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Investigation Report

Operation Jupiter

Allegations of improper conduct in the lead up to the 2020 General Election

Section 50(1) of the *Independent Commissioner Against Corruption Act 2017*.

May 2024

Office of the
Independent
Commissioner
Against
Corruption NT



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This report

- [1] I have prepared this report in accordance with section 50 of the *Independent Commissioner Against Corruption Act 2017*. It is the first of two reports I will prepare in respect of this investigation. My reasons for preparing two reports are set out later in this report.
- [2] Subsection 50(1) provides that:
- The ICAC may make a report (an **investigation report**) on an investigation to a responsible authority for a public body or public officer whose conduct is the subject of the investigation.*
- [3] A responsible authority is defined by reference to subsection (7).
- [4] Subsection (7) provides that the responsible authority for a minister or a Member of the Legislative Assembly (MLA) is the Speaker of the Legislative Assembly.
- [5] This report addresses the conduct of the former Chief Minister, The Honourable Michael Gunner.
- [6] I had also investigated the conduct of Ms Natasha Fyles MLA, in so far as there was a suggestion that she benefitted from the making of a short campaign video utilising public resources. However, given there was little evidence supporting her knowledge of the nature of the resources used it is unnecessary to consider that allegation further in this report.
- [7] Mr Gunner is no longer a minister or an MLA. However, section 8(1)(c)(i) of the ICAC Act extends 'conduct' to include conduct engaged in 'by a person who was a public officer at the time it was engaged in but who has since ceased to be a public officer'.
- [8] An investigation report of the kind contemplated by section 50 may contain recommendations. I intend to make seven recommendations.
- [9] Section 50(3)(a) provides that an investigation report may 'contain as much information as the ICAC deems appropriate in relation to the subject matter of the investigation to which the inquiry relates'.
- [10] I may also include in an investigation report a finding as to whether a person has engaged in, is engaging in or is about to engage in, improper conduct.¹ My capacity to make findings must be considered in light of other statutory provisions.

Disclosures

- [11] In the early stages of this investigation, I engaged Mr Mark Thomas, a barrister in the Northern Territory. As the investigation progressed, I engaged Ms Sally Flynn KC, a barrister in Victoria.
- [12] I was, and remain, satisfied that both Mr Thomas and Ms Flynn KC did not have conflicts of interest that would affect their ability to act in this matter.
- [13] I have met with both Mr Gunner and Ms Fyles on a few occasions since my commencement.
- [14] Each of those occasions have been in my capacity as the Commissioner and in their capacity as Chief Minister.
- [15] I have never engaged with Mr Gunner, nor Ms Fyles, on a social basis. Nor do I have any social

¹ Section 50(3)(b).

connection with any past or current member of staff of the Chief Minister (or, for that matter, any past or current minister).

[16] I am satisfied that there is no actual or perceived conflict of interest that would prevent me from dealing with this matter.

A short chronology of this investigation

[17] This investigation had its genesis in a report to my predecessor in February 2021. Contained within the report were two allegations.

[18] The first allegation was that, in the lead-up to the 2020 General Election, members of staff of the Office of the Chief Minister had engaged in political work during office hours to support the Northern Territory Labor election campaign (Allegation #1).

[19] The second allegation was that, during the caretaker period in the weeks leading to the 2020 General Election, the then Chief Minister and other public officers misused public resources by undertaking taxpayer funded travel for political purposes (Allegation #2).

[20] When I commenced in July 2021, that report had not yet been actioned. In November 2021 I determined to refer Allegation #1 to the Chief Minister for action. Within that referral I directed the then Chief Minister to report back to me, within 90 days, as to the action taken.

[21] In December 2021, I became aware that I had not considered and determined Allegation #2. In light of the nature of that allegation, I decided to commence an investigation.

[22] In that same month, I received another report alleging the same conduct. By then I had already determined the action I would take.

[23] In February 2022, the then Chief Minister informed me of the outcome of Allegation #1. He advised me that there was no evidence of improper conduct. In that letter he said:

There is a clear expectation, and this is communicated to staff regularly, that any work done for a political party (and not for the Government) is done outside of work hours, or while on leave, or while using time in lieu and not using Government resources.

...

... the work of Ministerial staff in a political office is a balance, given the work is inherently political.

[24] By May 2022, I had conducted a number of examinations and had received a good deal of evidence. Having reflected on the evidence received, I decided to expand my investigation to include Allegation #1, notwithstanding the response provided by the then Chief Minister in February of that year.

[25] The evidence gathering phases continued into 2023.

[26] During the course of this investigation, I received more than 650 items of evidence and I examined 20 witnesses. Each witness was compelled to answer questions. A good deal of the documentary evidence was shown to witnesses and witnesses gave explanations as to those documents.

[27] The vast majority of the evidence I received relates to Allegation #1.

[28] There was then a hiatus as Counsel Assisting me prepared comprehensive submissions. Those submissions were finalised in October 2023 and circulated to witnesses. A number of witnesses furnished me with responding submissions. Accompanying some of those submissions was new and additional material. It was therefore necessary to draw to the attention of all witnesses that new and additional material and provide a further opportunity to comment. That process was largely completed by January 2024. Further submissions were received as recently as 10 days ago.

[29] During that process, in February 2024, I circulated to witnesses a draft General Report to the Legislative Assembly. The purpose of that report was to set out some recommendations that I regarded as important, irrespective of the view I took in respect of individual conduct. However, one witness opposed the making of that report, primarily on the ground that to do so would amount to prejudgement. While I did not agree with the witness's submission, I decided to await the finalisation of my report. I am hopeful that the recommendations I make in this report can be considered and implemented prior to the commencement of the caretaker period before the 2024 General Election.

Delay in finalisation

[30] My investigation has, for a number of reasons, progressed at a glacial pace and I regret that it has taken so long to bring the matter to an end. It is not lost on me that such investigations can create stress and anxiety for those involved. That is to be balanced with the need to ensure that all relevant evidence is collected, interested persons have been afforded fair and reasonable opportunities to be heard, all of the evidence and submissions are subject to proper analysis, and that conclusions are drawn in accordance with law. That can be a time consuming process.

[31] Later in this report I will reflect upon how I will approach such matters differently in the future.

[32] The subject matter of this investigation is not straightforward. Indeed, it is quite complex. The divide between political activity and official duties might be thought, at first glance, to be clear. It is not. Often that line is blurred, creating significant complexity.

[33] That complexity, I suspect, has been amplified in this jurisdiction by rules that lack clarity and precision. One purpose of this report is to make some short term recommendations that might address some of the matters identified during the course of this investigation.

The allegations, this report and the making of findings

[34] When I commenced the investigation, I inquired into six occasions where charter aircraft were used to facilitate flights to remote and regional locations (Allegation #2). The then Chief Minister, Mr Gunner, travelled on each of those flights. Having conducted a number of inquiries, the number of trips that were the subject of continued investigation was reduced to three:

- (a) Nauiyu on 14 August 2020.
- (b) Galiwin'ku on 18 August 2020.
- (c) Wadeye on 19 August 2020.

[35] When I expanded my investigation to include Allegation #1, my attention was focused upon the activities of staff members in the then Chief Minister's office. There was, and remains, little evidence as to the then Chief Minister's knowledge, support or involvement in activities the subject of Allegation #1. For reasons which I will explain later, I will deal with Allegation #1 in a separate report.

- [36] There is no doubt that I am empowered to include findings in a report of this kind, including findings of improper conduct. The power to do so is expressed in section 50(3)(b) of the ICAC Act.
- [37] When determining findings, the relevant standard of proof is the balance of probabilities. But that is not the end of the matter. I must also have regard to the principles enunciated in *Briginshaw v Briginshaw*.² In that case Dixon J said (at 361):

[b]ut reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

- [38] In other words, I must not make a finding of improper conduct lightly, and I must have careful regard to the cogency of evidence that would support such a finding.
- [39] Of course, in coming to findings I must have regard to all of the relevant evidence I have before me, including the evidence of witnesses given during examinations. If I were to make findings of improper conduct, I would do so on the basis of my assessment of all of that evidence. Where evidence was conflicting, I would have to weigh that evidence in order to determine, to the relevant standard, where I think the truth lies.

Some legislative constraints on this report

- [40] An investigation report made to the Speaker (or the Deputy Speaker) is of a kind to which section 59 of the ICAC Act applies. So too is an investigation report that I publish in accordance with the newly included section 50A.
- [41] The effect of section 59 is to constrain the inclusion of certain kinds of evidence in a report to the Legislative Assembly or a report that I publish. Section 59(1), in its current form, states that a report of that kind must not contain 'material that would not be admissible in civil or criminal proceedings because of section 82'.
- [42] Section 82(1) of the ICAC Act currently provides that:

[a] representation made by a witness in evidence given to the ICAC or an authorised officer is not admissible in evidence against the witness in a civil or criminal proceeding except a proceeding for an offence against this Act.

- [43] An exception to that rule is contained in section 82(2). Subsection (2), in its current form, says:

[s]ubsection (1) does not apply to evidence given by a witness if, before the person gave the evidence, the ICAC or an authorised officer informed the person that the person was not obliged to give the evidence, but if the person did so, the evidence could be used against them in civil or criminal proceedings.

