REASONS FOR RULING ON

DISQUALIFICATION APPLICATIONS

1. This Royal Commission has been in existence since 13 March 2014.

2. On Friday 21 August 2015 four groups of persons presented applications for disqualification on the ground of apprehended bias. The applications centred on the contention that an agreement made in April 2014 to deliver in August 2015 the Sixth Annual Sir Garfield Barwick Address, an event organised by the Lawyers Branch and the Legal Policy Branch of the NSW Division of the Liberal Party of Australia, might cause a fair-minded lay observer reasonably to apprehend that I might not bring an impartial mind to the resolution of questions to be examined in the course of the Commission's inquiries. I have concluded that it is not the case that a fair-minded lay observer might apprehend that I might not bring an impartial mind to the resolution of the questions which the work of the Commission requires to be decided.

3. The reasons for that conclusion are organised under the following headings.

BACKGROUND

The Commission

4. This Commission was established by Letters Patent issued by Her Excellency Quentin Bryce AC, CVO, Governor-General, on 13 March 2014. These Letters Patent set out the Commission's Terms of Reference. They may be found in Appendix 1 of the Interim Report. Equivalent Letters Patent were thereafter issued by the Governor or Administrator of each State. These may be found in Appendixes 3-8 of the Interim Report. Some private hearings took place in April 2014. Public hearings began in May 2014. They continued to October 2014. On 30 October 2014 the Governor-General, His Excellency Sir Peter Cosgrove AK, MC, amended the Letters Patent in two respects. He extended the deadline for delivery of the Commission's Report to 31 December 2015. And he added an additional term of reference. See Appendix 2 of the Interim Report. Equivalent amended Letters Patent were ultimately issued by the Governor of each State.

Extensive written submissions were exchanged in October-November 2014. Oral argument took place in November 2014. An Interim Report was delivered to the Governor-General on 15 December 2014. Apart from Appendixes, it was 1712 pages long. By the time that Report was prepared, 239 witnesses had given evidence to the Commission. Of those, 33 gave evidence by witness statement or affidavit and were not required to give oral evidence. Other potential witnesses were interviewed, but were not called when it became clear that their evidence would not advance the inquiry. The Commission had issued 687 Notices to Produce. Hearings were conducted in Sydney, Melbourne, Brisbane and Perth. In 2014, the Commission sat on 16 days in private hearings and on 60 days in public hearings. Budgeted operating expenditure up to 30 November 2014 was $33,823,000. The amount actually spent was $17,011,000. The amount of budgeted capital funding up to 30 November 2014 was $5,293,000. The amount of capital funding actually spent up to 30 November 2014 was $1,159,000.

5. In 2015 the Commission continued. So far, in all 441 witnesses have given evidence in public and private hearings. One hundred and forty nine public and private hearings have been conducted. The public hearings have been 'live-streamed' via the Commission's website. In the public hearings, virtually no confidentiality orders have been made (except for those protecting the residential addresses, email addresses and private telephone numbers of witnesses and others, and medical information). By 18 August 2015, 1730 Notices to Produce had been issued. A Discussion Paper on options for law reform was released in May 2015, following four Issues Papers released in 2014. In 2015 hearings have taken place in Sydney, Canberra, Melbourne and Brisbane. The Commission's operating budget is approximately $61m (including AFP Police Taskforce) over two years. Operating expenditure, as at 30 June 2015, was approximately $28m (which includes the Office of the Royal Commission (including legal fees), NSW, Victoria and Queensland Police Taskforces and Attorney-General Department's financial assistance to witnesses). That figure of $28m excludes any costs incurred to date for the AFP component of the Police Taskforce, which falls within the AFP's departmental budget.

6. No court proceedings have been issued challenging any aspect of the conduct of the Commission's hearings either in 2014 or 2015. Nor have any court proceedings been issued challenging any finding in the Interim Report.

7. For the balance of the year Counsel Assisting propose to complete the Commission's inquiry into CFMEU officials in the ACT, to complete its inquiries into certain financial matters affecting CFMEU officials, to conduct further inquiries into CFMEU officials in Brisbane, and to conduct certain other inquiries into officials in various unions in different parts of Australia. It will then be necessary for written submissions of Counsel Assisting to be supplied to affected persons, for written submissions to be received from affected persons, and for affected persons to exchange any submissions they wish to about each other. Then the Final Report will be completed.

The Terms of Reference

8. As will be seen, the applicants stressed the proposition that the Australian Labor Party has strong historical ties with the union movement. They also stressed the fact that since the Second World War, the Liberal Party has been the principal political opponent of the Australian Labor Party in most States.

9. The Terms of Reference, however, are not expressed to apply to the conduct of either the Liberal Party or the Australian Labor Party. Nor are they expressed to apply to the conduct of the Australian Labor Party towards the union movement, or to the conduct of the Liberal Party towards the union movement.

10. The Terms of Reference require inquiry into topics which may be divided into two broad categories.

11. The first comprises the governance, arrangements and conduct of 'relevant entities'. 'Relevant entities' are 'separate entities' established by unions or their officers (paras (a)-(f) and (k) of the Terms of Reference).

12. The second comprises certain conduct by unions or their officials which may be in breach of any law, regulation or professional standard or may be corrupt (paras (g)-(k) of the Terms of Reference).

13. In short, the Terms of Reference concern possible departures by relevant entities, union officials or unions from proper standards. They do not concern the destruction of relevant entities or unions. Indeed, the Terms of Reference assume the desirability of maintaining the existence of unions. It may be said that they seek not to destroy unions or obstruct their purposes, but to see whether they have been fulfilled and to see how they might be better fulfilled in future.

14. Hence the Terms of Reference are not themselves hostile to the union movement. They do not assume the desirability of restricting union power or altering the present system of handling industrial disputes. The Terms of Reference are not directed primarily at industrial relations in their ordinary operation. What they are concerned with is bad governance within certain institutions which are not trade unions, and criminality and breaches of legal or professional duty on behalf of unions or their officials.

The 'case study' technique

15. There are no doubt many ways in which a Royal Commission could operate. It could operate by analysing generalised factual material, anecdotal material and submissions from trade, industry or academics about matters within its Terms of Reference. Whatever its advantages, that technique might result routinely in the reception of 'evidence' that was vague and untested multiple hearsay at best. It would be a technique which enabled a bird's eye view to be taken. But it would lack precision and particularity.

16. The technique adopted by this Royal Commission was different. It adopted the technique of considering various 'case studies' thought to throw up conduct, or highlight specific and often recurring issues, falling within the Terms of Reference. In each instance as much evidence was collected as was reasonably possible. Where the evidence adduced conflicted, consideration was given to issues including testimonial credibility and reliability, and the reliability of documents. The outcome of these issues

is reflected in findings made in the Interim Report. But no determination of rights was made. For reasons set out at some length in the Interim Report (Volume 1, Chapter 1, pp 5-21), there was no expression of concluded opinion about whether criminal offences had occurred. The goal was to assemble a mass of coordinated information as a basis for assessing the efficacy of the present systems regulating relevant entities and the extent of possible corruption and other possible breaches of duty by trade union officials. The technique is empirical, not theoretical. The technique rests on the idea that without some foothold in the concrete but sometimes untidy detail of the facts, so far as they can be discovered, it would be difficult to make useful recommendations. It also rests on the idea that the merits of the reasoning underlying findings and recommendations can be assessed by comparing it with evidence received in public and submissions made in public. Of course the reasoning may have flaws. But, if they exist, the open and detailed nature of the inquiry makes it easier to detect them.

