistent with a preconceived agenda.

132. We are again unable to accept this submission. It seems clear that the first respondent had been unaware of the existence of an integrated map, and there is no reason to doubt her explanation that she had been reluctant to impose further requirements on Mr Cheney when there had already been sufficient evidence as to the progression of the fire.

The survey of affected residents

133. During the course of the investigation, a survey of 378 people whose homes had been destroyed or damaged on 18 January 2003 was conducted with a view to ascertaining whether they had had a proper understanding about the risks of bushfires and the protective measures that could be taken to ameliorate those risks. On 15 October 2003, Mr Robert Stitt QC who represented ActewAGL, raised concerns about an expert report that appeared to rely upon data obtained from those surveys when a request for the data upon which the report was based had been refused. It had been indicated to Mr Stitt that none of the people surveyed were to be called to give evidence. There were other logical objections to the use of the survey as a basis for inferences as to the general level of community understanding, including the obvious fact that only people whose houses had been destroyed or damaged had been invited to participate and not those whose houses had been saved. Accordingly, junior counsel assisting the first respondent conceded that no conclusions could be drawn from the material without hearing from those who had provided the relevant information. Mr Castle had been cross-examined at length about community awareness of the risk of bushfires without any indication that such a survey had been undertaken.

134. However, the results of the survey were subsequently made available to counsel and, when Mr Prince, who was then the Acting Commissioner of the ACT Fire Brigade gave evidence, he was asked by his counsel to comment on material suggesting that amongst those whose homes were lost or damaged, some 85 per cent had known what precautions should have been taken. The first respondent had intervened to ask where that information had come from and, when Mr Whybrow referred to the survey, junior counsel assisting the first respondent said that her recollection of the statistical

analysis did not accord with that proposition. The first respondent said, "No, nor does mine, Mr Whybrow".

135. On 8 June 2004 junior counsel assisting the first respondent tendered documents reflecting a statistical analysis of the responses to the survey which indicated that lack of community awareness had been of concern to only 14 per cent of survey respondents. Mr Whybrow proceeded to express concern about the fact that, whilst the analysis had been in existence for some time, it had not been provided to him or counsel for other interested parties until the issue had arisen during his examination of Acting Commissioner Prince.

136. Mr Glissan submitted that a lay observer could reasonably have suspected that the evidence had been withheld because it had been inconsistent with an agenda being pursued by counsel assisting the first respondent. In response to this submission, Mr Burnside pointed out that it was only the analysis that had not been provided. The results of the survey had long been available to counsel and it had been open to them to have calculated the relevant percentages for themselves. Indeed, as Mr Burnside pointed out, whilst Mr Whybrow's questions may have been predicated upon some misconception as to the effect of the relevant survey question, they nonetheless revealed that he had calculated the relevant percentages with reasonable accuracy.

137. Whilst we doubt that any valid conclusions about the general level of community awareness could be drawn from a survey limited to people whose homes were actually destroyed or damaged, we are unable to see how any support for the prosecutor's contentions could be derived from this sequence of events.

The warning of Ms Harvey

138. The prosecutors contended that a further matter which might have caused disquiet to the hypothetical lay observer was a warning given to Ms Marika Harvey during the course of her evidence. Ms Harvey was the public relations manager employed by the ACT Chief Minister's Department at the time of the fires and had been asked to recall the events of the days leading up to the fires, in particular media releases, minutes of planning meetings and notes she had made herself on the unfolding situation. The following exchange occurred when she was recalled to give evidence on 22 March 2004:

> *THE CORONER: Before we continue, Ms Harvey, I have considered the evidence you gave last Thursday and the impression that you have given me is that you have been less than forthcoming in your comments in the evidence that you have given. I want to inform you of some of the provisions of the Coroner's Act and the possible consequences for you and indeed anybody who is summonsed to give evidence to an inquiry.*
>
> *I want to read to you section 81 of the Act. That section relates to false evidence. It says:*
>
> > *A person shall not, at an inquest or inquiry or hearing, knowingly give evidence that is false or misleading in any material particular.*
>
> *The penalty for that is $50,000 or imprisonment for five years, or both.*
>
> *Now I am of the view, Ms Harvey, that you are a person who could be subject to an adverse finding or comment by me. I also want to tell you that no counsel here represents you. I don't know what impression you have, but there is no counsel in this courtroom who represents your interests.*
>
> *Now I am prepared to give you the opportunity to seek some legal advice, if you want to do that. But if you choose to continue to give evidence before me in this inquiry, then I must tell you that you are obliged to be truthful in your evidence and to do the best you can to give truthful evidence, to do the best you can to give a truthful recollection of events and to do the best you can to assist this inquiry because that is what you are here for, to assist. Do you understand that?*
>
> *THE WITNESS: I fully understand that, your Worship.*

THE CORONER: Are you prepared to continue to give evidence?