- [44] Prior to November 2023, section 82(1) provided that:

A representation made by a witness in evidence given to the ICAC or an authorised officer is not admissible in evidence against the witness in a civil, criminal or disciplinary proceeding except a proceeding for an offence against this Act.

(my underlining added)

² (1938) 60 CLR 33

- [45] As can be seen, the protection afforded by section 82(1) prior to November 2023 was broader than it is now. That is so because, prior to November 2023, section 82(1) also captured disciplinary proceedings. The previous iteration of subsection (2) differed in the same respect.
- [46] In November 2023, the *Independent Commissioner Against Corruption Amendment Act 2023* (the Amendment Act) came into operation.³ Clause 173 of the transitional provisions to the Amendment Act said:
- Section 82, as in force immediately before the commencement of section 26 of the amending Act, continues to apply for the purposes of a disciplinary proceeding that occurs after the commencement in relation to a representation made by a witness in evidence given to the ICAC or an authorised officer before the commencement.*
- [47] In this investigation, I examined 20 witnesses. Every witness was compelled to answer questions posed at those examinations. In compelling those witnesses to answer questions, the protection afforded by section 82(1) was not displaced by subsection (2).
- [48] All of the witnesses were examined prior to November 2023. The effect of the transitional provision is to preserve the protection afforded to those witnesses, in so far as their evidence remains inadmissible against them in disciplinary proceedings, as well as civil or criminal proceedings.
- [49] Section 59 was also amended in November 2023. Prior to that date, section 59 extended the prohibition on the inclusion of evidence that would be inadmissible in ‘disciplinary proceedings’ in a report of this kind.
- [50] There are no transitional provisions in the Amendment Act relevant to section 59. In the absence of a transitional provision that would preserve the wording of section 59 as it existed at the time of conducting the examinations, it could be argued that it is now permissible to include evidence that could be used against a person in disciplinary proceedings (even where the prohibition on doing so is preserved). Even if that is correct, I would not proceed on that basis.
- [51] At the time witnesses gave their evidence, they did so in circumstances where that evidence would be inadmissible in civil, criminal and disciplinary proceedings. Because of the wording of section 59 at the time of those examinations, witnesses understood that such inadmissible evidence could not be included in a report of a kind mentioned in that section.
- [52] As a matter of fairness, I do not think I should now include any evidence that could be used against a witness in disciplinary proceedings, where that evidence was given at a time when there was a prohibition in including that evidence in a public report or statement. There is no principled reason to treat that evidence any differently to evidence that would be inadmissible in civil or criminal proceedings. Of course, compelled evidence given post November 2023 could be used for disciplinary proceedings and could be included in a report (provided that evidence could not be used against a witness in criminal or civil proceedings).
- [53] Having formulated my approach in respect of section 59, the next question is what evidence could still be included in this report.

³ Save for some delayed provisions that are not relevant here.

- [54] First, there is nothing in the legislation that would limit the application of section 59 to only that evidence which is inadmissible against the person the subject of this report. Other witnesses who have given evidence under compulsion, and whose evidence could not be used against them in civil or criminal proceedings, enjoy the protection afforded by section 59, even if the report does not relate to them. As I have explained, I have extended my approach to section 59 to include evidence that would be inadmissible in disciplinary proceedings.
- [55] Second, one must carefully consider the compelled evidence in order to determine which evidence could be used against a witness in subsequent proceedings, and to avoid including that evidence in a report of this kind. That is not always a straightforward task, particularly where the evidence given by witnesses has not always been consistent. Moreover, there is a certain element of 'crystal ball gazing' necessary in order to foresee what proceedings might likely arise in the future for which the prohibition in section 82 will bite.
- [56] In coming to findings, fairness dictates that I should explain my reasoning. To do so would require an explanation, and analysis, of the relevant evidence. That evidence may include that which is inadmissible because of section 82(1) of the ICAC Act and, therefore, prohibited from inclusion in a report of this kind by section 59(1) of the ICAC Act.

The impact on the making of findings

- [57] As I have said, I could only make a finding of improper conduct after a consideration of all the relevant evidence. To make such a finding would involve a consideration, and in some cases a rejection, of some or all of the evidence given in the examinations, some or all of which might be inadmissible by virtue of section 82(1). Questions of reliability and credibility of witnesses might figure in that assessment, particularly where witness evidence is conflicting. Adverse findings could only be made in light of the principles in *Briginshaw*.
- [58] As a matter of fairness, I should be able to set out all of the relevant evidence I relied upon to come to a finding, whether that finding be adverse or otherwise.
- [59] Since receiving all of the submissions I have given a great deal of consideration to how I might bring a proper resolution to this matter, while at the same time giving effect to the prohibition contained within section 59.
- [60] There is no question that I could proceed to make findings in this report without setting out all of the evidence that supported those findings.
- [61] But, as a matter of fairness, I am loathe to do so.
- [62] Section 20 of the ICAC Act provides that:
- [i]f the ICAC has a discretion in performing a function under this Act, the ICAC is to act in the public interest, taking into account the matters set out in Schedule 1 that the ICAC considers relevant and appropriate in any particular case.*
- [63] Schedule 1 in turn sets out a number of matters that the ICAC may take into account in determining the public interest. The first matter addressed in Schedule 1 is 'acting and being seen to act fairly and impartially'.⁴ In my mind it is no coincidence that basic tenets of fairness and impartiality should sit at the top of that list.

⁴ Schedule 1, clause 2(a).

- [64] Without descending into the evidence, it is fair to say that some of the evidence given by some witnesses may be of a kind that would be inadmissible by virtue of section 82(1) of the ICAC Act. Some of that evidence is relevant to the matters the subject of this report.
- [65] For that reason, I have taken a very cautious approach to the inclusion of compelled evidence in this report.
- [66] I will summarise the evidence of Mr Gunner, and other individuals, in so far that evidence is relevant to this report and to the extent I am comfortable that it does not impinge upon section 59.

No concluded findings

- [67] Before proceeding further, it is appropriate to note that I have not made any findings in respect of Mr Gunner. That is, I have not made a finding that he did, or did not, engage in improper conduct.
- [68] It is not lost on me that the events the subject of this report occurred almost 12 months before I commenced as the Commissioner, and almost four years ago.
- [69] This report addresses three trips to remote locations amongst a myriad of other activities.
- [70] As I will explain, the events occurred in an environment where there was little by way of clear guidance, and in circumstances where the question of what constitutes an official duty versus a political activity was not clearly defined.
- [71] Notwithstanding that I have not made findings, I have determined that it is in the public interest to prepare this report, because the circumstances giving rise to this investigation are an appropriate vehicle to highlight improper conduct risks and to make recommendations aimed at addressing those risks.

Why two reports?

- [72] I have already explained that an investigation report must be provided to a 'responsible authority' as defined in section 50(7) of the ICAC Act. For a public officer, other than a minister or MLA, the responsible authority is:
- (i) *an entity having authority to deal with one or more matters relating to improper conduct the subject of the investigation to which the report relates; or*
 - (ii) *an entity whose functions include making future decisions in the public interest that may be better informed by receipt of the investigation report.*⁵
- [73] In so far as Allegation #1 is concerned, almost all of the evidence gathered relates to the conduct of staff members within the then Chief Minister's office. I had considered whether the Legislative Assembly would be the appropriate responsible authority to receive a report in respect of those staff or, alternatively, to complete a single report addressing both allegations. In the end, I was not persuaded to follow that path.
- [74] First, I do not regard the Legislative Assembly as the appropriate responsible authority to receive a report about the conduct of public officers other than ministers or MLAs. The Legislative Assembly is not responsible for ministerial staff. That is a matter for the relevant minister and that

⁵ Section 50(7)(a).

minister's chief of staff.

- [75] Second, were I to provide the second report to the Legislative Assembly, the same constraints to the inclusion of compelled evidence would apply as they do to this report.
- [76] In my view, the most appropriate responsible authority is the Chief Minister. I have come to that view because the Chief Minister is in a better position to consider any findings I make and to implement, throughout ministerial offices, any further recommendations. In making a report to the Chief Minister, the constraints imposed by section 59 will not be enlivened, which will allow me to set out all of the evidence that is relevant to any findings I make.
- [77] I will furnish the Chief Minister with my second investigation report in this matter by 30 June 2024.
- [78] I pause to note that I have received submissions that I ought not make reference publicly to the making of a second report. The basis for those submissions is the concern that the Chief Minister will face significant pressure to release that report and that, more generally, the confidential nature of that report may be undermined by attempts by the media and others to obtain a copy.
- [79] While I acknowledge those submissions and the concerns expressed, I am not satisfied that those concerns outweigh the public interest in confirming that a second report will be prepared. The public are entitled to know the nature of my work on this investigation, and that this report is not the only report that I will prepare in respect of it.
- [80] I have no doubt that the Chief Minister will take appropriate steps to protect the confidentiality of the second report and, to the extent that it is in the public interest to do so, I will make a public statement about the second report (noting that such a public statement would also be subject to the constraints imposed by section 59 of the ICAC Act).