THE APPLICATIONS

The origins of the applications

17. On 17 August 2015 a letter from a firm of solicitors acting on behalf of the Australian Council of Trade Unions ('the ACTU') addressed a letter to me personally requesting the provision of documents in 10 categories in my possession. It was brought to my attention shortly after 9.42am. It stated that the ACTU needed to examine the documents in order to decide whether to institute a disqualification against me on the grounds of bias. At 10.00am a scheduled public hearing into a CFMEU matter resumed. By 11.39am, despite the absence of any obligation to do so, documents which were thought to answer the ACTU request had been assembled and were handed to counsel for the ACTU at a hearing organised in response to the ACTU letter. Senior counsel for the CFMEU, who had been appearing at the scheduled public hearing, was also supplied with the documents. At that time it was thought bona fide that the request had been fully answered. It turns out that it had not been fully answered, in that the attachments to an email dated 12 August 2015 were not produced. The identical documents were, however, produced as attachments to an earlier email. Below it is concluded that the omission was innocent and did not operate to prejudice the ACTU or anyone else in any

material way. Later that day directions were given that in the event that the ACTU or any other person wished to pursue an application for disqualification, an indication of that desire together with written submissions in support should be filed by 2.00pm on Thursday 20 August, and a public hearing was fixed for 21 August so that oral argument could be presented. In fact on 19 August the ACTU solicitors indicated that they had instructions to make the bias application. Three written submissions were filed by approximately 2.00pm on 20 August. They are lengthy and detailed.

18. On 20 August 2015 a further letter was received from the CFMEU's solicitors requiring further documents. A reply was sent two and a half hours later. This correspondence raised issues dealt with below at [168]-[199].

19. On 21 August 2015, four groups of counsel, as well as Counsel Assisting, appeared.

20. The first group comprised senior and junior counsel for the ACTU, together with the CEPU, the HSU, the TWU, Unions NSW and the Maritime Union of Australia. Last year there were several hearings into the HSU, the TWU and the Maritime Union of Australia. This year there have been further hearings into the TWU, the CEPU and to a small degree Unions NSW. Those for whom these counsel appeared will be referred to collectively as 'the ACTU', and their submissions as 'the ACTU submissions'.

21. The second group comprised senior and junior counsel for the CFMEU and 34 natural persons connected with that Union. Many of them have given evidence or will be giving evidence in the inquiry. Some were the subject of adverse findings in the Interim Report. The CFMEU and the 34 natural persons will be referred to collectively as 'the CFMEU', and their submissions as 'the CFMEU submissions'.

22. The third group comprised senior and junior counsel for the Australian Workers' Union. Aspects of the life of the Australian Workers' Union in Western Australia and Victoria in the mid-1990s were considered in the Interim Report. Further aspects of its life over the last 15 years have been the subject of inquiries this year. That Union will be referred to as 'the AWU', and the submissions advanced on its behalf as 'the AWU submissions'.

23. Junior counsel appeared alone for Mr Brian Parker, State Secretary of the CFMEU, Construction and General Division, New South Wales Divisional Branch. Some adverse findings were made against him in the Interim Report. He has given evidence again on other issues in 2015.

24. The persons represented reflect a wide segment of the unions examined by the inquiry and a lesser segment of the witnesses called. But some unions and many individuals the subject of case studies were not represented.

25. On 27 August 2015, the solicitors for the ACTU and AWU wrote to the Solicitor Assisting the Commission requesting further documents, the opportunity to make further submissions once those documents were provided and a deferral of the announcement of my decision which had been scheduled for 10.00am on 28 August 2015. Later that day, the Solicitor for the Commission replied to the solicitors for the ACTU, which reply was also sent to the solicitors for the other applicants, enclosing the documents requested and indicating that any further submissions in connection with the applications should be made in writing by 5.00pm on 28 August 2015. The ACTU, AWU and CFMEU filed additional written submissions by 5.00pm on 28 August 2015. To allow the applicants time to make their submissions, the time for the announcement of my decision was deferred until Monday 31 August 2015 at 2.00pm.

The scope of the applications

26. About half way through the oral hearing of these applications on 21 August the following submission was advanced by senior counsel for the ACTU: 'I know you understand it, but for the benefit of everyone else, I, at no point in these submissions, are suggesting that you [are] actually biased'. (21/8/15, T:37.7-10; see also ACTU written submissions para 3) The relevant part of that counsel's submissions, including that sentence, was adopted by senior counsel for the CFMEU and 34 CFMEU officials or employees in saying that with one presently immaterial exception 'we embrace and support my learned friend's submissions and I say that with great respect to him'. (21/8/15, T:57.17-19; see also 58.7-9 and CFMEU written submissions paras 2 and 64) Senior counsel for the AWU, who spoke third, said: 'We are indebted to the written and oral submissions that

have been presented by [the first two counsel] this morning and we would support those submissions subject to what I'm about to say'. (21/8/15, T:70.5-8; see also AWU written submissions paras 3 and 32) What he then said did not resile from the submission initially quoted above. Junior counsel for Mr Brian Parker, NSW State Secretary of the Construction Division of the CFMEU, neither presented nor adopted any argument but merely joined in the applications. (21/8/15, T:74.14-15)

27. The form of bias eschewed by counsel is often called 'actual bias'.

28. The submission denying actual bias is accepted.

29. The form of bias which is being relied on by counsel is often called the 'appearance of bias'. Despite earlier public statements by the ACTU alleging bias in respect of the conduct of the Commission (ACTU MFI-4 and 5), none of the present applicants made any submission that any aspect of the conduct of the hearings in 2014 or 2015 was relied on in their applications.

Two procedural curiosities

30. Much of the applicable law in relation to issues of 'apprehended bias' concerns how a fair-minded lay observer would reason. To some minds, including those of fair-minded lay observers, it might seem strange that a person complaining about the bias of a Royal Commissioner should make application for disqualification not to a court, but to the person accused of bias or apprehended bias. What are the prospects of success in making an application against a Royal Commissioner on that ground, it might be said, when that Commissioner hears the application?

31. Of course if the application to the decision-maker for disqualification fails, the applicant then has the opportunity to seek relief from a court of competent jurisdiction. But why should the applicant have to go through the preliminary step of applying to the decision-maker? Whatever the reasons, it is at least a custom and, leaving aside exceptional circumstances, possibly also a rule of law, that in the first instance the application should be made to the person whom the applicant alleges is biased or is apparently biased. If that is not done, the court to which the application is made may reject it as premature.

That is so whether the person in relation to whom the disqualification application is made is a judge in a court, or a member of a non-curial Tribunal, or a Royal Commissioner or a person conducting any other form of inquiry. This was the course followed, for example, in relation to a challenge to the Royal Commission into the Building and Construction Industry: *Ferguson v Cole* (2002) 121 FCR 402. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 361 [74]; *Australian National Industries Ltd v Spedley* (1992) 26 NSWLR 411 at 436; *Wentworth v Graham* [2003] NSWCA 240.

32. A related procedural curiosity is this. Counsel for the ACTU made the following submission in their written submissions, (para 114) and the other senior counsel for the applicants agreed: 'Counsel Assisting does not act for the Commissioner. It follows that Counsel Assisting does not have a role to perform in making submissions in respect of this application.'

33. Now even though the Royal Commission has a fact-finding, 'inquisitorial', function, its public hearings are often conducted adversarially. That is so in the sense that Counsel Assisting calls evidence from some witnesses represented by lawyers which may be adverse to other persons, then calls the other persons as witnesses represented by other lawyers: the latter lawyers may then contend against the point of view of the former witnesses. Counsel Assisting may make submissions favouring one stance or the other, or argue for a different position. So far as this application was concerned, this course was opposed by counsel for the applicants. They saw it as right that Counsel Assisting should not adopt their usual role of acting as contradictors if they saw fit. If the ascertainment of truth is best secured by the process of considering powerful statements on both sides of a question, it was not a process urged by counsel for the applicants. That is because the process favoured by counsel for the applicants permitted only the argument for disqualification to be put, not any argument against it. Counsel Assisting, however, acquiesced in the position advocated by counsel for the ACTU. (21/8/15, T:25.36-47) They filed some written submissions on the law. They tendered some evidence on behalf of the applicants. But they took no other role save to explain at the end of the hearing the significance of one development during it. The applicants did not object to the behaviour of Counsel Assisting in these respects. (21/8/15, T:26.13-19) The fact that the impugned decision-maker hears arguments from those favouring

disqualification without hearing any arguments from anyone opposing disqualification does create difficulties for the decision-maker. So there are points to be made in criticism of these two procedural curiosities. There are, however, also points to be made in justification of them. Despite this controversy, the position asserted by counsel for the ACTU is the orthodox one.

THE LAW

The test

34. The applicants relied on the legal test set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]. (ACTU written submissions para 4, CFMEU written submissions para 3, AWU written submissions para 3) There Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> … 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.