THE WITNESS: I am prepared to. Everything that I have said has been - I have tried to be as helpful as possible. I have only said the truth. I am sorry that I can't help but if I cannot remember all the details of what was a very traumatic time for me.

THE CORONER: We will continue Ms Harvey.

139. We have been unable to discern any hint of an uncooperative attitude in Ms Harvey's evidence. However, we have been dependent upon a transcript of her evidence and have not had the opportunity of assessing her demeanour. We see no reason to doubt that the first respondent had genuinely formed an impression that Ms Harvey had been "stonewalling" in response to questions that she did not wish to answer. The impression may have been erroneous but no such error has been established and, in any event, an error of perception would not of itself, provide any ground for an apprehension of bias.

140. Whilst we can readily understand that a witness who had been conscientiously trying to answer questions honestly might become apprehensive due to comments of this nature, on the material before us we are unable to see how we could find that a lay observer with the opportunity to see and hear the evidence that had precipitated them would have formed any adverse impression of the first respondent's conduct.

The suggestion that slants had been put on the evidence

141. Mr Glissan also referred to an exchange between Mr Whybrow and Mr Lasry on 7 May 2004. Mr Whybrow complained that a number of volunteer firefighters had been summoned to give evidence but had been given no idea as to why they were being called as witnesses at that late stage of the proceedings. He went on to say that some had a perception that there was a particular slant to the inquiry and that they were asked to give evidence to, in effect, "dob in their mates". He added that a number of witnesses felt concerned about the way in which others had been

questioned "about what is expected of them, not knowing whether they will be one of the ones if they can't remember something that will be criticised for it – things of that nature". It was suggested that this last comment was a reference to the treatment of Ms Marika Harvey.

142. Mr Lasry responded by denying that any such subpoenas had been issued but stated that Ms Drew had contacted three rural firefighters to inform them that they would be required to give evidence. Ms Drew had arranged to bring them to court during the following week to enable them to become familiar with court proceedings before they were actually called to give their evidence. Mr Lasry said that the information provided to Mr Whybrow was completely at odds with what he had been told and that he rejected any implication that "slants" had been put on evidence or that witnesses had been examined in the manner suggested. The first respondent also rejected these allegations.

143. It was not suggested that any attempt had been made to substantiate the proposition that slants were being put on aspects of the evidence, and the first respondent seems to have been left with an exchange of assertions from the bar table relating to the perceptions of people who had not themselves been called to give evidence at that stage. The exchange occurred only about six weeks after the warning had been given to Ms Harvey and it is possible that the concerns mentioned by Mr Whybrow had been evoked by whatever accounts of that incident may have been conveyed to them, either directly or via the "grapevine". However, no matter how genuine their concerns may have been, we are unable to see how Mr Whybrow's submission and its subsequent rejection could provide any support for an allegation of apprehended bias on the part of the first respondent.

The criticism of cross-examination by Mr Watts

144. Mr Tracey complained that when Mr Watts, who then appeared for Mr Newham, was cross-examining Mr Roche, he was criticised for not confining his cross-examination to evidence within the scope of the brief of evidence that had been prepared by counsel assisting. It was submitted that this approach had not only been legally erroneous but had also revealed a "differential" approach which sought to prevent or dissuade counsel from putting propositions to a witness which were inconsistent with the view of the inquiry taken by counsel assisting. It was submitted that the first respondent had joined with counsel assisting in this approach.

145. Mr Tracey relied upon a portion of the transcript which recorded Mr Watts cross-examining in a manner apparently intended to meet suggestions by Mr Roche that Territory agencies had done nothing to prepare for the 2002-2003 fire season. He had asked a number of questions with a view to ascertaining what enquiries had been made about whether any heavy plant had been acquired for that fire season. Mr Roche had told him that he was not aware of anybody being asked about that. Mr Watts had then asked how he could tell the inquiry that it hadn't been done if the question had never been asked and Mr Roche had responded by saying "the fact is there wasn't any". At that point Mr Lasry objected on the basis that Mr Watts had been going over and over the same ground. Mr Watts persisted, submitting that he had been entitled to press the witness as to the existence of any direct evidence that heavy plant had not been hired. The first respondent then intervened to indicate that she understood Mr Roche to have been saying that he had not seen any evidence of the relevant action having been taken and Mr Roche had confirmed that that was correct. Mr Watts then resumed his cross-examination and, sometime later, suggested that if a special training program had been conducted for "DUS" firefighters on remote area fire fighting in October and November 2002 that "would not be consistent