Codes of Conduct

- [81] An appropriate starting point is to describe the relevant guidance as to ministerial, and ministerial staff, conduct and behaviour as it existed at the relevant time.
- [82] Applicable standards of conduct and behaviour expected of ministerial staff was addressed in a series of documents administered by the Office of the Chief Minister. While not exhaustive, those documents provided the framework for relevant staff members in relation to ethical decision making as well as principles and values to be followed when performing official duties.
- [83] The Cabinet Handbook is a publicly available document outlining the underlying principles of Cabinet and general expectations for Cabinet business and meetings. That document was designed as a resource for ministers, ministerial staff and officials involved in the development and progression of Cabinet business. The version of the Cabinet Handbook that had application in 2020 was dated November 2019.⁶
- [84] The Northern Territory Ministerial Code of Conduct (Ministerial Code) was annexed to the Cabinet Handbook. The Ministerial Code contains guidelines 'developed to assist Ministers understand their responsibilities and obligations within the Westminster system of government and as Ministers generally'.⁷

⁶ Cabinet Handbook, November 2019 (a copy of which can be downloaded from the Territory Stories website).

⁷ Ibid, page 38.

- [85] There are a number of elements of the Ministerial Code that are relevant.
- [86] The Ministerial Code required ministers to understand their responsibilities during the Caretaker period.⁸ It required that ministers ensure that all ministerial staff are aware of their ethical and administrative obligations generally and as specified in a document entitled 'Statement of Standards for Ministerial Staff'.⁹ It also required that public resources be used in a proper manner, and that Information and Communications Technology (ICT) resources not be used for non-government or private purposes.¹⁰
- [87] The Ministerial Code also made clear that ministers themselves do not retain financial or human resources delegations. Instead, the Department of Chief Minister and Cabinet's Chief Executive Officer generally delegates required responsibilities under the relevant legislation for the Office of the Chief Minister (OCM) to the chiefs of staff and deputy chiefs of staff of the OCM. However, ministers maintain a level of responsibility in ensuring good governance in the spending of public money.¹¹
- [88] The standards of conduct for ministerial staff were found in a Code of Conduct approved by the Chief of Staff to the Chief Minister.
- [89] I received two different versions of the ministerial codes for staff during this investigation. Although one document related to ministerial staff and the other to ministerial officers, the two documents were similar in respect of their content and purpose.
- [90] The purpose of the Ministerial Staff Code of Conduct (Staff Code of Conduct) dated 15 May 2017, was to stipulate the basic level of conduct and expected of ministerial staff. Ministerial staff were defined in the document as ministerial officers, Departmental Liaison Officers and staff of the Leader of the Opposition.¹² The Staff Code of Conduct set out the framework for ethical conduct and ethical decision making as to the expected behaviour of a public official and the principles and values to which a ministerial staff member's work performance and personal conduct must be directed.¹³
- [91] The Staff Code of Conduct provided that one of the principles and values was to ensure the effective, efficient and appropriate use of public resources.¹⁴ It stated:
- In performing official duties, a ministerial staff member shall:*
- *use public resources in an effective and accountable manner;*
 - *accept and value their duty to manage public resources effectively, efficiently and economically;*
 - *ensure that resources are not wasted, abused or used improperly or extravagantly;*
 - *seek to achieve high standards of public administration;*
 - *continuously improve performance;*
 - *manage information as openly as practicable within the legal framework.*¹⁵
- [92] The Staff Code of Conduct made specific reference to party political work not being performed using public funds or government resources. It stated one of the required standards of conduct was not to use official resources for party political purposes and to avoid anything which might

⁸ Ibid.

⁹ Ibid, page 44.

¹⁰ Ibid, page 43.

¹¹ Ibid, page 38.

¹² Item 425, paragraph 2.

¹³ Ibid, paragraphs 3-6.

¹⁴ Ibid, paragraph 6.2.

¹⁵ Ibid, paragraph 6.2.

reasonably lead to criticism that persons were engaging in party political activities while being remunerated with public money.

[93] The Code of Conduct for Ministerial Officers (Code for Ministerial Officers) was dated August 2020. That Code of Conduct set out the standards expected of ministerial officers in the performance of their duties. It applied to all staff working for a minister of the Northern Territory (as well as the Leader of the Opposition or an independent MLA, into whose service a ministerial officer is recruited, but did not include Department Liaison Officers).¹⁶

[94] The Code for Ministerial Officers set out a statement of principles. Ministerial officers were required to agree to act in the public interest and abide by ethical principles to use public resources in a proper manner with due economy and not subject those resources to wasteful or extravagant use.¹⁷ The document stipulated that ministerial officers were accountable for the use of public resources in relation to their duties and must:

- *not use public resources, or allow such resources to be used by others, for personal advantage or benefit;*
- *not use official resources for party political purposes;*
- *be scrupulous in ensuring the legitimacy and accuracy of any claims they make on the public purse; and*
- *ensure they are used with appropriate efficiency and economy in the conduct of public business.*¹⁸

Caretaker conventions

[95] Section 23(2) of the *Electoral Act 2004* (NT) (Electoral Act) provides that the General Election is to be held on the fourth Saturday in August in the fourth year after the previous General Election.¹⁹

[96] On 30 July 2020, the then Administrator of the Northern Territory issued a notice proroguing the Legislative Assembly pursuant to s 22(1) of the *Northern Territory (Self-Government) Act 1978* (Cth).²⁰ On the same day, the then Administrator issued a writ pursuant to s 27 of the Electoral Act fixing the election to be held on 22 August 2020. The Caretaker period therefore commenced on 30 July 2020 for a period of 23 days.

[97] Prior to the commencement of the caretaker period in 2020, a Guidance on Caretaker Conventions document dated June 2020 was distributed to ministers and ministerial officers in the OCM. Those guidelines stated that they had application to all NTG ministers, ministerial staff and to all officers of NTG agencies.²¹

[98] The guidelines stated that '[m]inister's travel and meeting expenses for official government business during the caretaker period can be met from government funds in the normal way'.²²

[99] The then Chief Minister signed a memorandum dated 30 July 2020 that was addressed to all ministers. The memorandum stated that the writ for a Northern Territory General Election on

¹⁶ Item 426, page 2.

¹⁷ *Ibid*, page 3.

¹⁸ *Ibid*, page 7.

¹⁹ This applies unless the previous General Election was an extraordinary General Election, triggered by either the passage of a motion of no confidence or the non-passing of appropriation bill in the Legislative Assembly. See s 23 read with s 24 and s 25 of the *Electoral Act*. The election prior to the 2020 General Election was not an extraordinary General Election. Therefore s 23(2) of the *Electoral Act* had application in 2020.

²⁰ Prorogation Notice No. S42 dated 30 July 2020.

²¹ Item 162, page 5.

²² *Ibid*, page 15.

- [102] Pursuant to that provision, the Electoral Commissioner appointed 169 mobile voting centres throughout the Northern Territory prior to the 2020 General Election.²⁵ While some of those centres were to be open on election day, others were open up to 12 days prior to the date of the election for, in some cases, less than an hour.²⁶
- [103] Voting began in some of those centres on 10 August 2020. The Electoral Commissioner created a schedule to visit each community at a specific time to enable people from those communities to vote prior to the election at a booth within their community.²⁷
- [104] This investigation focused on occasions during the caretaker period in 2020 where the Chief Minister undertook travel to remote communities at a time that coincided with the mobile voting centre in that location being open. The documentary evidence suggests that the Chief Minister, together with ministerial staff, travelled on taxpayer funded charter aircraft to three remote communities at the same time that mobile voting centres were open.
- [105] I should note, as a matter of fairness, that there were 169 remote voting centres operated by the Northern Territory Electoral Commission for the 2020 General Election.²⁸ This investigation related to three occasions where the Chief Minister visited a remote polling location during the 2020 caretaker period. I am not aware of any other occasions where the then Chief Minister travelled to a remote voting centre during that period.
- [106] I must also note that there were other trips taken by ministers during the caretaker period. As an example, I had commenced this investigation inquiring into six occasions that involved the then Chief Minister. However, upon a consideration of the evidence it was clear to me that there were proper reasons for three of those trips. My investigation therefore focused upon the three trips which I explain later.
- [107] The *Ministers and Ministerial Staff Travel Policy Framework*²⁹ (Travel Policy) sets out a number of requirements for planning, undertaking and managing travel paid by public money.
- [108] The Chief Minister's Chief of Staff had overall responsibility for ensuring that official travel complied with the policy.³⁰ The Travel Policy required all ministerial officers responsible for booking official air travel to complete a Movement Requisition (MR) for all travel more than 50 kilometres from the employee's workplace, including same day and short-distance air travel.³¹ The purpose was to maintain a record of each instance of publicly funded travel.³² These records were facilitated through a platform called TRIPS, a whole-of-government system used to record movement requisitions, approve requests and automate the payment of travel allowances.³³ The TRIPS system required three stages of input to approve official travel, including (a) input by a booking officer, (b) endorsement by an officer who checks the records, and (c) approval by an officer with the appropriate delegation.

²⁵ Above n23, page 63.

²⁶ *Ibid.* For example, voting centres in Tennant Creek in the 2020 General Election were open for the same hours on Election Day as those in urban centres, but were considered mobile voting centres and staffed by remote mobile teams. By contrast, the voting centre in the remote station of Amanbidji was only open for a 45 minute period on 12 August 2020, some 10 days prior to the General Election.