35. The CFMEU and Counsel Assisting addressed the question whether the test which applied to judges also applied to Royal Commissioners. Counsel Assisting cited (written submissions para 13) and the CFMEU quoted (written submissions para 4) the following from the joint reasons of Kiefel, Bell, Keane and Nettle JJ in *Isbester v Knox City Council* (2015) 89 ALJR 609 at 614 [22]:

> It was observed in *Ebner* that the governing principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision-making and decision-makers. It was accepted that the application of the principle to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making. The analogy with the curial process is less apposite the further divergence there is from the judicial paradigm. The content of the test for the decision in question may be different.

36. Counsel Assisting cited (written submissions para 14) a number of cases establishing that in relation to the test for apprehended bias a Royal Commissioner is permitted to take a more interventionist role in conducting hearings: see *R v Carter; ex parte Gray* (1991)

14 Tas R 247 (FC) at 260-263 [29]-[34]; *Carruthers v Connolly* [1998] 1 Qd R 339 at 358; *Keating v Morris* [2005] QSC 243 at [46]. However, since the applications in the present case were not based on anything done in the course of hearings of the Commission, those passages were not directly applicable.

37. The ACTU also submitted: (written submissions para 20)

> The fair-minded lay observer is not a lawyer. Being reasonable and fair-minded, this hypothetical person … would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.

38. There was some dispute between the applicants and Counsel Assisting about whether the *Ebner* test created a low hurdle. Thus counsel for the ACTU said it created 'actually quite a low bar' (21/8/15, T:31.43-44) or a 'low threshold'. (21/8/15, T:32.8) Counsel Assisting submitted that an allegation of apprehended bias must be 'firmly established'. (written submissions para 12) They cited *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 CLR 546 at 553-554; *R v Watson; ex parte Armstrong* (1976) 136 CLR 248 at 262. To those authorities may also be added the statements of French CJ and Gummow J respectively in their dissenting reasons in *British American Tobacco Services Ltd v Laurie* (2011) 242 CLR 283 at 305 and 313-314 and the authorities cited there. Counsel Assisting also submitted that a judge should not disqualify himself or herself on the ground of bias or reasonable apprehension of bias unless 'substantial grounds' are established: *Bienstein v Bienstein* (2003) 195 ALR 225 at 233 [36] per McHugh, Kirby and Callinan JJ. The *Ebner* passage does not necessarily contradict those on which Counsel Assisting relied. But it seems preferable to concentrate on the language of the test to see whether it is satisfied, not to worry about whether it is hard or easy to satisfy.

39. It is noteworthy that in one of the cases cited by Counsel Assisting, *Isbester v Knox City Council* (2015) 89 ALJR 609 at 613 [20], Kiefel, Bell, Keane and Nettle JJ said:

> The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a

> factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.

The fair-minded lay observer

40. Counsel Assisting also made certain submissions about the role of a fair-minded lay observer. (Counsel Assisting's written submissions paras 15-18) The applicants did not appear to quarrel with these submissions. Counsel Assisting submitted that the fair-minded observer does not make snap judgments: *Johnson v Johnson* (2000) 201 CLR 488 at 494 [14]. He or she is taken to be reasonable: *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12]. He or she knows commonplace things and is neither complacent nor unduly sensitive or suspicious: *Johnson v Johnson* (2000) 201 CLR 488 at 509 [53]; *Helow v Home Secretary* [2008] 1 WLR 2416 at 2418 [2], 2421 [14], 2427 [39]. Knowledge of all the circumstances of the case must be attributed to the fair-minded observer: *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-4; *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 355, 359, 368 and 371-2; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87-8 and 95. Counsel Assisting further submitted that the fair-minded observer was an informed one. Where the decision-maker is a judicial officer the fair-minded observer will have regard to the fact that a judicial officer's training, tradition and oath or affirmation equip the officer with the ability to discard the irrelevant, the immaterial and the prejudicial*: Johnson v Johnson* (2000) 201 CLR 488 at 493 [12], citing *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527, adopted in *Vakauta v Kelly* (1989) 167 CLR 568 at 584-5. Thus judges are expected to be equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in evidence together with other material which is notorious or common knowledge. The same, it may be interpolated, is to be expected of Royal Commissioners with experience of litigation at the bar or on the bench. Counsel Assisting pointed to the words of Lord Rodger of Earlsferry in *Helow v Home Secretary* [2008] 1 WLR 2416 at 2422 [23]:

> Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience.

41. In the same case, Lord Hope of Craighead said at 2418 [2]-[3]:

> The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious. … Her approach must not be confused with that of the person who has brought the complaint. … The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. …
>
> Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she had read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

The distinction between prejudgment and predisposition

42. Counsel Assisting also pointed out that the rule against bias, actual or apprehended, is directed to prejudgment incapable of being altered by evidence or argument. It is not directed to predisposition capable of being swayed by evidence or argument. They cited the words of Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 531-2 [71]-[72]:

> Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. … Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

43. Counsel Assisting also cited *R v S (RD)* [1997] 3 SCR 484 at 533-4 [119]. That Canadian case was quoted with approval in *Helow v Home Secretary* [2008] 1 WLR 2416 at 2435 [57]. In the Canadian case, L'Heureux-Dubé and McLachlin JJ said:

> It has been observed that the duty to be impartial "does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge, is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind".

44. Counsel Assisting also argued that since the test for apprehended bias is concerned with prejudgment, not predisposition, teetotallers may try licensing applications provided they are not implacably opposed to all applications: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook, 2013), p 642 [9.200]; *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, 2013), pp 560-561 [10-054]. On the same reasoning, they argued, it was right to hold that the Chairman of the Independent Liquor and Gaming Authority could hear applications to grant poker machine licences notwithstanding his public statements that he 'hate[d] gambling', 'despise[d] poker machines' and was a 'dedicated non-gambler' who had 'never gambled with money at all': *O'Hara v Independent Liquor & Gaming Authority* [2014] NSWSC 880 at [5]. Counsel Assisting also submitted that the mere fact that a decision-maker is a member of an association does not mean that the decision-maker should be taken to endorse every view or opinion expounded by that association: *Helow v Home Secretary* [2008] 1 WLR 2416.

45. Counsel for the ACTU said that *Helow v Home Secretary* was a fact-specific decision on English law, and was distinguishable. (21/8/15, T:32.41-47) It is true that all the cases in this field are in a sense fact-specific. But the submission did not explain how any difference from English law deprived the case of utility. It is also true that in English law, after *Porter v Magill* [2002] 2 AC 357, the test for apprehended bias (as opposed to the test for automatic disqualification stated in *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet (No 2)* [2000] 1 AC 119) is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real

possibility that the tribunal was biased: see [2002] 2 AC 357 at 484 [103]. The test is thus slightly more demanding than the *Ebner* test in that it involves a 'would' coupled with a 'might'. However, the point of distinction relied upon by counsel for the ACTU was that the judge in *Helow v Home Secretary*, 'while a member of an organisation, had not adopted a public claim of support of that organisation in the way we say you have done'. (21/8/15, T:32.44-46) As explained below, the premise of this distinction, stated in the closing words, is not supported by evidence. Thus it is fallacious so far as the present controversy is concerned.

46. Counsel for the ACTU accepted that if the present application were 'simply based on someone doing a search and working out that you had been to Liberal Party Functions, or a member of the Liberal Party indeed, this would be [an] application which I don't think I would be prepared to make'. (21/8/15, T:30.36-41) That is a concession which is correct. An argument which would disqualify a Commissioner who was not a member of the Liberal Party, but would not disqualify a Commissioner who was a member, raises questions over its own validity. Despite the fact that *Helow's* case was said to be distinguishable, the concession appears to have been made in order to accommodate it.

A three-step test

47. Finally, Counsel Assisting pointed out that the *Ebner* test involves two steps ((2000) 205 CLR 337 at 345 [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ):

> First, it requires the identification of what it is said might lead a [decision-maker] to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding a case on its merits. The bare assertion that a [decision-maker] has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

48. However, the last sentence of that passage from *Ebner's* case suggests that there is an additional third step. In *Isbester v Knox City Council* (2015) 89 ALJR 609 at 619 [59], Gageler J set out the three steps as follows:

> Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as a result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.