with doing nothing". Mr Lasry again intervened and the Coroner proceeded to ask Mr Watts where "in the brief" he had obtained that information. Mr Watts replied that the information was not in the brief because the relevant question had never been asked. The first respondent pointed out that Mr Roche had said that he had relied upon information that had been contained in the brief and asked whether she could accept the assertion in Mr Watts' questions as evidence that the suggested actions had been taken. Mr Watts responded by indicating that he had simply been pointing out that Mr Roche had been drawing conclusions that things had not been done when the relevant questions had never been asked. Mr Lasry then submitted that Mr Watts should provide the factual basis for his questions and the first respondent indicated that she would require him to do so. Mr Watts then indicated that he would consider whether to adduce evidence of those matters after his cross-examination had been completed. Following a short adjournment, the first respondent suggested to Mr Watts that it was not fair for him to criticise Mr Roche for not taking into account information that had not been available to him, and indicated that if Mr Watts had information that showed that Mr Roche's suggestions had been wrong then she invited him to produce it. Mr Watts thanked the first respondent and indicated that he had no further cross-examination.

146. These exchanges occurred on 7 October 2004, twelve months after the inquiry had been opened and at a time when more than 7,500 pages of transcript had already been accumulated. In these circumstances it was entirely understandable that the first respondent would wish to know whether Mr Watts intended to adduce evidence of steps that had been taken by government agencies that may have previously been overlooked or whether he was merely attempting to emphasise Mr Roche's failure to enquire about such matters by putting to him a series of abstract hypotheses. Her

Worship was not bound by the rules of evidence and we can see no error in the approach taken but, even if it had been erroneous, it would not have provided any support for the prosecutors' contentions.

The criticism of Mr Bayliss

147. On 9 August 2004, the first respondent made the following remarks:

> *There is one matter that I wish to be heard on. It is the issue that is addressed in the affidavit of Ms Bird, particularly paragraphs 21 and 22. It is an issue of the Australian Government Solicitor (sic) and the role of the Australian Government Solicitor (sic) in its role. I have been critical about the lack of appreciation from the start of this inquiry for the need for separate representation for certain persons and the delay that has resulted to this inquiry that I thought was a lack of appreciation by the Government Solicitor.*
>
> *As I understand it from Mr Bayliss's letter [dated 5 August 2004] to the counsel, withholding funds until this late date for counsel to have access to experts and to be able to obtain second opinions from experts falls into that category of criticism. And again shows, in my view, a lack of foresight on the part of the Government Solicitor and again has resulted in a delay of this inquiry.*

148. Mr Tracey strongly argued that this criticism of Mr Bayliss was misconceived. Mr Bayliss had been obliged to act responsibly in his stewardship of public funds and it had been entirely appropriate for him to withhold funding until some real need for separate representation emerged. We accept that submission.

149. However, Mr Tracey went further, arguing that the criticism was so unreasonable as to provide a further ground upon which the hypothetical lay observer might fear that the first respondent would not bring an unbiased mind to bear upon any issues concerning the conduct of ACT Government agencies. We do not accept that submission.

150. The first respondent faced a formidable task and would almost inevitably have become frustrated at repeated delays due to the need to give witnesses whose conduct might be questioned, time to apply for funding to enable them to obtain separate

representation. She may well have formed the impression that the ACT Government Solicitor ("ACTGS") should have been able to anticipate which witnesses would have been likely to have found themselves in that situation and, if in doubt, have discussed the possibility with counsel assisting. In these circumstances, it is understandable that she may have thought that Mr Bayliss, who was present as an officer of the ACTGS, had unreasonably failed to address these issues. The remarks in question were apparently made spontaneously and certainly seem to reflect understandable frustration at an apparent bureaucratic failure.

151. Whilst we accept that the evidence does not reveal any failure of duty by Mr Bayliss, the first respondent's remarks do not suggest any ground for an apprehension of bias against the ACTGS, let alone any of the people or agencies represented by ACTGS.