²⁷ *Ibid.*, page 63

²⁸ *Ibid.*, page 129.

²⁹ Item 596.

³⁰ *Ibid.*, page 4.

³¹ *Ibid.*, page 8.

³² *Ibid.*, page 8.

³³ *Ibid.*, page 15.

- [109] TRIPS required the public officer responsible for booking travel to input details in order to create a MR.
- [110] The Travel Policy required those responsible for approval to exercise their delegated authority competently and without bias.³⁴
- [111] After the travel had been undertaken, there was a requirement that a public officer acquit the travel within the system, and in doing so confirm that the travel took place as planned and booked. Evidence of the travel was then recorded and stored in the TRIPS system.³⁵

Community Engagement

- [112] Before turning to consider the three remote trips in more detail, it is prudent to set out the explanation given by Mr Gunner, and others, as to the underlying purpose for the travel. Because I have decided not to make adverse findings, it is not necessary to set out the evidence in detail.
- [113] In each of the three trips that I will describe below, it was not disputed that those trips were timed to permit attendance in a community during which a remote polling booth was open. Indeed, the evidence was that those trips were planned for the very reason that those remote polling booths would be open.
- [114] The purpose of attendance at those locations was said to be for community engagement. It was said that engagement within remote communities is difficult and rarely are there events during which the community will come together. An open polling booth is such an occasion and the evidence was that advantage was taken of that opportunity to engage with the community, while the community was largely gathered around a single location.
- [115] I acknowledge that part of a minister's responsibility is to engage with members of the community, and that face-to-face engagement is, in many respects, the best approach. I expect that is particularly the case in remote communities. Indeed, the same is true for the Leader of the Opposition and, where the engagement is within their electorate, all members of the Legislative Assembly. While my own experience with remote communities has been very limited, I do acknowledge that organising opportunities to meet with and engage with members of a remote community can be challenging.
- [116] I also acknowledge that these trips occurred as remote communities were emerging from the initial stages of the COVID-19 pandemic and subsequent restrictions on movement. On that point Mr Gunner submitted that:

The Chief Minister's handling of the covid pandemic and its potential impact on aboriginal communities was arguably the single biggest issue for government in the period leading up to the travel in question. Getting out into communities once they reopened after lockdowns and engaging with the people in those communities was a critical part of official government business irrespective of the impending Territory election.

- [117] After describing each trip in more detail I will return to the issue of community engagement in the context of official duties verses political activity.

³⁴ Ibid, page 9.

³⁵ Ibid, page 12.

Naiyu and Minyerri travel

- [118] The mobile voting centre at Naiyu Nambiyu (Naiyu) was located in ‘NN Inc Boardroom’ and was open on 14 August 2020 from 8am to 12pm.³⁶ Naiyu is located in the electoral division of Daly.³⁷
- [119] The mobile voting centre at Minyerri was located in the ‘Council Meeting Room’ and open on 14 August 2020 between 10am and 3pm.³⁸ Minyerri is located in the electoral division of Arnhem.³⁹
- [120] On 20 July 2020, planning for a trip commenced with a staff member emailing a number of private aviation companies requesting quotes for a chartered flight on 14 August 2020 from Darwin to Naiyu, with 1-2 hours on the ground, then Naiyu to Minyerri, with 1-2 hours on the ground, then Minyerri returning to Darwin.⁴⁰
- [121] On 21 July 2020, the staff emailed a second staff member with the quotations for the planned travel.⁴¹ The quotations ranged from \$4468 to \$5200.
- [122] On 11 August 2020, there was an email exchange between two staff members, which included a proposed itinerary for the Naiyu and Minyerri travel.⁴² Alongside the proposed itinerary, the attachment to that email contained a highlighted passage that stated “1 hour at each booth”.⁴³
- [123] A short time later, a staff member sent a pre-approval request to another staff member for pre-approval for the charter flight.⁴⁴ That email contained a proposed list of passengers which included the then Chief Minister, three staff members and Mr Warren Snowdon.⁴⁵ That request was approved.⁴⁶
- [124] An Outlook meeting invitation was sent from the then Chief Minister’s email account by a staff member on 13 August 2020. That invitation was sent to three other staff members and bore the subject line ‘ARNHEM – MINYERRI BOOTH’.⁴⁷
- [125] On the same day, a staff member entered the MR into the TRIPS system.⁴⁸ The MR listed the reason for booking the travel as ‘Ministerial travel’, and the primary reason for travel as ‘Community engagement’.⁴⁹ The MR stated the travel was taking place because of a ‘requirement to attend on site’, and ‘stakeholder engagement face to face’.⁵⁰ The MR listed the same passengers as set out in the previous pre-approval request correspondence, save that one staff member was substituted for a different staff member.⁵¹

³⁶ Item 166, page 108.

³⁷ Ibid.

³⁸ Ibid, page 106.

³⁹ Ibid, page 106.

⁴⁰ Items 61, 62 and 63.

⁴¹ Item 64.

⁴² Item 65.

⁴³ Ibid.

⁴⁴ Item 66.

⁴⁵ Ibid.

⁴⁶ Item 143.

⁴⁷ Item 447.

⁴⁸ Item 68.

⁴⁹ Ibid – I note the term ‘Community Engagement’ is a descriptor that is widely used for travel by parliamentarians, as recorded on the TRIPS system.

⁵⁰ Ibid.

⁵¹ Ibid.

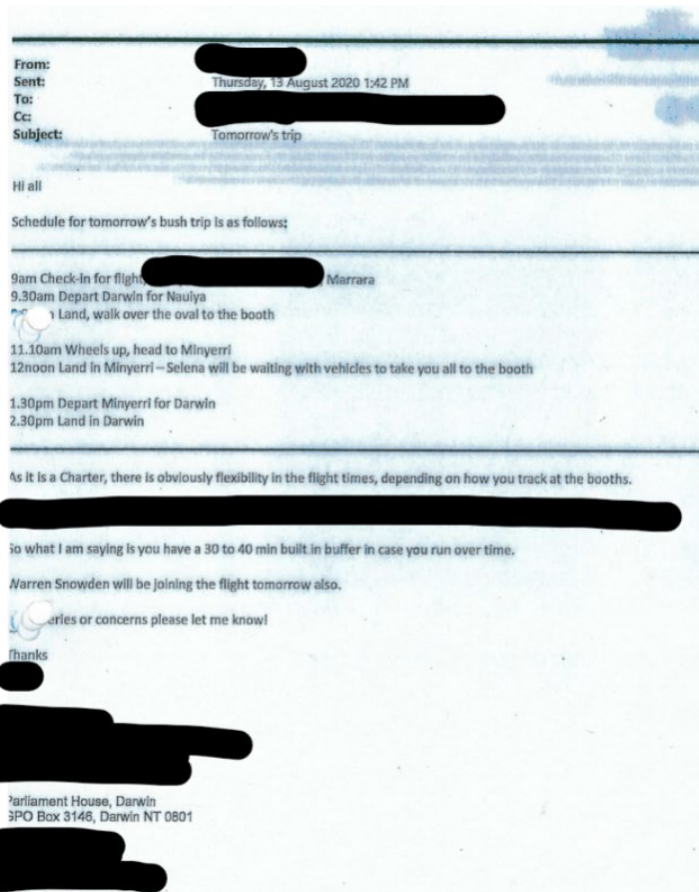
- [126] The finalised MR, which had been acquitted in accordance with the Travel Policy, noted that ‘due to fog, the plane couldn’t land in Nauliyu so...rerouted straight to Minyerri’.⁵² The final cost of the trip recorded in TRIPS was \$4,850.⁵³
- [127] The then Chief Minister’s diary for 14 August 2020 is replicated below.

14 August 2020		August 2020							September 2020						
Friday		Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su
		3	4	5	6	7	8	9	1	2	3	4	5	6	
		10	11	12	13	14	15	16	7	8	9	10	11	12	13
		17	18	19	20	21	22	23	14	15	16	17	18	19	20
		24	25	26	27	28	29	30	21	22	23	24	25	26	27
		31							28	29	30				

Time	Event
FRIDAY	14
	← From 6 Aug Darwin Festival To 16 Aug →
	DALY / ARNHEM
	Variety NT Bash Starts
7 AM	[REDACTED]
8	[REDACTED]
9	Morning Campaign Meeting; CM's Conference Room, 5th Fl
	Darwin to Nauliyu; Charter - Hardy Aviation; Michael Gunner
10	DALY - NAULIYU BOOTH - didn't get there due to fog NN Inc Boardroom Michael Gunner
	5th Floor Staff Meeting; *change* now Litchfield Room, Level 3,
11	Nauliyu to Minyerri Charter - Hardy Aviation; Michael Gunner
12 PM	ARNHEM - MINYERRI BOOTH Council Meeting Room Michael Gunner
1	[REDACTED]
2	Minyerri to Darwin Charter - Hardy Aviation Michael Gunner
3	[REDACTED]
4	[REDACTED]
5	[REDACTED]
6	[REDACTED]
7	[REDACTED]

- [128] I infer that the entry, “didn’t get there due to fog” was entered after the proposed travel to Nauliyu did not eventuate.
- [129] The itinerary for 14 August 2020 proposed a time of 1 hour at each booth.⁵⁴ An email from a staff member dated 13 August 2020 contained multiple references to the group travelling to, and between, booths. The email set out the schedule for the trip and included that at Nauliyu, the party would “walk over the oval to the booth” and at Minyerri the local MLA would be waiting with vehicles to take the travel party to the booth. The email indicated that as the flight was a charter flight, there would be flexibility in the flight times, depending on how they tracked at the booths. The email is replicated below.