49. And in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 208 CLR 507 at 564 [185] Hayne J set out a related but differently expressed three-step analysis:

> Saying that a decision-maker has prejudged or will prejudge an issue, or even saying that there is a real likelihood that a reasonable observer might reach that conclusion, is to make a statement which has several distinct elements at its roots. First, there is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. Secondly, there is the contention that the decision-maker will apply that opinion to the matter in issue. Thirdly, there is the contention that the decision-maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. Most importantly, there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.

OVERVIEW OF THE FACTS

50. As will be seen, the applicants' arguments centred largely on emails passing between me and the coordinator of the Sir Garfield Barwick Address for 2015 in the period April 2014 to August 2015. In the hearing those emails formed Exhibits ACTU MFI-2 and MFI-6 (the electronic form of which was ACTU MFI-8).

51. It will be necessary to examine the content of some of those emails in detail later. But it is convenient to set out the basic chronology of those emails and other events here in order to appreciate the background of the arguments which the applicants advance. At the outset, it should be noted that there is evidence that I have no computer and that all email correspondence is sent and received by my personal assistant (ACTU MFI-6). Indeed it is notorious among the legal profession that I am incapable of sending or receiving emails. The consequence is that I read emails only after they have been printed out for me.

52. Several years ago I had one or more informal discussions with the coordinator of the Sir Garfield Barwick Address concerning the possibility of delivering the address at some future time. (See ACTU MFI-7 Tab 11.) On 10 April 2014, a further approach was made orally to me in the Banco Court after I had delivered the Acton Lecture. I indicated to the coordinator that I would be amenable to delivering the Sixth Annual Sir Garfield Barwick Address in August 2015 if the Commission had completed its work.

53. On 10 April 2014, the coordinator sent me an email providing various details about the Sixth Annual Sir Garfield Barwick Address.

54. On 11 April 2014, I caused an email to be sent to the coordinator stating: 'Yes, I can deliver the Barwick address in August 2015.' The coordinator then sent an email of thanks.

55. On 2 March 2015, I received an email from the coordinator. It stated: 'I am proposing that "save the date" emails for the 2015 Barwick address, which you have kindly accepted for, should go out in March.'

56. On 25 March 2015, I caused my personal assistant to send the coordinator an email indicating a topic and consenting to a range of dates. On the same day the coordinator sent me an email stating, inter alia, 'If you have no preference on dates I'll try to aim for a non-Parliamentary sitting week to give the politician-lawyers less excuse not to turn up!' On 4 April 2015, the co-ordinator sent another email which stated, inter alia: 'We have gone for Wednesday 26 August 2015 subject to venue availability … which is a non-sitting week for Federal and NSW Parliaments ….'

57. On 7 April 2015, I caused my personal assistant to send an email to the coordinator that I had entered the event into my diary for 26 August 2015.

58. On 12 June 2015, the coordinator sent me an email. It will be necessary later to consider this email and its attachments in detail. For present purposes it is enough to note that the attachments comprised an invitation (one page), an RSVP form (one page) and a form entitled 'State Donation Compliance' (one page). I did not read the attachments.

59. The next two communications from the coordinator to me took place within two minutes on 12 August 2015. The second email, sent at 11.14am, inquired whether anyone would be accompanying me to the dinner. The first, sent at 11.12am, began by stating that it enclosed the invitation for my reference. It was in fact enclosed, as is discussed below. This was the same invitation as had already been attached to the 12 June 2015 email.

60. On the morning of 13 August 2015, at approximately 9.00am, I had a short conversation with Senior Counsel Assisting, Mr Stoljar SC. Unbeknownst to me until 27 August 2015, Mr Stoljar had made a note in his diary of the conversation. The note reads:

> Following conf – discussion JDH re Garfield Barwick address and my email from Chris Winslow saying it was a Liberal Party fundraiser. However JDH showed me an email from Greg Burton to him, also yesterday 12/8, saying it is not a fundraiser. JDH: Burton is closer to the action than Winslow – he ought to know. So OK to go ahead if JDH writes clarifying + response OK.

61. The email from Mr Winslow, an officer of the NSW Bar Association, was an email sent on 12 August 2015 at 7.31pm to Mr Stoljar's chambers' email address with subject 'Dyson' stating: 'Is Dyson Heydon aware that the Garfield Barwick Address, which he is due to deliver, is a Liberal Party fundraiser?' Mr Stoljar had replied at 8.05pm saying: 'I'll raise that with him. Thanks.' In our conversation on the morning of 13 August 2015, Mr Stoljar did not show me either Mr Winslow's emails or the reply.

62. Following the discussion, I caused my personal assistant to send an email replying to the two emails of 12 August. The reply, which was sent at 9.23am, concluded: 'If there is **any possibility** that the event could be described as a Liberal Party event he will be unable to give the address, at least whilst he is in the position of Royal Commissioner.' (emphasis in original)

63. On 13 August 2015, the Commission publicly released an email chain containing the coordinator's email of 12 August at 11.12am (without attachments) and the reply of 13 August at 9.23am. The events after that have already been recounted.

SUMMARY OF APPLICANTS' ARGUMENTS

64. It may be easy for a reader to get lost in both the detail of the applicants' submissions, and the detail of these reasons. Without wishing to discount or undermine the applicants' arguments as they are put, it may assist if a simple summary of them is given.

65. The applicants submitted that the agreement to give the Sixth Annual Sir Garfield Barwick Address is evidence of various characteristics on my part. One, according to the CFMEU, is that I have 'an affinity with, and partiality in favour of, the Liberal Party'. (CFMEU written submissions para 63) Another CFMEU formulation is 'You have lent your support to the Liberal Party'. (21/8/15, T:58.5-6 and 66.19-24) Another, according to the ACTU, is that I 'might have a political persuasion or allegiance toward the Liberal Party', or be 'partisan to the Liberal Party and might harbor a political prejudice against the Australian Labor Party', or have a 'persuasion or alignment toward the Liberal Party'. (ACTU written submissions in respectively paras 18, 19 and 110) Yet another, according to the AWU, is an 'association' with the Liberal Party. (AWU written submissions para 10) Hence, according to the applicants, a fair-minded observer might conclude that I might not decide the matters before the Commission impartially.

66. Those matters are described by the CFMEU as 'findings of fact in a politically controversial inquiry'. (CFMEU written submissions para 63) The matters are described by the ACTU as 'issues that concern the connection between the unions and the Australian Labor Party and any recommendations for law reform as to the governance of unions that may form part of the final report'. (ACTU written submissions para 19) The AWU refers to 'the determination of the matters to be investigated by the Commission'. (AWU written submissions para 21)

67. With respect, these submissions are imprecise. They are not altogether easy to understand. That is true also of the subsidiary submissions underlying them. However, despite the lack of precision, it would appear that in essence the applicants advanced two separate strands of argument.

68. According to the first strand of argument, a fair-minded observer might apprehend bias merely because of an agreement to give a legal speech at a function organised by two lawyer branches of the New South Wales Liberal Party. On this argument, issues of fundraising were irrelevant. It was enough that to my knowledge, so the argument went, the event was organised by persons having an association with the Liberal Party, perhaps in combination with other matters such as the fact that it would be likely that Liberal Party politicians and other members would be in attendance. Below, this argument is called the 'Liberal Party event' submission.

69. The second argument was a narrower one. It was an argument that the fair-minded observer might apprehend that I might not approach the matters for decision impartially because the fair-minded observer might apprehend that my intention in agreeing to give the Sixth Annual Sir Garfield Barwick Address was to raise funds or assist in raising funds or generating support for the Liberal Party. Below, this argument is called the 'Liberal Party fundraiser' submission.

70. It is necessary to address those two arguments separately. To some extent this requires detailed examination of the evidence.

71. However, before embarking on that course, there are two important matters arising from the ACTU's submissions (which were relevantly adopted by the CFMEU and the AWU) which should be stated immediately.

72. The ACTU's submissions, particularly in relation to the events of 2015, tended to take each event separately and consider what impact that particular event would have on the fair-minded observer's thinking, and allege that, as a result, at that particular time, that observer would be bewildered or misled or confused or in doubt or concerned or puzzled or wondering. (ACTU written submissions para 82; T:53.9-24; second submissions paras 8 and 13-15) To some extent this technique infected the submissions of others. (AWU second submissions para 7) However, on the authorities, the correct approach would seem to be to examine the reaction of the fair-minded observer at the moment when it is contended that disqualification should take place, the fair-minded observer

then having knowledge of all of the relevant circumstances and reserving judgment until all of those matters are considered.