The remarks to Mr Walker

152. Somewhat similar considerations arise in relation to this issue. On 7 October 2004, the following exchange occurred:

> *MR WALKER: Do you have any idea what the training budget is of the ACT Bushfire Service?*
>
> *MR ROCHE: No, I don't.*
>
> *MR WALKER: So if you make a suggestion like "Stockyard might have been better fought if you had a rappelling capability", you may be completely oblivious to whether that is a realistic proposition for the Australian Capital Territory or not, don't you?*
>
> *MR ROCHE: Absolutely not.*
>
> *MR WALKER: Just give me your best guess of what you think the ACT's Bushfire Services training budget is?*
>
> *MR LASRY: What is the point of that? I object. He says he doesn't know. What is the point of asking him for his best guess? If we asked that question, there would be howls of derision.*
>
> *THE CORONER: Where does it take you, Mr Walker?*

MR WALKER: I don't want evidence of what the training budget is. He says he doesn't know. I want to know whether this man is on the same planet as the ACT-

THE CORONER: It is totally inappropriate for you to make those comments, Mr Walker.

MR WALKER: Let me withdraw that and say: I want to know whether this gentleman thinks the budget is measured in tens of thousands, hundreds of thousands or millions.

THE CORONER: Are you suggesting a small jurisdiction should be allowed to burn because there is no money to protect it? Is that the proposition you are putting? That is what it sounds like, and that patently is nonsense.

MR WALKER: I didn't put any proposition that went anywhere near that.

THE CORONER: Well you are.

153. Counsel for the prosecutors submitted that the first respondent's comments to Mr Walker had clearly not been warranted by the submissions he had made and that a lay observer might have formed an impression that they betrayed an antagonistic attitude towards his client.

154. These submissions seem to reflect an idealised and somewhat unrealistic view of the limits of judicial restraint. It is true that judicial proceedings are usually conducted with great courtesy. Indeed, there have been occasional suggestions that the degree of courtesy exhibited between judges and counsel may be seen as excessive or anachronistic in a contemporary society. Judges and magistrates certainly strive to deal with even the most trying litigants with due equanimity. Nonetheless, courts are places in which conflicts are aired and resolved. Emotions sometimes run high and may sometimes colour both submissions of counsel and responses from the bench. Anecdotes of colourful exchanges between barristers and judges have long formed part of the enduring legal folklore and, whilst such occurrences may be regrettable, they do not usually provide any ground for an apprehension of bias. In *Galea v Galea*

(1990) 19 NSWLR 263 at 283 Meagher JA deprecated a tendency to rely upon any acerbic judicial comment as evidence of bias and said that such an approach was not justified by the authorities. In our view, it is certainly true that the odd intemperate or ill-considered remark made by a judicial officer will not, of itself, provide any ground for intervention on the ground of apprehended bias. The hypothetical lay observer should not be taken to form such an apprehension based upon some naïve belief that judicial officers are devoid of the human emotions that almost inevitably influence conflicts and other forms of social interaction.

155. In the present case, we see no reason to suppose that a lay observer would have seen the exchange between Mr Walker and the first respondent as indicative of anything more significant than the first respondent's frustration with counsel in sensitive circumstances. We would accept that her Worship's perception of Mr Walker's intent was not objectively justifiable but that, again, does not bespeak an appearance of bias. A mistaken perception is no basis for such a criticism.

The email from counsel assisting

156. The prosecutors relied heavily upon an email which Mr Lasry had sent to Mr Cheney in response to an email from him complaining of remarks the Chief Minister had apparently made in the Legislative Assembly, though evidence as to the content of those remarks was not, of course, admissible in evidence by reason of s 16 of the *Parliamentary Privileges Act 1987 (Cwth).* Mr Lasry had replied in a one-line email stating "They'll get their's, Phil".

157. It was submitted that this statement involved either a vague threat to deal with the Chief Minister and/or government employees of government agencies harshly during the subsequent course of the inquiry or, alternatively, that it suggested that Mr Lasry knew, even at that stage, that the first respondent's report would be critical of them. The prosecutors also relied upon the first respondent's failure to disassociate herself from this email when it came to light in open court.

158. Mr Burnside submitted that the email should be viewed merely as a vague gesture of consolation and it seems likely that it was motivated by such a sentiment. Nonetheless, it does seem to convey an implication that the unspecified people who formed the subject of the email would suffer some form of retribution for unspecified misconduct. It is understandable that people in the position of the individual prosecutors may have reacted to it with some concern. However, the present applications are based upon allegations that the circumstances provide grounds for an apprehension of bias on the part of the first respondent; not Mr Lasry.

159. Whilst there may be situations in which an apprehension of bias on the part of a coroner could arise from statements made by counsel assisting him or her, the email sent by Mr Lasry does not provide any ground for such an apprehension regarding the coroner. It does not suggest that the email was sent on behalf of the first respondent

and the language did not imply any threat by her. Whilst a lay observer might have been concerned that counsel assisting had formed an adverse view of such people, we are not satisfied that the email should be construed as foreshadowing future criticism on the part of the first respondent.