⁵² Item 71.
⁵³ Ibid.
⁵⁴ Item 144.



[130] On 13 August 2020, a staff member sent an email containing a schedule, with multiple references to the group travelling to, and between booths.⁵⁵ The schedule is replicated below.

Company	Plane	Fly Time Darwin-Nauliyu	FLY TIME Nauliyu to Minyerri	FLY Time Minyerri to DWN	Seat capacity	Payload	Cost
[REDACTED]	[REDACTED]	35mins	1hour 25mins	1hour 35mins	seats	kg	\$4486
[REDACTED]	[REDACTED]	25mins	50mins	1 hour	seats	0kg	\$5200
[REDACTED]	[REDACTED]	40mins	1.5hours	1.7hours	seats	0kg	\$4680
[REDACTED]	[REDACTED]	40mins	1hr26mins	49mins	Seats	kg	\$4555

1 hour at each Booth

Slowest Plane
 Fastest Plane

0800-0830 SEMC
 0900-0930 travel to airport
 0930 Depart Darwin
 0930-1010 – Travel
 1010 Land Nauliyu
 1110 Checkin
 1140 Depart Nauliyu
 1140-1310 travel
 1310 Land Minyerri
 1410 Checkin
 1430 Depart Minyerri
 1430-1615 travel
 1615 Land Darwin


0800-0830 SEMC
 0900-0930 travel to airport
 0930 Depart Darwin
 0930-0950 – Travel
 0950 Land Nauliyu
 1050 Checkin
 1120 Depart Nauliyu
 1120-1210 travel
 1210 Land Minyerri
 1310 Checkin
 1330 Depart Minyerri
 1330-1430 travel
 1430 Land Darwin

⁵⁵ Item 145.

[131] On 14 August 2020, an email was sent from the then Chief Minister's email account to staff in his office, together with electorate offices occupied by Labor Party members. The subject of the email was 'Happy Friday!'. The email provided a summary of some key events that involved the Chief Minister throughout the week, including the Mynyerri trip. Relevant parts of that email are set out below.

From: Michael Gunner
Sent: Friday, 14 August 2020 5:50 PM
To: DCM OCM Caucus; DCM OCM MinisterFylesOffice; DCM OCM MinisterKirbyOffice; DCM OCM MinisterLawlerOffice; DCM OCM MinisterManisonOffice; DCM OCM MinisterMcCarthyOffice; DCM OCM MinisterMossOffice; DCM OCM MinisterUlboOffice; DCM OCM MinisterWakefieldOffice; Electorate Johnstori; Electorate Arafura; Electorate Arnhem; Electorate Barkly; Electorate Braiiling; Electorate Brennar; Electorate Casuarina; Electorate Drysdale; Electorate Fannie Bay; Electorate Karama; Electorate Katherine; Electorate Namatjira; Electorate Nightcliff; Electorate Port Darwin; Electorate Sandersori; Electorate Wanguri; DCM OCM ChiefMinisterOffice
Subject: Happy Friday!

Hi everyone

ther huge week – I thank you all for the amazing effort you are putting in to ensure a Territory Labor Government returns next term. We've delivered a huge amount in the last four years but there is still more to do.

The election is only 8 days away!

Labor has the best volunteers and we just need to ask a little more of you – so please get in touch with [REDACTED] or [REDACTED] if you can spare an hour or two this weekend. I look forward to seeing you out and about.

Please remind everyone you speak to that early voting is OPEN every day until the election and will save them waiting in line. Also a reminder for you all to ensure you cast your vote – every vote is important!

██████████ is working hard down in Katherine and I headed down there on Wednesday for what was a very busy day – we visited the FAFT at MacFarlane Primary School, dropped off delicious treats to Katherine Hospital and hit the doors to name just a few.



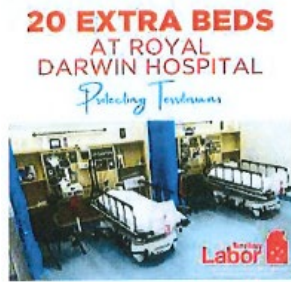
It is always great to have the Supercars back in town and Paul Kirby and I gave Huddy his first Transporter Convoy experience last night. He loved the noise – clearly a rev head. After knock-off, ██████████ and I took my father-in-law out for chicken wings to Six Tanks. Confession: I again took away the title of eating the most wings.



Always a pleasure getting out to Arnhem and today I visited the Minyerri booth with the Federal Member for Lingiari. It was great to have Warren with us and to see democracy working for our bush electorates.



On a subject close to my heart, this week we announced an extra 20 beds for Darwin Hospital following the opening of a new ward at Palmerston Regional Hospital. The new ward means ENT, urology and gynaecology procedures will be performed at the Palmerston campus for the first time. This is great capacity building for our health care system.



Today we hit zero active cases of COVID-19 in the Territory. And we have still never had any community transmission. I know this can change at any moment. It's likely we will get cases again. It's not something any of us should take for granted. But it does mean our hard borders for hotspots policy is working.

A big **Happy Birthday** to Te [REDACTED] who is celebrating her birthday this Sunday. No doubt she will be having a busy day doing her part for Namitjira. Have a great day Te: [REDACTED]

A reminder that the Darwin Festival wraps up this Sunday. All tickets are sold out (which is amazing) but there is always to be had and great food at Festival Park.

We are all doing long days right now so please make sure you take the time to do something nice for yourself this weekend.

Cheers
Michael

[132] Within that email was the following:

[a]lways a pleasure getting out to Arnhem and today I visited the Minyerri booth with the Federal Member for Lingiari. It was great to have Warren with us and to see democracy working for our bush electorates'.⁵⁶

[133] Below that text was a photo of the then Chief Minister, a person I understand to be Mr Snowdon and the then Minister for Aboriginal Affairs, together with three other persons wearing Labor Party shirts and standing under a Labor Party Marquee.⁵⁷ The email did not reference other activities while in Minyerri.

[134] During the course of this investigation, I took evidence from a number of individuals in respect of this trip. The essential features of that evidence are as follows:

- (a) The trip was planned to coincide with remote polling booths.
- (b) The trip to Nauiyu did not eventuate due to weather conditions.
- (c) The trip to Minyerri took place.
- (d) The purpose of the trips was to engage with the community, with open polling booths a good community event to have that engagement.

⁵⁶ Exhibit Item 145.

⁵⁷ Exhibit Item 145.

- (e) The trip to Nauiyu was also intended as an opportunity for the then Chief Minister to meet with an Aboriginal Elder.
- (f) The trip to Minyerri included other meetings and a tour of housing.
- (g) Care was taken not to engage in campaign activities such as handing out how to vote cards.

Maningrida and Galiwin'ku travel

- [135] Maningrida is located in the electoral division of Arafura.⁵⁸ The mobile voting centre at Maningrida was open from 8:30am to 4:30pm on 18 August 2020 and from 8:30am to 3:30pm on 19 August 2020.
- [136] Galiwin'ku (Galiwinku) is located in the electoral district of Daly.⁵⁹ The mobile voting centre at Galiwinku was open on 18 August 2020 between 1:15pm and 4:30pm and 19 August 2020 between 8:30am and 4:30pm.
- [137] I obtained a number of documents related to the planned purpose of this travel. That included TRIPS records, diary entries and email correspondence relevant to the travel.
- [138] On 13 August 2020, planning for a trip commenced with a staff member emailing a number of private aviation companies requesting quotes for a chartered flight on 18 August 2020 from Darwin to Maningrida, Maningrida to Galiwinku, and returning to Darwin.⁶⁰
- [139] On 17 August 2020, the staff member requested approval from another staff member to book a charter flight from Darwin to Maningrida, Galiwinku and back to Darwin on 18 August 2020.⁶¹ The quotations ranged from \$4,525 to \$5,775. The pre-approval correspondence contained a list of passengers including the then Chief Minister and three staff members.⁶² A staff member approved the travel via email 2 minutes later.⁶³ Later that day, further emails communications were sent between staff, again confirming that the then Chief Minister would only travel to Galiwinku, not Maningrida as was originally planned and asked for pre-approval of \$5,600 for a charter flight from Darwin to Galiwinku and return. That approval was given.⁶⁴
- [140] The Chief Minister's diary for 18 August 2020 is replicated below.

⁵⁸ Item 166, page 106.

⁵⁹ Ibid, page 108

⁶⁰ Items 72,73 and 74.

⁶¹ Item 78.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Item 79.

[144] I summarise the witness evidence as follows:

- (a) The trip was planned to coincide with the opening of a remote polling booth.
- (b) The trip took place.
- (c) The purpose of the trips was to engage with the community, with open polling booths a good community event to have that engagement.
- (d) During the trip the then Chief Minister engaged with community members about COVID, and met with a local housing association and local health organisation.