73. Secondly, at the hearing on 17 August 2015 I made a statement of certain matters in order to give a convenient contextual background to the emails which were on that day marked ACTU MFI-2. It is probably not necessary to have much resort to that statement, because the things which it asserts follow as a matter of circumstantial inference. What is its significance? In oral argument the ACTU submitted that 'it is admissible as evidence but not evidence of the fact'; but that it was something the hypothetical observer 'knows and takes into account when coming to his or her ultimate conclusion'. (T:52.43-44 and 53.1-3) This not quite right. There is no point in the hypothetical observer taking it into account unless it is evidence of the fact. If it were not evidence of the fact it would have no relevance, for it cannot be regarded as akin to 'original evidence' like operative words. The correct position was stated by the English Court of Appeal in *Locabail UK Ltd v Bayfield Properties Ltd* [2000] QB 471 at 477, which was in fact cited in the ACTU's written submissions para 97. The statement is admissible as evidence of its truth, but a court of review is not bound to accept it as reliable, though it may conclude that it is.

THE 'LIBERAL PARTY EVENT' SUBMISSION

74. The 'Liberal Party event' submission depends on the proposition that the Address was to be in some sense a 'Liberal Party event', a 'Liberal Party function', a 'party political event' or a 'Branch meeting', all expressions used at various times in the applicants' submissions. These terms are lacking in any precise meaning. This is a pervasive difficulty in the ACTU's submissions, for example. They used terms like 'Liberal Party event', 'Liberal Party function', 'a function of the Liberal Party', 'party political function' and 'party political event' interchangeably. See, for example, 21/8/15, T:41.17-18, 42.41, 43.29, 48.24, 48.45, 49.9-11 and 54.5-6.

75. Yet the definitional question in relation to these terms is important. It must be remembered that the applicants' submissions depend on isolating conduct which reveals a particular characteristic – affinity with, partiality for, lending of support to, persuasion,

allegiance or alignment to the Liberal Party, or a political prejudice against the Australian Labor Party. The definitional question is important because under the *Ebner* test it is necessary to see whether the selected definition, if the facts indicate that it is applicable, reveals the characteristic and meshes with the issues which it is said may as a result not be decided impartially. If so, the first step requires an assessment of whether that characteristic might raise a question whether the issues will be resolved otherwise than a result of a neutral evaluation of the merits. The second step requires articulation of how that characteristic revealed by the definition might cause that deviation from neutral evaluation. And the third step requires consideration of the reasonableness of the apprehension of that deviation being caused by that characteristic revealed by the definition in that way. In this regard it is instructive to consider why a concession correctly made by counsel for the ACTU, and adopted by counsel for the CFMEU and counsel for the AWU, was correct. The concession was that mere membership of the Liberal Party, or mere attendance at its functions, would not warrant disqualification.

76. The applicants offered no proper articulation of what matters generate an apprehension of an association prejudicial to the Australian Labor Party. Many Australians have particular political views at a given time, though they often change over time. Indeed the laws making voting compulsory go close to compelling Australians to have political views, subject to the possibility of spoilt ballots. If it was enough to disqualify a person from a role because the fair-minded observer might conclude that the person held political views, there would be no-one who could occupy the role.

77. Further, whether those political views are publicly stated or known or not cannot make a difference. Otherwise, those who hide their political views and may be more likely to be biased would be allowed to sit but those who were open and honest would be disqualified. Reasoning suggesting this paradoxical conclusion suggests that the law is being misapplied.

78. It follows from the concession that before disqualification there must be something more than *mere* party membership or attendance at party functions, eg active support of the organisation, or substantial involvement, or proselytizing.

79. How does agreeing to give a public address to a gathering assembled by the Chairs of two lawyer branches indicate support which enables an inference that one of the offending characteristics exist? Subject to the content of an address, to give an address does not by itself indicate that the speaker supports the views of any person in the gathering. But an address about a topic unrelated to the possible goals of the Party with which the two lawyer groups are associated cannot give rise to an apprehension of bias. In that example there is no proselytizing and no substantial Party activity.

80. In the present case, the additional element must come, if at all, from the suggestion that the Address represents substantial Party activity or involvement in raising funds. This is rejected below.

81. What were the critical Liberal Party elements in the Address?

82. If 'Liberal Party event' means a legal address in relation to which the New South Wales Attorney-General would propose a vote of thanks – an appropriate course, since the holder of that office is the chief law officer of New South Wales, whether or not the holder of that office happened to be Liberal or Labor – how does that demonstrate that the speaker has an affinity with or partiality for or a persuasion or allegiance or alignment to the Liberal Party, or lent it support?

83. If 'Liberal Party event' refers to a legal address to a gathering open only to members of the Liberal Party, the allegation is not made out on the facts. There was no secrecy about the Address. Nor were there any restrictions on those who might attend. In ACTU MFI-7, a bundle of documents tendered at the request of the CFMEU, there is a notice of the lecture directed to all members of the New South Wales Bar Association (Tab 7). And the Exhibit also contains evidence that notice of the event 'was widely distributed within the legal profession' (Tab 11). At the Bar, and in the wider legal profession, there are obviously many, many people who are not Liberals.

84. If 'Liberal Party event' refers to delivery of a legal address to a dinner attended mostly or to a large extent by members of the Liberal Party (including Federal and State Members of Parliament) but which was open to and attended by others, leaving aside uncertainties as to the establishment of those facts precisely, it is hard to see why it should be called a

'Liberal Party event' instead of 'event attended by Liberals and non-Liberals to hear a non-political legal address'.

85. If 'Liberal Party event' refers to an event at which a legal speech will be given on a topic of interest to the lecturer, many lawyers and some others, whether they be Liberal or not, being an event open to the whole legal profession but organised by two lawyers' branches of the Liberal Party, how does that demonstrate that the speaker has the relevant affinity and so forth? If it does not, how can it be called a 'Liberal Party event' in any substantively useful sense?

86. The 'Liberal Party event' submission must be rejected. It must be rejected for three reasons, which correspond with the three-step test. In summary those reasons are as follows.

Summary of the reasons

87. First, the applicants have not articulated why, and there is no rational basis for concluding, that a fair-minded observer might, acting reasonably, apprehend any predisposition against the Labor Party or the unions in a speaker who merely agrees to give a legal speech at an event with the characteristics last described. The mere fact that a person agrees to deliver a speech at a particular forum does not rationally establish that the person is sympathetic to, or endorses the views of, the organiser of that forum. The point is demonstrated by the facts and reasoning in *Helow v Home Secretary* [2008] 1 WLR 2416, where it was held that the fact a judge was a member of an international association of Jewish lawyers did not have the consequence that the judge should be taken to endorse every view or opinion expounded by that association. On the legal argument presented by the applicants, given the highly political nature of the matters which can come before the courts, no sitting judge could give a legal lecture to an organisation which has a political affiliation. Yet many distinguished judges have done so in the past without qualms on their part and without being subject to any reasonable criticism. This must immediately place a serious question mark over the applicants' legal argument.

88. Secondly, the applicants have not demonstrated, as distinct from merely asserting, how any such predisposition, even if it might be apparent to the fair-minded observer, was logically connected to the actual issues for determination in the Commission.

89. Thirdly, even if the first and second reasons are not accepted, and assuming that the fair-minded observer might apprehend some relevant predisposition on my part, the applicants have failed to establish that the fair-minded observer might reasonably conclude that I could not deal with the issues for resolution on their merits.

The first reason: no apprehension of bias from non-political speech

90. It is now necessary to develop the first of these three reasons for rejecting the 'Liberal Party event' submission in more detail. The development of that reason commences with a consideration of Sir Garfield Barwick and then turns to the nature of past addresses and of the contemplated address about him.