160. Whilst it is true that the first respondent did not expressly disassociate herself from the content of the email, the circumstances did not require her to do so. The email did not attribute to her some belief or intention that might reasonably have called for such a response. Furthermore, she may initially have understood the email as raising questions about Mr Lasry's objectivity as counsel assisting her rather than any issue of apprehended bias on her part. In any event, there is no general principle requiring judges and magistrates to intervene whenever counsel is shown to have made some intemperate or otherwise unfortunate remark in relation to the proceedings.

Counsel "struggling" to put a case

161. Mr Tracey argued that in relation to a number of issues counsel assisting had adopted an approach of questioning witnesses with a view to establishing that the responses from the Emergency Services Bureau had been deficient. He maintained that that approach had been characterised by the use of leading questions persistently and aggressively pursued in a manner that went beyond the permissible bounds for counsel assisting an inquiry of this nature. Several examples were cited of cross-examination in which it was submitted that Mr Lasry had been "struggling" to assert a particular position.

162. Mr Tracey cited a decision of the High Court of Australia in *Subramanian v The Queen* [2004] HCA 51 affirming the long standing proposition stated in *R v Puddick* [1865] 4 F 497 at 499 that prosecutors are to regard themselves as ministers of justice and should not "struggle for a conviction". It should be noted that this principle does

not absolve a prosecutor from the obligation to put the Crown case firmly to the jury and to test any case advanced on behalf of the accused, though he or she must do so temperately and with due regard for the primary duty to aid in the attainment of justice rather than to secure a conviction: see, for example, *McCullough* (1982) 6 A Crim R 274; *Vella* (1990) 47 A Crim R 119. Whilst the duties of Crown prosecutors and counsel assisting coroners are by no means the same, we accept that both should be guided by the overriding principle that their goal is the attainment of justice rather than the achievement of a preconceived objective. However, justice is not always, nor even usually, attained by a forensically passive approach in which counsel assisting eschew any responsibility to explore particular possibilities actively or to test assertions which may or may not be accurate. On the contrary, coroners are entitled to expect that counsel assisting them will actively pursue the truth and that will almost inevitably involve identifying particular possibilities or tentative conclusions and testing the evidence with a view to determining whether it can be confirmed or discounted.

163. In our opinion, none of the examples cited by counsel demonstrate that Mr Lasry or any of the other counsel assisting the first respondent cross-examined witnesses in a manner that went beyond the permissible limits appropriate for counsel assisting a coroner. There is certainly nothing in the nature of the questions asked by Mr Lasry that could provide any basis for an apprehension of bias on the part of the first respondent.

The proposal for counsel to assist in writing the final report

164. Mr Tracey also referred to evidence suggesting that Mr Lasry, if not other members of the team assisting the first respondent, had set aside time to assist in writing the final report. Mr Tracey argued that this was clearly inappropriate as the first respondent bore the sole responsibility for determining what findings should be made. The prosecutors submitted that any sharing of that responsibility with counsel who had been advocating propositions that were contrary to the interests of the prosecutors would inevitably give rise to a reasonable apprehension of bias.

165. Whilst, as Mr Tracey has suggested, a coroner cannot delegate his or her responsibility to weigh the evidence and make appropriate findings, that does not mean that he or she must write the report unaided. On the contrary, a coroner is entitled to have counsel assisting or an associate undertake a range of tasks, such as providing a summary of the evidence, an outline of the relevant statutory provisions and references to authorities.

166. In the present case, the evidence does not suggest that Mr Lasry intended to trespass into areas that were exclusively the responsibility of the first respondent, and we are unable to see how the terse note upon which Mr Tracey's submissions had been founded could provide any support for the prosecutors' contentions.

The dissemination of copies of submissions by a court officer

167. During the course of the application before the first respondent, submissions on behalf of the contradictor were sent to the parties by Ms Angela Papanicolaou, an administrative officer of the ACT Magistrates Court, and the Executive Officer to the Inquest. Further copies of the submissions as amended on 21 October 2004 were also disseminated to the parties by Ms Papanicolaou.

168. This incident offers a further example of the potential for public confidence in the independence, and hence impartiality of courts to be undermined by administrative arrangements which treat them as sub-branches of public service departments. In making this comment, we intend no criticism of Ms Papanicolaou or any other departmental officer attached to the Coroner's Court. The problem lies in the blurring of boundaries between the judicial and executive arms of government. In the present case, a lay observer might have been startled to find someone who was apparently a court officer employed by and under the legal direction of the prosecutor in matter number 698 of 2004 dispensing copies of written submissions made by a party to an application upon which that court had to adjudicate. Indeed, in any other circumstances, a finding that such an event could give rise to an apprehension of bias might be inescapable.