Wadeye

[145] The mobile voting centre at Wadeye was located in the 'Sport and Recreation Hall' and was open on 19 August 2020 between 8:30am and 4:30pm, and on 20 August 2020 between 8am and 2pm. Wadeye is located in the electoral district of Daly.⁷²

[146] On 13 August 2020, planning for a trip to Wadeye commenced. A staff member emailed a number of private aviation companies requesting quotes for a chartered flight on 19 August 2020 from Darwin to Wadeye return.⁷³

[147] On 17 August 2020, the staff member requested approval from another staff member to book a charter flight from Darwin to Wadeye and back to Darwin on 18 August 2020.⁷⁴ The quotations for the charter were between \$2,470 - \$3,250. The pre-approval correspondence contained a list of passengers including the then Chief Minister and three staff members.⁷⁵ That was approved some four minutes later.⁷⁶

[148] Later that day, a staff member entered the MR into the TRIPS system.⁷⁷ That MR listed the reason for booking the travel as 'Ministerial travel', and the detailed reason for travel as 'Stakeholder engagement'.⁷⁸ The MR stated the travel was taking place because of a 'requirement to attend on site', and 'stakeholder engagement face to face'.⁷⁹ Two staff members gave the requisite endorsement and approval through the system later that day.⁸⁰

[149] The Chief Minister's diary entry on 19 August 2020 is replicated below.

⁷² Item 166, page 108

⁷³ Items 93, 94 and 95.

⁷⁴ Item 96.

⁷⁵ Ibid.

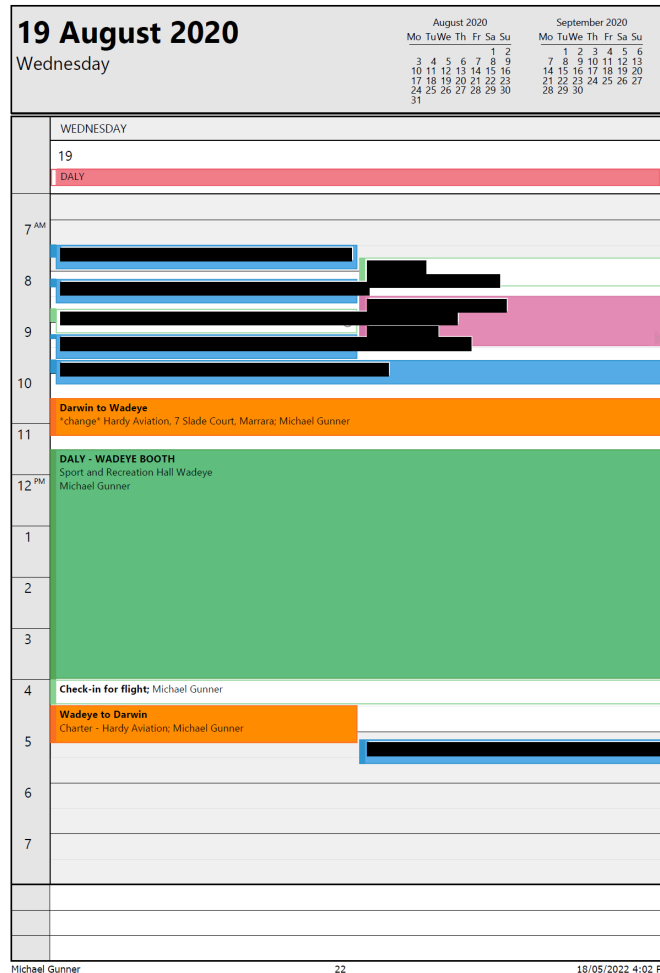
⁷⁶ Ibid.

⁷⁷ Item 98.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.



- [150] On 19 August 2020, an Outlook meeting invitation was sent from the then Chief Minister’s email account to three staff members. That email bore the subject line ‘DALY – WADEYE BOOTH’.⁸¹
- [151] On 18 August 2020, a staff member sent an email to the aviation company, booking the flight and indicating the passengers would be the then Chief Minister, three staff members and Mr Snowden.⁸²
- [152] The finalised MR, which had been acquitted in accordance with the Travel Policy direction, noted that the cost of the travel, consistent with the invoice provided by the charter company, was \$3,750.⁸³
- [153] I obtained a number of videos and photos taken by a staff member while the group was in Wadeye. Included among these was a video with the then Chief Minister promoting the NT Labor candidate for Daly in the election, Mr Anthony Venes.⁸⁴ That video contained footage of Mr Gunner walking alongside Mr Venes through Wadeye. The video contains the Territory Labor logo and has a Labor Party endorsement. I note that the video was shot on the same day as the media blackout period began, meaning that the video could not have been used for campaign purposes in any event.
- [154] While in Wadeye, Mr Gunner also recorded a video to acknowledge Freedom Day, celebrating the Gurindji Walk-Off in 1966.

⁸¹ Item 448.
⁸² Item 100.
⁸³ Item 98.
⁸⁴ Item 621.

[155] I summarise the witness evidence on this trip as follows:

- (a) The trip was planned to coincide with the opening of a remote polling booth.
- (b) The trip took place.
- (c) The purpose of the trips was to engage with the community, with open polling booths a good community event to have that engagement.
- (d) During that trip the then Chief Minister met with:
 - a person who had recently been appointed to a Government Commission,
 - a traditional owner
 - a local development corporation.
- (e) The video taken of the then Chief Minister and the then local candidate was not pre-planned and could not have been used for campaign purposes in any event (because of the commencement of the 3 day advertising blackout).

Some Observations

General comments

[156] While I have declined to make any findings in respect of the travel discussed above I wish to record some observations.

[157] It is clear that each of the three trips were designed to coincide with attendance in a community during the period in which a mobile voting centre was open. It is to be recalled that 169 such mobile voting centres were open and there is no evidence before me of some systematic attempt to ensure ministerial attendance at all, or a good portion, of them.

[158] I am not in a position to determine whether the then Chief Minister's attendance at the mobile polling booths had any positive, or negative, impact upon his party's election campaign. While some evidence was provided accompanying submissions, I am simply not in a position to determine that question.

An established practice?

[159] I received a submission that '[m]inisterial travel during the caretaker period to places where polling is occurring is an established practice/convention.'⁸⁵

[160] In support of that submission, I was provided with a document setting out what I understand to be suggested travel by the then Chief Minister, Adam Giles, in the lead up to the 2016 General Election, to regional and remote locations during remote polling booth opening hours. Because I have not inquired into the events leading up to the 2016 General Election, I will not express any view as to the accuracy of the information provided.

[161] My attention was also drawn to extensive travel undertaken by the then Prime Minister and the then Leader of the Federal Opposition during the caretaker period leading up to the 2022 Federal Election, much or all of which was said to be publicly funded.

⁸⁵ Submission of Ms Fyles, page 25.

[162] I was also referred to a document, which I understand was tabled in the Legislative Assembly, which set out travel by the current Northern Territory Leader of the Opposition in the lead up to the 2020 General Election. According to that document, there was one trip taken by the Leader of the Opposition during the caretaker period.

[163] That trip was to Alice Springs and occurred on 4 August 2020. That travel appears to have been via a commercial airline (based upon the airfare cost).

[164] The trip did not coincide with an open polling booth.

The risk of mischief

[165] Putting to one side the particular events that were the subject of this investigation, it seems to me that great caution must be exercised when a minister, or any MLA, undertakes publicly funded travel, particularly during the caretaker period, in order to avoid the real, or perceived, risk that such travel is for a political, rather than a public, purpose.

[166] What constitutes a political purpose, as opposed to a public purpose, is not well defined and there remains, in my view, intolerable ambiguity. That ambiguity is one of the reasons I have decided not to proceed to record findings in this report.

Political activities vs official duties

[167] In the Northern Territory, there is little guidance as to what constitutes an official duty and how that is to be distinguished from a political activity. There are, of course, some fairly obvious examples of activities that are purely political in nature. Such examples can be found in the Electoral Act, which I will return to later. Defining the concept of 'official duty' is more difficult.

[168] In so far as ministers are concerned, I have previously noted that '[t]he functions given to a Minister of the Crown are not neatly encapsulated.'⁸⁶ I remain of that view.

[169] Determination No.1 of 2022 of the Northern Territory of Australia Remuneration Tribunal sets out the salaries and other entitlements for MLAs (MLA Determination). A very broad definition is given to the concept of 'official business' and 'services as a Member'. Both terms are defined to 'cover all matters of relevance or interest to Northern Territory electors'.⁸⁷

[170] Notwithstanding such definitional challenges, one might consider it a straightforward task to distinguish between an activity which is political in nature versus one which is undertaken to advance a public purpose. But that divide is not always straightforward.

[171] Community engagement is a prime example. There can be little doubt that engagement with, and within, a community is a legitimate public function which is, and ought to be, undertaken by all MLAs, including ministers. The vast remoteness of the Northern Territory means that in many cases, such community engagement will necessitate significant travel, and such travel may necessitate the expenditure of public money.