91. Sir Garfield practised as a barrister until the age of 55. He achieved a reputation as the greatest Australian barrister of at least the middle third of the 20th century. In that role he achieved a stature comparable with predecessors or contemporaries in other fields like Kingsford Smith, Macfarlane Burnet, Melba or Bradman. He then embarked on a political career which lasted less than six years. After some months on the backbenches, he became Attorney-General until 1964. From 1961 to 1964, he, like Dr H V Evatt and J G Latham before him, also bore the burden of being Minister for External Affairs. He then served as Chief Justice of the High Court for 17 years, a period exceeded by no other Chief Justice. As a politician he had, like his companion on the High Court from 1975, Justice Murphy, former Labor Attorney-General, three main interests, and they were legal interests – altering the divorce laws, introducing effective trade practices laws, and increasing the number of federal courts (for they were both concerned to reduce the heavy burden on the High Court of single justice work). He achieved this glittering career by talent alone, without enjoying the advantages of inherited wealth, or a lofty background, or high status or rank, or family connection.

92. The email of 10 April 2014, discussed below, reveals that the Sir Garfield Barwick Address stands in a long tradition of the common law. Those in that tradition find great

interest in the careers of advocate-politicians, whether on the conservative or the progressive side of politics. The greatest representative of that category in the United States, leaving aside Abraham Lincoln himself, may be John W Davis, who was the unsuccessful Democratic candidate for the Presidency in 1924, and who for a long time held the record for appearances before the Supreme Court of the United States. A later example on the left is Robert Jackson, Chief Prosecutor at Nuremberg and later Chief Justice of the Supreme Court of the United States. On the conservative side there was President (later Chief Justice) Taft. Two 19th century English examples can be found in the careers of Hugh Cairns (Conservative) and Roundell Palmer, later Lord Selborne (Liberal). In the early 20th century among Liberals there were Asquith and Haldane (who served twice as Lord Chancellor, one in a Liberal Cabinet and later in a Labour Cabinet). In Labour ranks there was also Patrick Hastings. In Conservative ranks there was F E Smith and, in later times, there were the Hoggs (father and son). Over the last decades of the Indian Empire there were Motilal Nehru, Mohammed Ali Jinnah and indeed Mahatma Gandhi. In Australia, on the right, apart from Barwick, there were Samuel Griffith, Edmund Barton, J G Latham, R G Menzies, Nigel Bowen and two of the earlier speakers at the Barwick Address. On the left there were Dr H V Evatt, Lionel Murphy, N K Wran and Gough Whitlam. In another but related category is a figure like Sir Maurice Byers – not a politician, but prominent at both the private bar and in public life as Solicitor-General.

93. At least in Australia, there has been a tendency for the memory of some of these persons to be kept green by addresses and foundations. This tendency forms part of a broader tendency in relation to politicians. Thus there are addresses connected with Alfred Deakin, Earle Page and Neville Wran. There are institutions connected with the names of Menzies and Evatt. There is a learned society which honours Sir Samuel Griffith. There is a lecture series named after Maurice Byers. While addresses about these people are generally laudatory, they need not be so. And those who are interested in the addresses are not confined to those who share the particular political thinking of either the persons honoured or those who honour them. The partisanship with which distinguished politicians, including lawyer-politicians, were viewed in their lifetimes tends to fade away as new generations develop interest in their forebears.

94. While Sir Garfield Barwick is far from universally admired, even his enemies admit that his career was one of great achievement, for good or ill. He wrote a good autobiography. He was the subject of a very good biography by a person not associated with the political right. At least in his generation he was found to be endlessly fascinating.

95. The fair-minded observer would reflect that a speech about a public figure can be interesting even to those who do not share that public figure's philosophy and can be delivered by a person who does not share it either. The evidence to be analysed below about what the coordinator of the Sir Garfield Barwick Address said of it suggests that the Address could range from historical reminiscence to analysis of values to analysis of political contributions by lawyers on both side of politics. It was an occasion supported by the Barwick family.

96. The email of 10 April 2014 from the coordinator to me made the following statements about the Sir Garfield Barwick Address, which, incidentally, I had never attended:

> Thank you also for an indication that you would be amenable to delivering the sixth annual Sir Garfield Barwick Address in August 2015 if the Commission has completed. I write to give you some detail.
>
> I am chair of one of the Lawyer Branches of the Liberal Party NSW Division (one has a focus on policy, the other on professional engagement, I am chair of the latter and … an in-house solicitor … formerly at Colin Biggers & Paisley, is chair of the other, we work jointly).
>
> Although we are formally a branch of the Party, our aim is to be a liberal-minded "bridge" to the profession rather than overtly party-political (although we trust we show the Party in a favourable light!). We do have some member-only branch meetings but most events are open to those who wish to attend and we have a large non-member database from attendees at previous events whom we invite to open events. There is a broad range of people, mainly lawyers from all parts and sizes of the profession. We organise forums on matters of professional and legal policy interest (topics have included bail, arbitration reform, PPSA, right to silence, workers comp reforms, family provision, with revenue law and sentencing potential future topics). These to date have attracted high-quality presenters and an able and engaged audience prepared to comment and participate.
>
> Our flagship event is the annual Sir Garfield Barwick Address, which in 2014 is in its fifth year. The lecture has been held in August of each year during a dinner at the Castlereagh Hotel's elegant dining room (old Masonic Club in Castlereagh between Market and Park). The theme is the lecturer's choice

> with a focus on a matter of current and/or historical interest in areas of professional/political involvement or interest for Barwick (so it is a broad canvas!). The Barwick family has been active in its support and attendance and we have had a broad spectrum of attendees from the profession and politics, with an audience usually of 80-100 and increasing each year to date.

97. The email also pointed out that earlier lectures had been given by the current Federal Attorney-General (Senator Brandis, a member of the Liberal-National coalition government), by former Attorneys-General in Liberal-National coalition governments (Messrs Hughes and Ellicott) and by a former Liberal Prime Minister (Mr Howard). The ACTU submitted that the fair-minded lay observer would be 'cognisant that the Commissioner was aware' of those matters.

98. However, the ACTU made no submission about the next statements in the email – that 'the focus of [the ex Attorneys-General] included personal reminisce [sic] including November 1975, with a historical focus celebrating Barwick, but [the current Attorney-General] took the Barwick legacy through to the present in a scholarly examination of lawyers' contribution to policy and politics (on both sides of the chamber) and [the former Liberal Prime Minister] focused on the values that Barwick sought to embody and promote in their currency for Australia.' Giving personal reminiscences, examining the contribution of lawyers from both sides of politics, and discussing the values of Sir Garfield Barwick – values on which the Liberal Party can have no monopoly – negate the idea that the event was what might be called a 'Liberal Party event'. Nor did the ACTU submissions deal with the statement that the 2014 lecture would be delivered by a very distinguished lawyer (the Hon Murray Gleeson AC, former Chief Justice of New South Wales and of the High Court of Australia). All that counsel for the ACTU said of him was: 'I don't think anyone would dare suggest what way his political leanings bend. I would imagine he would keep them very close to his chest.' (21/8/15, T:39.21-23) This submission, which was relevantly joined in by senior counsel for the other applicants, would appear fatal to what has been described as the 'Liberal Party event' submission and indeed the applications in their totality. The applications for disqualification rest on the proposition that a conclusion might be drawn about my 'political leanings' by reason only of my agreement to speak at the sixth annual Sir Garfield Barwick Address. Yet if no-one 'would dare suggest' what 'political leanings'

were held by a person who had agreed to deliver and actually delivered the fifth annual Sir Garfield Barwick Address, then there can be no rational basis to attribute to me any political affiliation with the Liberal Party by reason that I agreed to but did not deliver the sixth annual Sir Garfield Barwick Address.

99. The email also spoke of a decision by another very distinguished lawyer (the Hon Ian Callinan AC) to be a lecturer in future, and to the possibility that Sir Garfield's last associate (the Hon Garry Downes AM) would be a speaker. These people have no known Liberal Party affiliation either.

100. Contrary to the submissions of the ACTU, the 12 August (11.12am) 2015 email does not lead to any different conclusion. The relevant portion of the text of the email reads:

> The NSW Attorney has kindly agreed to give a brief vote of thanks if she is able to get away from Parliament for the dinner and address ….
>
> As you know, although nominally under the auspices of the Liberal Party lawyers' professional branches, this is not a fundraiser – the cost charged is purely to cover dinner including our guests and a small contingency for fixed costs in case of a numbers collapse (which doesn't look like happening at present!) although of course people will disclose it if they go over the State donation limit. It is not open to the media. I shall compere questions and there won't be any on the Royal Commission.
>
> In the absence of hearing from you we have proceeded on the basis you are happy to go ahead even though the Commission is still in hearing (not expected when originally arranged) and thought it presumptuous to do other than leave that up to you ….