169. However, all of the relevant circumstances must be considered, including the nature of the proceedings and the particular application, the stage at which the submissions were provided and, in the present case, the fact that they had been submitted for distribution by counsel appearing for counsel assisting the coroner. In the light of these circumstances we have ultimately concluded that any inference that might otherwise have been drawn from this incident would be of insufficient weight to warrant such a finding of bias.

The brevity of the decision to refuse the application and the absence of reasons

170. The prosecutors pointed out that the first respondent adjourned for only 38 minutes after the completion of submissions before returning to dismiss the application for her to disqualify herself from further conduct of the inquiry. Mr Tracey also complained that she had then given no substantial reasons for her decision, referring only to the relevant test and stating that she was not satisfied that "any fair-minded member of

the public who had followed the details of this inquest over its full length could reasonably form the view that I might not bring an impartial mind to the resolution of the questions that I am required to decide."

171. It is true that judicial officers have a duty to give reasons for their decisions, but the reasons need not be extensive, and in some cases little more may be required than a statement of the main conclusions on which the decision is based: see, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria* (2001) 207 CLR 72 at 83-84.

172. A failure to provide even brief reasons may constitute an error of law. In the present case, however, Mr Burnside pointed out that the application had been argued over several days and the nature of the oral argument had been foreshadowed in written submissions. He argued that it is not unusual for an extemporaneous judgment to be given on such an application and that neither the legal principles nor the factual allegations relied upon by the prosecutors had been disputed. The issue for determination had essentially been dependent upon a judgment as to the impression that may have been formed by a lay observer and her Worship had expressed the opinion that the facts relied upon did not provide adequate grounds for an apprehension of bias. It was difficult to see what more could have been required of the first respondent. Whilst these submissions were persuasively argued, we are satisfied that it was an error to fail to provide reasons that addressed, albeit briefly, the contentions that had been advanced in support of the application.

173. However, we see no reason to regard this error as providing any support for the prosecutors' contentions. The mere fact that a judicial officer has failed to provide adequate reasons provides no basis for an assumption that he or she was actuated by

improper motives, nor does it provide any other sensible ground for an apprehension of bias.

174. As Mr Burnside pointed out, no adverse inference could possibly be drawn from the fact that an extempore judgement was given shortly after the oral argument was completed. There is no basis for the suggestion that the absence of a longer time for reflection indicates that the submissions were not duly considered, bearing in mind that the first respondent had actually had the benefit of written submissions for a full week.

175. Mr Tracey also submitted that the application for disqualification had presented the first respondent with an opportunity to provide an explanation for the matters that had been raised in argument and allay the concern of the prosecutors. Yet she had not done so. A lay observer would, he submitted, have expected that any innocuous explanation that existed for these matters of concern would have been provided. Mr Tracey relied upon a series of authorities for the proposition that a later statement may sometimes assuage a preliminary impression of bias created by something said or done earlier. See, for example, *Vakauta v Kelly* (1989) 167 CLR 568; *Johnson & Johnson* (2000) 201 CLR 488; *GIO v Glasscock* (1991) 13 MVR 521; and *ASIC v Rich* [2004] NSWSC 970.

176. However, these authorities do not establish the proposition that any failure to seize the opportunity presented by a disqualification application to provide an explanation for matters raised by the applicants will itself provide further support for their contentions. The obligation to provide reasons does not require the provision of an explanation for every act or statement queried by counsel for the applicants. It may sometimes be appropriate for a judicial officer to allay the apparent concerns of litigants by explaining what was meant by a potentially ambiguous statement or

qualifying some remark, but that does not mean that he or she should feel obliged to respond to a series of complaints as if amenable to interrogation. Indeed, that would be quite inappropriate.

177. Whilst we would not wish to be taken to have suggested that a failure to explain could never provide further support for an application of this kind, we think that it will usually have little, if any significance, other than to remove any opportunity for any such explanation to be relied upon in answer to contentions based upon earlier conduct and statements. In the present case, the argument that has been advanced may serve to underline the need for appropriate reasons, but we think that it lends little, if any, additional support to the prosecutors' contentions.