[172] Of course, it could not seriously be suggested that community engagement may not also include a political element. One need not look far to find examples of community engagement during which partisan commentary ensues. But such political undertones do not, in my view, undermine

⁸⁶ Investigation Report – Operation Crimen – Tabled in the Legislative Assembly, May 2023, page 23.

⁸⁷ See page 2.

the legitimacy of the engagement or, where relevant, the incurrence of public expenditure in conducting the engagement.

- [173] On the other hand, one can envisage a circumstance where travel is undertaken, under the guise of legitimate 'community engagement', but where the sole, or dominant, purpose is to advance a purely political objective. Attendance at a fundraising event for a political party, a campaign launch event, or a campaign rally event are examples of purely political activities. Travel undertaken for the sole, or dominant, purpose of door knocking electors, handing out politically branded flyers, or filming campaign videos, are other examples.
- [174] More generally, a hallmark of Australia's democracy is the exchange, and debate, of ideas and policies. Governments and oppositions will formulate policy positions and will, inevitably, criticise and find fault with their opponents. Those interactions intensify in the lead up to elections.
- [175] In formulating policies, and criticising their opponent's approach, government and opposition members are fulfilling both a political purpose and an official purpose. A great deal of time and resources may be expended in developing policies and in dissecting the policies of opponents. Doing so involves both a political, and public, element.
- [176] How then can the conduct of ministers, and indeed all MLAs, be governed in a way that does not undermine their legitimate role in democracy, while at the same time preventing misuse of public resources to achieve purely political outcomes?

Sole or dominant purpose test?

- [177] One approach is to look to the underlying purpose of the activity to determine whether that purpose is solely, or dominantly, political. In order to do so consistently and fairly, one needs to first attempt to define activities that are political and those that might be regarded as public, or official.
- [178] In the Commonwealth, attempts have been made to improve clarity in respect of publicly funded travel and other expenses incurred by parliamentarians. The *Parliamentary Business Resources Act 2017* (PBRA), which commenced in 2018, establishes a framework for the management and use of public resources.
- [179] The PBRA permits the incurrence of public expenditure, provided that expenditure is incurred for the dominant purpose of conducting 'parliamentary business'.⁸⁸
- [180] Parliamentary business is defined by reference to four streams⁸⁹:
- (i) Parliamentary duties
 - (ii) Electorate Duties
 - (iii) Party Political Duties
 - (iv) Official duties
- [181] Section 6(4) of the PBRA provides that the minister responsible for the administration of the legislation must:

determine activities of a member that are:

(a) ***parliamentary duties*** of the member; or

⁸⁸ *Public Business Resources Act 2017* (Cth), section 26.

⁸⁹ See section 6.

- (b) **electorate duties** of the member; or
- (c) **party political duties** of the member; or
- (d) **official duties** of the member.

[182] Parliamentary duties have been determined by the relevant minister as follows:

Schedule 1—Parliamentary duties

(Act s 6(4)(a))

Column 1 Member (or class)	Column 2 Parliamentary duties
All members who are a senator or member of the House of Representatives	<p>In the member's capacity as a member of the Parliament:</p> <ul style="list-style-type: none"> a) Preparing for, participating in and attending to business arising from proceedings of the Parliament, whether by committee of the whole or otherwise; b) Developing, reviewing or amending legislation or proposed legislation, and activities engaged in for that purpose; c) Undertaking research, communication (including with stakeholders) or administration connected with the business of the Parliament, the member's policy portfolio, or their role as a member; d) Preparing for, participating in, or attending to matters arising from an official government, parliamentary or vice regal meeting, event or function; e) Preparing for, participating in and attending to matters arising from a meeting (including with stakeholders), event or function for the purposes of their role as a member, including in relation to the member's policy portfolio; f) Preparing for, participating in, or attending to business arising from a non-Parliamentary committee, taskforce or other formal group in which the member participates; g) Representing the Parliament, in accordance with an approval of the Parliament or a House of the Parliament, and engaging in associated activities for that purpose; h) Representing a Minister or office holder in their official capacity, at the request of that Minister or office holder, at a meeting, event or function; i) Representing the Government or Australia, with the approval of the Prime Minister. <p><i>Note: For Ministers representing the Government or Australia in their capacity as a Minister, this would be part of the member's official duties (see Schedule 4).</i></p>

[183] I note, in that regard, Mr Gunner's submission that, had this framework been in place in the Northern Territory, '[t]his would seem, in context, to permit travel by the Chief Minister into any electorate for the purposes of stakeholder engagement whether that occurs within an election caretaker period or not.'⁹⁰

[184] In respect of party political duties, the relevant minister determined as follows:

Schedule 3—Party political duties

(Act s 6(4)(c))

Column 1 Member (or class)	Column 2 Party political duties
All members who are a senator or member of the House of Representatives	<p>In respect of the political party to which the member belongs, participating in any of the following in their capacity as an elected Senator or member of the House of Representatives:</p> <ul style="list-style-type: none"> a) a formal meeting of the political party (including a meeting of the party executive, a committee or a subcommittee); b) a national, state or territory conference.

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[185] As can be seen, it is not contemplated that activities whose dominant purpose is to advance an election campaign will permit the expenditure of public resources. On the other hand, curiously,

⁹⁰ Further submission of Mr Gunner, dated 10 May 2024.

⁹¹ Parliamentary Business Resources (Parliamentary Business) Determination 2017

attendance at formal party meetings, or party conferences, can be undertaken at taxpayer expense.

[186] In respect of official duties, the relevant minister determined as follows:

Schedule 4—Official duties

(Act s 6(4)(d))

Column 1	Column 2
Member (or class)	Official duties
All office holders and Ministers of State	In the member’s official capacity (being their capacity as a Minister or office holder, as the case may be): <ul style="list-style-type: none"> a) Exercising the powers or functions, or performing the duties, of the member’s office, or activities engaged in for the purposes of doing so; b) Attending an event to which the member has been invited in their official capacity; c) Other activities directly related to, and engaged in for the purposes of, performing the member’s official role.

[187] The Commonwealth has, by virtue of the PBRA and relevant determinations, established a framework that attempts to better define those activities for which public resources may be expended.

[188] The key element to that framework is to assess the activity in order to determine its dominant purpose. If the dominant purpose falls within the remit of ‘parliamentary business’, the expenditure of public resources on that activity is permitted.

[189] The framework in the Northern Territory is less clear.

[190] By way of example, the 2019 version of the Guidance on Caretaker Conventions provides that publicly funded travel for ‘official government business’ is permissible. What constitutes ‘official government business’ is not defined.

[191] Moreover, clause 11 of the MLA Determination sets out each member’s entitlement to office space and equipment. Clause 11.3 states that ‘the Member must ensure that the office is not used for commercial or electioneering purposes’. What constitutes ‘electioneering’ is not defined.

[192] The Codes of Conduct for ministers, and ministerial staffers, as applicable at the relevant time, prohibited the use of public resources for ‘party political purposes’. However, what constitutes a party political purpose is not defined.

[193] Clearly, there is room for greater clarity in the Northern Territory.

[194] In my view, consideration ought to be given to adopting a framework that requires consideration of the ‘dominant purpose’ of an activity, which is then used to determine, by reference to defined criteria, whether it is an activity to which public resources can be properly expended. I think that approach is preferable given that many activities may be intended to achieve both a public, and a political, purpose.

[195] To that end, the Commonwealth’s approach is worthy of further consideration.

[196] I acknowledge that such an approach would require a good deal of deliberation and potential legislative change. I also acknowledge that it is not possible for such change to occur prior to the 2024 General Election. For that reason, I intend to make a number of recommendations that

might address risks in the short term, pending consideration of a longer term approach to the issues identified in this report.

Allegation #1 – Alleged use of public resources within the Chief Minister’s office to advance Labor election campaign.

- [197] Before turning to my recommendations, I wish to comment about Allegation #1.
- [198] As I have already explained, I intend to address Allegation #1 in a separate report to the Chief Minister. I will complete that report by 30 June 2024. However, I am alive to the fact that, were I to make recommendations in that report, the period within which those recommendations could be considered and, if accepted, implemented before the 2024 caretaker period commences, would be very short.
- [199] Irrespective of any findings I make in the second report, it is clear to me that greater clarity is necessary to ensure those who work for ministers, and indeed all MLAs, use public resources for appropriate and legitimate public purposes.
- [200] For those reasons, I have decided to make some recommendations in this report to stimulate discussion, debate and reform prior to the 2024 General Election. I may make further recommendations in the future.
- [201] While it should be obvious, to avoid doubt any reference I make in these recommendations to an MLA includes a Minister and the Leader of the Opposition.

Recommendations

- [202] As I have already mentioned, in February 2024 I circulated a draft General Report to witnesses. That draft report set out a number of proposed recommendations. Some of those proposed recommendations have found their way into amended guidelines for ministerial staff.
- [203] While this investigation was focused upon allegations relating to a ministerial office, all MLAs are in a position to engage, or for their staff to engage, in both political and public activities. For that reason, my recommendations are expressed in terms that would capture all MLAs and their staff.
- [204] My recommendations to MLAs are couched in terms of voluntary uptake. I do not purport to compel Members to adhere to my recommendations. Rather, I hope that Members will consider my recommendations and decide for themselves whether they will adopt some or all of them.