101. The ACTU put two groups of submissions about this email. The first group was dedicated to the proposition that 'the fair-minded lay observer would be left in no doubt that the event was a Liberal Party event'. The second group of submissions centred on the 'Liberal Party fundraiser' issue which is dealt with below (see [126]-[159]).

102. In connection with the first group of submissions, the ACTU submitted:

> a. the body of the email referred to the "auspices of the Liberal Party";
>
> b. the body of the email referred to the NSW Attorney giving a vote of thanks;

c. the fair-minded observer would have known that the NSW Attorney was a member of the Liberal Party;

d. part of the email chain includes an email which had the title "FW: Liberal Party of Australia (NSW Division) Lawyers' Branch and Legal Policy Branch";

e. the fair-minded observer would naturally infer that the Commissioner read emails and attachments sent to him, in particular those to which he responded; and

f. the fair-minded observer would infer that the Commissioner remembered the circumstances of the discussions and correspondence in 2014.

103. Paragraph (a) does not correspond with the evidence. The email did not refer 'to the auspices of the Liberal Party'. Rather it said that 'although *nominally* under the auspices of the Liberal Party *lawyers' professional branches*, this is not a fundraiser' (emphasis added). The word 'nominally' means in name only, not actual or real. Given this statement, the submission that the email left 'no doubt that the event was a Liberal Party event' is unsustainable. Paragraphs (b) and (c) add nothing of relevance to the character of the event. Paragraph (d) goes nowhere. It states no more than had been stated in the email of 10 April 2014. Paragraph (e) is incorrect: see [140]-[141] below. As to paragraph (f), even if the fair-minded observer would infer that I had an infallible memory, the correspondence in 2014 pointed to the legal, not political, character of the Address.

104. The email of 10 April 2014 reveals that the dinner at which the Sir Garfield Barwick Address takes place is something organised by a group of lawyers, no doubt Liberal-leaning, who are interested in Barwick, who have gathered together a group of people not limited to Liberals, together with members of the Barwick family, in order to hear an intellectual or academic or serious after-dinner address about some theme connected with one of the many activities, almost all of them law-related, engaged in by Sir Garfield in the course of his long and energetic life.

105. The topic I selected was: 'The Judicial Stature of Chief Justice Barwick Viewed in a Modern Perspective', and my notes outlining the matters to be covered form part of ACTU MFI-2 – see Tab 12. It was intended to provide a jumping off point for analysis

of the general nature of the High Court and its methods of operation under him, to consider certain legal doctrines then regarded as the law which have now fallen from favour, to mention other principles that have survived and been developed, and to describe various skills and techniques which the Chief Justice personally and the other High Court Judges employed during his tenure of office. The address would have drawn attention to the fact that institutional conditions in his day on the High Court were very different from now. For example, the Court's burdens were greater because appeals as of right lay where as little as $20,000 was at stake, with the result that many personal injury appeals were disposed of by skilful ex tempore judgments delivered by three-judge panels. To compare Sir Garfield's judicial work with that of later members of the High Court operating under different institutional conditions would be a fascinating enterprise, at least to lawyers. The Address would have discussed the great changes in the construction of the Constitution since his day. One example would have been s 92. Another would have been the massive restrictions on the executive power of the Commonwealth introduced since his day by *Pape's* case and the two *Williams* cases. There are obviously others. The Address would have discussed the abandonment by later courts of his taxpayer friendly approach in tax cases. It would have examined his combative role in argument in court, his relations with his judicial colleagues and his techniques compared with theirs – for their identity, and therefore their styles, changed quite a lot and quite frequently over the 17 years. It would have considered Sir Garfield's long and intensive experience as a trial lawyer and how that was utilised in his judicial work, for example the role of appellate courts in relation to factual questions. It would have considered how far he could be seen as an example of A W B Simpson's thesis that, from the Middle Ages, on the common law has not been made by the judges unilaterally, but by the pressures of an ethos shared by a lawyerly caste – not only judges but barristers and others involved in litigation – a tightly organised caste characterised by common systems of education, apprenticeship and styles of argument tending to produce cohesion of thought. In short, even if the Address would not have aspired to original scholarship, it would have endeavoured to appeal to some points of possible curiosity amongst the audience.

106. Lectures given in honour of or associated with Deakin, Page, Griffith, Wran, Murphy, Menzies, Evatt and Byers are given by speakers of all opinions and heard by audiences

of all opinions, even though the bulk of each audience and the organisers might have a particular opinion aligned with the person honoured. A number of distinguished judges have given such lectures. Judges and ex-judges tend to be inundated by requests to speak on public occasions. It is common for the invitations to be extended by persons having a connection with particular groups, including political groups. Justice Kirby gave the Alfred Deakin lecture while Chairman of the Australian Law Reform Commission, the Earle Page lecture while President of the New South Wales Court of Appeal and the Neville Wran lecture while a High Court judge.

107. The contemplated character of the evening at which the Barwick Address was to be given provided an opportunity for a legal, non-political address on a subject which, it was thought, would be interesting to lawyers and others of all political persuasions. It was about Sir Garfield Barwick's judicial career, not about politics. Even though the evening was organised by the Chair of two Branches of Liberal Lawyers, it could not be said that a fair-minded observer, operating reasonably, might conclude that a willingness to give a legal address such as the Barwick Address indicates any predisposition on the speaker's part towards the Liberal Party or against either the Australian Labor Party or unions. Another way of dealing with this issue is to ask whether it might reasonably be thought that I had the intention of advancing the Liberal cause or had acted so 'as to associate yourself with the Liberal Party'? (21/8/15, T:30.29-30) That would depend on the possible existence of an intention to advance the Liberal cause. It might be possible to point to an intention of that kind if the invitation had been to deliver a political speech, depending on its content. But it was not to be a political speech. It was to be a legal speech. There is no rational basis for concluding that a fair-minded lay observer, acting reasonably, might apprehend any predisposition against the Australian Labor Party or the unions arising out of the arrangements for the Address.

The second reason: no logical connection between any predisposition and the issues

108. Turning to the second reason for rejecting the 'Liberal Party event' submission, the following matters are relevant.

109. Counsel for the ACTU submitted that the Royal Commission had a political context, and was politically charged. In part this was because of the natural political hostility between the Australian Labor Party and the Liberal Party. And in part it was because of the historical and current association between the trade union movement and what is in part its political wing, the Australian Labor Party.

110. At a general level these propositions are unexceptionable. And the degree to which the Royal Commission has been the subject of public political comment has certainly increased during its lifetime.

111. The AWU also pointed to various documents – Notices to Produce concerning relations between Industry 2020 Pty Ltd; the Australian Labor Party and the AWU; Ch 3.3 of the Interim Report on Industry 2020 Pty Ltd; and the Commission's 19 May 2015 Discussion Paper: Options for Law Reforms, which discussed some issues arising more generally. (AWU written submissions paras 25-28) The AWU submitted that these investigations and others being carried on in 2015 had political sensitivity. In that submission, too, there is a deal of truth.

112. The ACTU submitted that the relevance of this background was that a fair-minded lay observer might apprehend that in circumstances where the Royal Commission has a clear and incontrovertible political context, a Commissioner that might harbour a political prejudice against the Australian Labor Party might not bring an impartial mind to the issues being examined by the Commission, including, for example, issues that concern the connection between the unions and the Australian Labor Party and any recommendations for law reform as to the governance of unions that may form part of the Final Report.

113. The applicants' submissions exaggerate both the extent of the political context and its significance.

114. For one thing, the submissions overlook the fact that the members of many trade unions are not necessarily members of the Australian Labor Party.