The suggestion that the first respondent had "descended into the arena"

178. It is also suggested that further grounds for an apprehension of bias had arisen because the Coroner had effectively "descended into the arena" by having Mr Burnside and Ms Neskovcin assist her in relation to the disqualification application, and because the written submissions they had prepared for use in those proceedings had been substantially reproduced in the proceedings in this Court.

179. The general principles upon which the prosecutors relied for this contention were succinctly explained by the High Court of Australia in the following passage from *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 23:

> *In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. . . . If a tribunal becomes a protagonist in this court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal.*

180. It is true that this statement has been qualified in the subsequent case of *Fagan v Crimes Compensation Tribunal* (1982) 150 CLR 666 at 681-682 where Brennan J

explained that the position is different when the proceedings before the Tribunal have not been *inter partes*, the Attorney-General has not intervened to represent the public interest and neither a law officer nor public official is to be heard by the court. In that event, it may be desirable for the tribunal to appear via counsel to make such submissions as may assist the court and, in an appropriate case, present arguments in opposition to the application. See also *Broken Hill Pty Ltd v National Companies and Securities Commission* (1986) 61 ALJR 124 at 127-128. However, it is difficult to envisage any case in which it would be appropriate for a coroner to appear in proceedings of this kind and the importance of the strictures expressed in *Hardiman* was explained in *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 527 where Burchett J, observing that a possible outcome of the case had been a rehearing before the Commission, asked:

> *How could the matter then proceed to be, and be seen to be, dispassionately determined? The Commission had chosen, without any necessity . . . to descend into the arena and contend on an issue of substance as a partisan. In my opinion, it is very important, if parties are to retain confidence in the integrity of the Commission's decisions, that it refrain from a role which risks bringing its impartiality into question.*

181. Whilst these authorities dealt specifically with cases in which tribunals had taken an active part in proceedings before superior courts for prerogative relief, it was submitted that the relevant strictures should be applied with even greater force to the first respondent's decision to "enter the arena" by having Mr Burnside and Ms Neskovcin briefed for the express purpose of opposing the application and defending her against allegations relating to the manner in which she had conducted the proceedings.

182. There are a number of points that should be made in relation to these issues. First, as Brennan J explained in *Fagan*, the passage quoted from *Hardiman* does not establish

the existence of a strict rule of inflexible application, but reflects general principles, the application of which may depend upon relevant circumstances. Second, since a coronial inquiry is not litigation *inter partes,* there may be no other party interested in or in a position to present opposing arguments and, should counsel assisting the coroner remain silent, the allegations put forward by the applicants might remain unanswered save in the reasons for judgment. Third, in the present case the applications were based not merely on allegations relating to acts and statements of the first respondent, but also upon acts and statements of counsel assisting her. It is a long-standing rule of legal ethics that counsel should not appear on any application involving potential criticism of their conduct and it was obviously necessary for new counsel to be briefed unless the allegations were to remain unanswered. Furthermore, a number of the allegations relating to the conduct of counsel assisting related to things apparently said and done in the absence of the first respondent and she may have had no knowledge of them. Hence, in the absence of any participation by counsel assisting her, a situation may have developed in which allegations relied upon by the prosecutors could not be refuted or put in context by anyone in a position to take instructions as to what had actually occurred. Fourth, the application was based upon an extensive series of incidents and a substantial range of legal principles. The prosecutors were all represented by senior and junior counsel. It is true that judges and magistrates constantly resolve applications for disqualification without having counsel retained to assist them and, in many cases, without calling upon counsel for the opposing party to make submissions about the matter. Mr Tracey cited, by way of example, the judgment of Hayne J in *Bienstein v Bienstein* (2003) 195 ALR 225. However, having regard to the nature of the proceedings, the profusion and difficulty of the issues raised and the position of counsel assisting the first respondent, we are

unable to accept that she was not entitled to receive the assistance of Mr Burnside and Ms Neskovcin on the application. Furthermore, even if her decision to obtain such assistance could have been shown to contravene the principle in *Hardiman*, the error would not have provided any substantial support for the prosecutors' contentions.

183. It was also argued that a lay observer might reasonably suspect that the first respondent had effectively entered the arena by reason of the participation of Mr Burnside and Ms Neskovcin in the proceedings before us. Whilst they had "technically" represented the Director of Public Prosecutions, the Director had had no obvious interest in the outcome of the proceedings and had been joined as a party only for the purpose of ensuring that the arguments previously put to the first respondent's counsel could again be answered. In essence, the same counsel had relied upon substantially the same written submissions for the purpose of achieving the same result. It was argued that in these circumstances a lay observer might well suspect that Mr Burnside and Ms Neskovcin were, in substance, still representing the first respondent and might dismiss the protestation that they were now appearing for the Director as a mere pedantic quibble.