Establishing definitions

- [205] One of my proposed recommendations was to incorporate into guidelines, rules and other documents certain definitions applicable to ministers, ministerial staff members, MLAs and staff of members. That recommendation was to be directed to the Chief Minister and all MLAs.
- [206] In March 2024, new Ministerial Staff Guidelines were published by the Office of the Chief Minister (the Guidelines). The guidelines have largely captured the definitions I had proposed in February 2024. The Guidelines define ‘Political Activities’ as follows:

Political Activities means conduct engaged in for the sole purpose of advancing the election campaign (whether this occurs during the Caretaker period or not) of a party or individual candidate(s), including:

- (i) preparing and distributing posters, flyers, videos, social media posts and other materials which bear political party logos, names of candidates and/or party colour/branded schemes
- (ii) door knocking or face to face participation in other election/party driven campaign activities
- (iii) undertaking **campaigning activity** as defined in the [Electoral Act 2004](#) to mean any of the following:
 - canvassing for votes;
 - soliciting the vote of a person;
 - inducing a person not to vote for a particular candidate;
 - inducing a person not to vote at the election;
 - exhibiting a notice or sign relating to the election.
- (iv) all steps preparatory to any of the above activities.

[207] The Guidelines define public duties as follows:

Public Duties means conduct engaged in to:

- (i) advance governmental and ministerial policy objectives
- (ii) support governmental and / or ministerial decision making
- (iii) communicate ministerial and government decisions, policies, objectives and viewpoints
- (iv) support a Member of the Legislative Assembly (MLA) to perform official functions as a member;
and
- (v) to otherwise advance the public interest, as distinct from the interests of a political party or candidate(s).

[208] Since I proposed those definitions in February 2024, I have reflected on some improvements that could be made.

[209] First, for reasons I have already explained, activities engaged in by a minister or MLA may have a dual purpose. Defining a political activity to one in which the sole purpose is to advance an election campaign may well camouflage activities whose dominant purpose may be political, but where the hint or suggestion of a public purpose may be sought to legitimise the otherwise improper expenditure of public resources.

[210] Accordingly, I make the following recommendation.

Recommendation 1:

I recommend that the Chief Minister cause an amendment to be made to the current Ministerial Staff Guidelines to replace reference to 'sole purpose' in the definition of political activity to 'dominant purpose'.

[211] *Political Activities*, as defined in the Guidelines, makes reference to the definition of ‘campaigning activity’ as defined in section 268 of the Electoral Act. Another statutory definition is also relevant. Section 268A of the Electoral Act defines *campaign material* as follows:

- (1) **Campaign material** is an advertisement, document or any other thing that is intended to promote the electoral prospect of a particular candidate or group of candidates for an election.
- (2) Without limiting subsection (1), **campaign material** includes any of the following:
 - (a) an electoral advertisement;
 - (b) a printed document containing an electoral matter (for example, a handbill, pamphlet or how-to-vote card);
 - (c) a message containing an electoral matter that is sent by telephone or otherwise broadcast by electronic means;
 - (d) material containing an electoral matter that is published.

[212] In my view, point (i) in the definition of *Political Activities* in the Guidelines should be amended to include reference to campaign materials as prescribed in section 268A of the Electoral Act.

Recommendation 2:

I recommend that the Chief Minister cause an amendment to be made to the current Ministerial Staff Guidelines to replace (i) in the definition of *Political Activities* with the following:

- (i) preparing and/or distributing posters, flyers, videos, social media posts and other materials which bear political party logos, names of candidates and/or party colour/branded schemes, and the preparation and/or distribution of campaign materials, as defined in the *Electoral Act 2004*.

Applying the definitions

[213] The Guidelines apply only to ministerial staff. However, ministerial staff are not the only group of individuals who may be in a position to engage in political activities and official duties. Ministers, MLAs, and staff members of MLAs may all have the opportunity to engage in such activities.

[214] I have already mentioned the difficulty in defining the functions of a minister and I have already made reference to the broad concept of ‘official business’ and ‘service as a Member’ in the MLA Determination. In the lead up to an election, those individuals will likely be confronted with opportunities to engage in both political activities and official duties. Many such opportunities will include both an official, and a political, objective.

[215] I think it would be beneficial for all MLAs, including ministers, to adopt an approach by which each Member agrees not to use or expend public resources on a political activity, as defined in the Guidelines, and to agree to ensure that their staff do not engage in such political activity while being remunerated from public money. I note that public resources includes public funds, public assets (such as computers, cameras and other information technology) and publicly funded employees.

Recommendation 3:

I recommend that each Member of the Legislative Assembly (including ministers) agree that neither they, nor their staff, will use or expend public resources on a Political Activity, as that term is defined in the Guidelines for Ministerial Staff (and amended as per the recommendations in this report).

I further recommend that such agreement be documented in writing and communicated to the Member's staff.

Travel during the caretaker period

- [216] I have already referred to the Northern Territory *Guidance on the Caretaker Convention*, as it existed at the relevant time. That document provided that '[m]inister's travel and meeting expenses for official government business during the caretaker period can be met from government funds in the normal way'.⁹²
- [217] What constitutes official government business is not always straightforward, and views may differ as to the dominant purpose of the travel.
- [218] Pending further consideration after the 2024 General Election, I propose that during the 2024 caretaker period, an MLA who undertakes, or participates in, publicly funded travel outside of their electorate, or outside of the Darwin/Palmerston region, commit to providing detailed information about that travel to the Clerk of the Legislative Assembly. In order to promote transparency and to discourage improper use of public resources for travel purposes, it is sensible that the Clerk of the Legislative Assembly publish information about that travel as soon as practicable after receiving it.

Recommendation 4:

I recommend that each Member of the Legislative Assembly agree to keep a record of any travel undertaken during the caretaker period where that travel is fully or partially funded with public money, including:

- the purpose(s) of the travel;
- the date of travel;
- the locations to which travel was undertaken;
- the means by which travel was undertaken (i.e. vehicle, charter aircraft, commercial flight etc);
- the total cost of the travel;
- that portion of travel costs paid for with public money;
- who travelled and the capacity in which each person travelled; and
- the activities undertaken during that period of travel.

This recommendation is not intended to capture travel undertaken by a Member of the Legislative Assembly within their own electorate, or travel undertaken within the Darwin/Palmerston region.

Recommendation 5:

I further recommend that the Clerk of the Legislative Assembly establish a process to make public information provided by Members of the Legislative Assembly in accordance with recommendation 4 above.

Keeping timesheets and out of hours political activities

- [219] In my February 2024 draft General Report, I proposed a recommendation that persons employed in ministerial offices, and in the offices of MLAs, keep timesheets documenting the time spent on public duties and time spent on political activities. I proposed that recommendation because the evidence I received in this investigation has made it difficult to discern when particular staff members were 'on the clock', and performing public duties, and when they were otherwise engaged in political activities in their private time. That is so because of the often extended, and non-linear, working hours engaged in by some ministerial staff (and, I expect, staff of other MLAs).
- [220] I also proposed a recommendation that staff of MLAs only participate in political activities before or after ordinary business hours or, alternatively, take leave for as long as those activities are being undertaken.
- [221] The Guidelines published in March 2024 have adopted the second of those proposed recommendations.⁹³
- [222] I make the following recommendations and ask that all MLAs consider applying them.

Recommendation 6:

I recommend that each Member of the Legislative Assembly agree to require all persons employed within their ministerial office (where applicable), opposition office (where applicable) and their electorate office to complete a timesheet, at least for the period of 60 days preceding the day of the General Election.

That timesheet should clearly identify time spent on public duties and time spent on political activities.

The timesheet should be approved by a person with sufficient seniority as to be accountable for the accuracy of the content of the timesheet.

Recommendation 7:

I further recommend that each Member of the Legislative Assembly (including a minister and the Leader of the Opposition) agree to ensure that employees for whom they are responsible only engage in political activities (as defined in the Ministerial Staff Guidelines and amended as per the recommendations in this report) prior to or after ordinary business hours, and that where a staff member is engaged in a political activity during ordinary business hours, that staff member takes leave for so long as that activity is undertaken.

⁹³ See paragraphs 2.1 and 4.1.

How such investigations will be conducted in the future

- [223] I have already observed that this investigation, and this report, has taken far too long to finalise.
- [224] Over the last several months I have reflected upon how I might conduct an investigation of this kind in the future.
- [225] In November 2023, a number of amendments were made to the ICAC Act. Amendments were also made to other legislation which gives me enhanced powers to screen individuals attending for the purpose of a public hearing.
- [226] If an investigation of this kind were to be undertaken in the future, it is likely I would conduct that investigation by way of public inquiry. I am comfortable that the organisation now has the capacity to conduct public inquiries.
- [227] Even if were not to conduct a public inquiry, I would likely give consideration to permitting representatives of all known witnesses to attend all examinations in order that the evidence of each witness can be tested by those representatives in a more timely and efficient manner. I would also consider receiving submission orally in order to improve efficiency and allow for more engagement with those submissions.
- [228] Before 30 June 2024 I will publish information about the conduct of public inquiries under the ICAC Act.

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