184. This argument must also be rejected. The practice of having a government official or statutory officer such as the Director of Public Prosecutions joined as a party to act as a "contradictor" is commonly adopted in relation to proceedings in which the contentions of parties such as the prosecutors would otherwise remain unchallenged. The party so appointed is not a mere cipher for the magistrate or coroner, and will act independently in briefing and instructing counsel. The fact that submissions are made in opposition to those made on behalf of the prosecutors will not provide any basis for suspicion that the counsel whom he or she has retained are, in reality, acting on behalf of the coroner, but will simply reflect the fact that the role of "contradictor" requires

submissions in contradiction. Such a party may find it convenient to brief counsel who have already been involved in the matter, because they are likely to have already done much of the work that will be necessary to prepare the case and their retention may save time and expense. There may, of course, be cases in which that is not feasible because of a perceived conflict of interest but, in the absence of any difficulty of that nature, a decision to brief the same counsel may be entirely appropriate. Furthermore, there is no reason to suppose that counsel who have been retained in that manner should not reproduce written submissions previously prepared for the purpose of addressing the same issues.

185. In our opinion, there is no basis whatever for a lay observer to suspect that the joinder of the Director had been exploited by Mr Burnside and Ms Neskovcin to enable them to enter the arena on behalf of the first respondent under the guise of fresh instructions.

The significance of the present proceedings

186. Finally, the prosecutors contended that, even if we were not able to find that the conduct of the Coroner and/or of counsel assisting her had given rise to an apprehension of bias prior to the institution of the present proceedings, we should nonetheless direct that the matter be continued before a different coroner on the basis that a lay observer might reasonably apprehend that the present applications, and the submissions made in support of them might subtly influence her attitude towards the resolution of issues of concern to the prosecutors.

187. We are unable to accept this proposition. In the absence of any conduct sufficient to create some apprehension to the contrary, a lay observer should be taken to accept that coroners can be trusted to act fairly in the resolution of issues before them. The mere fact that allegations concerning her conduct of the proceedings have been found

groundless does not provide any basis for fearing that the first respondent's approach to the case might thereafter be coloured by resentment. Furthermore, acceptance of such a proposition might encourage a view that any litigants whose cases appear to be going badly can always opt out of the proceedings by the simple expedient of bringing an application of this kind which will achieve the desired result, even if the stated grounds are found to be spurious.

Conclusions

188. Whilst we understand the considerations that led to the prosecutors seeking prerogative relief at this stage rather than waiting for notification under s 55 of any adverse comments proposed, we think that the applications have nonetheless been made prematurely. Some of the grounds relied upon plainly provide no basis for any reasonable apprehension of bias, while others provide some possible ground for concern but only if adverse findings as to certain issues are contemplated. Any findings as to some of those issues would clearly be beyond the scope of the jurisdiction conferred by the Coroners Act and the likelihood of adverse findings on others is presently a matter of speculation. In these circumstances we can not be satisfied that even the cumulative weight of the matters raised by the prosecutors have established grounds upon which a reasonable lay observer might reasonably apprehend that the first respondent might not bring an impartial mind to the resolution of some question that she is required, entitled or likely to decide.

189. Furthermore, even if we had been satisfied that there had been grounds to believe that a reasonable lay observer might be left with some apprehension as to possible bias in relation to possible comments going beyond the scope of the findings that the first respondent may be required to make, we would nonetheless have declined to make the orders sought. The arguments advanced by the prosecutors would have raised, at

most, grounds for concern in relation to circumstances that have not arisen and might never arise. Prerogative relief will not usually be granted to address fears of such possibilities.

190. The applications are dismissed.

I certify that the preceding one hundred and ninety (190) numbered paragraphs are a true copy of the Reasons for Judgment herein of their Honours, Chief Justice Higgins, Justice Crispin and Justice Bennett.

Associate:
Date: 5 August 2005

Counsel for the prosecutors: (SC 697/04)	J Glissan QC, GP Craddock, E Pike, P Walker, J Watts and S Whybrow
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Counsel for the contradictors: (SC 697/04)	J Burnside QC, P Neskovcin
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Counsel for prosecutors: (SC 698/04)	RRS Tracey QC, GC McCarthy, PI Lakatos
Solicitor for prosecutors: (SC 698/04)	ACT Government Solicitor
Counsel for the contradictors: (SC 698/04)	J Burnside QC, P Neskovcin
Solicitor for the contradictors:	ACT Director of Public Prosecutions
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