115. Further, some trade unions can be quite hostile to Australian Labor Party policy. An example is the attitude of the ETU to the privatisation of electricity assets by the New South Wales State Government. (4/5/15, T:513.1-13)

116. And some trade union officials can adhere to and support parties other than the Australian Labor Party. An example is Dean Mighell of the Victorian ETU, who switched his support from the ALP to the Greens and the Katter Party because of its dissatisfaction with the ALP. (5/5/15, T:659.29-664.34)

117. The submissions tended to equate the 'Liberal Party' with the federal executive government formed by reason of the fact that the Liberal and National parties have a majority in the House of Representatives. If that equation were sound, it would be right to equate 'the Australian Labor Party' with the executive governments existing in the States formed by reason of the fact that the Australian Labor Party holds a majority of seats in the lower houses (or house) of those States. The constraining effect on the asperities of partisan political life of the practical need to run an executive government, however, is illustrated by the fact that the Governor of South Australia, on the advice of the Australian Labor Party Government in that State, on 22 May 2014 issued Letters Patent corresponding with those issued by the Governor-General. And on 18 June 2015 the Governor of South Australia amended them conformably with the amendment of the Letters Patent issued by the Governor-General, again on the advice of the Australian Labor Party Government in that State. Similarly, the Governor of Victoria issued the amended Letters Patent on 4 June 2015 on the advice of the Australian Labor Party Government elected late the previous year. Neither of these Labor Governments took any step to revoke the subsisting Letters Patent. Nor did the Labor Government elected in Queensland early in 2015. These circumstances weaken the theory that the Royal Commission is politically charged. It is supported in very important respects by governments of all parties including those with no Liberal component.

118. The applicants' argument that the Royal Commission was politically charged was not advanced by their references to the fact that on 10 September 2014 the Hon Ms J Gillard, former Labor Prime Minister, was called to give evidence, and that on 8 and 9 July 2015, the Hon Mr W Shorten, her successor as Federal party leader but one, was called to give

evidence. (ACTU written submissions paras 37 and 59, AWU written submissions para 30, CFMEU written submissions paras 19-20 and 39-40)

119. Ms Gillard was called because of her role in the Australian Workers' Union – Workplace Reform Association Inc case study. She gave evidence not because she wanted to be or later became a Labor politician, but because a long time ago she acted as a solicitor for an official who was successively Western Australian State Secretary and Victorian State Secretary of the AWU. That official was investigated for breach of his duty as an official. Her connection, through him, with the Terms of Reference was real but in a sense adventitious. The evidence in relation to that case study came from quite a number of witnesses and from many documents. In any event, Ms Gillard's general credibility and demeanour were found to be satisfactory. I viewed her as a very good witness in almost all respects. Many, many findings favourable to her and rejecting the attacks of her numerous critics were made. See, in the Interim Report, pages 117-129 [55]-[69], 134 [77], 142 [86], 150 [99], 151-153 [101]-[104], 247-251 [322]-[331], 256-260 [343]-[352] (involving a rejection of some of the submissions of Counsel Assisting), 272-274 [373]-[377] and 289-300 [405]-[430]. The substantial quantity of evidence about her, documentary and testimonial, was closely analysed by several counsel and also in the Interim Report. All possible findings of criminal misconduct or actionable civil misconduct were rejected. There were only two criticisms of her testimony, made as part of a process of deciding that two other witnesses should be preferred to her – one in direct conflict with her, the other in indirect conflict. There have been critics of the conclusions about Ms Gillard. Some think she was harshly treated. Others think that she was treated too leniently. But whether any of those critics is right or wrong depends on precise analysis of the evidence accepted, discounted or rejected, and the strength of the reasoning from that evidence to the conclusions in question. Neither the evidence nor the reasoning in question has anything to do with her later political career.

120. Similarly, Mr Shorten was not called to give evidence because of anything he did as a Labor politician. In 2014 he gave evidence in the form of a witness statement in relation to two case studies. In relation to the first of those, his evidence about events 20 years ago was not rejected. In relation to the other case study, consideration of his evidence

was postponed until the examination this year of further case studies about matters predating his entry into politics – some of them years before that entry.

121. Mr Shorten's position was the same as that of other trade union officials who became politicians such as the Hon Mr C Melhem, the Hon Mr R F Smith and the Hon Senator C Ketter. The point is that assessment of what trade union officials did at a particular time is not affected either by their political role at those times or by their later adoption of a political career. It depends on a close forensic analysis of the facts – of the type that was essayed most fully in relation to Ms Gillard. The Commission's inquiry is not into the political activities of union officials after they have laid down their offices, but their union activities while they had those offices.

122. Merely to state that the inquiry is 'politically charged' does not establish that there might be no neutral evaluation of what is inquired into by someone who agreed to deliver a speech about the judicial career of Sir Garfield Barwick which was organised by the Chairs of two groups of Liberal lawyers.

123. Thus even assuming, contrary to the fact, that there is a rational basis for concluding that the fair-minded observer, acting reasonably, might apprehend some predisposition against the Australian Labor Party and the unions arising out of the arrangements for the Address, there was no logical connection whatever between that predisposition and the actual issues for determination in the Commission, bearing in mind the specificity of those issues and the Commission's detailed methods of dealing with them.

The third reason: no reason to find incapacity to deal with issues impartially

124. The third reason for rejecting the 'Liberal Party event' submission is that any apprehension of a deviation from neutral evaluation of the merits of issues thrown up by the Commission's inquiries would be completely unreasonable.

125. The force of the third reason for rejecting the 'Liberal Party event' submission is supported by several factors known to the fair-minded observer. One is the 'case study' technique of the Commission, with its attempt to assemble very detailed bodies of evidence which is forensically tested. Another is the way that technique was applied in

the Interim Report to affected persons, including political identities or former political identities. Yet another is that even if it were to be assumed, for the sake of argument, that in my private life I had some 'affinity' or 'partiality' for the Liberal Party, as the applicants appear to contend, the authorities make it plain that the fair-minded observer would have regard to my experience in the law as an academic lawyer, a barrister and a judge working in an ethos where judges are expected to direct their entire professional career towards excluding the 'irrelevant, the immaterial and the prejudicial': *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. That is, the applicants did not grapple with the authorities which discussed the difference between predisposition and prejudgment.

THE 'LIBERAL PARTY FUNDRAISER' SUBMISSION

126. The 'Liberal Party fundraiser' submission is that a fair-minded observer might apprehend that in agreeing to give the Address I had the intention of raising funds, or assisting in raising funds, or otherwise generating support for the Liberal Party and that this might cause the fair-minded observer to apprehend that I might not approach the matters for decision in the Commission impartially.

Summary of the reasons

127. This argument, like the 'Liberal Party event' argument, must be rejected. Again there are three reasons for this. In summary they are as follows.

128. First, as a matter of fact, there is no reason to think that the fair-minded observer might apprehend that my intention in agreeing to give the Address was to raise funds or assist in raising funds or gathering support for the Liberal Party. Accordingly, there is no rational basis to conclude that a fair-minded observer might apprehend any predisposition on my part against the Labor Party.

129. Secondly, the applicants have not demonstrated, as distinct from asserting, how such predisposition, even if it might be apparent to the fair-minded observer, was logically connected to the actual issues for determination in the Commission.

130. Thirdly, assuming, contrary to the first and second reasons, that the fair-minded observer might apprehend some relevant predisposition on my part arising from some supposed apparent intention to assist in raising funds or gathering support for the Liberal Party, the applicants have failed to establish that the fair-minded observer might reasonably conclude that I could not deal with the issues for resolution on their merits.

First reason: no apprehension of intention to raise funds or generate support

131. The force of the 'Liberal Party fundraiser' submission depends very heavily, though not exclusively, on the attachments to the 12 June email. The first page of the 12 June email consisted in form of two emails. One was to me. It described the subject as 'FW: Liberal Party of Australia (NSW Division) – Lawyers' Branch and Legal Policy Branch'. The attachments were described as 'Barwick Invitation – August 2015 (1) docx; State Donation Compliance.docx'. The email to me said: 'I thought you would like a copy of the formal invitation, following the "save the date" that was circulated some months ago. You of course are our guest – please let us know if you would like to bring a guest.'

132. On the page containing the email to me was another email. It was from Mary Field, and had no specific addressee. The subject was described as 'Liberal Party of Australia (NSW Division) – Lawyers' Branch and Legal Policy Branch'. The text stated who the address was in honour of, who was delivering it, where and when. It also said that the cost was '$80 incl GST'.

133. The ACTU submissions drew attention to the words appearing opposite 'Subject' and 'Attachments' in the email to me and the words appearing opposite 'Subject' in the email from Mary Field. They also drew attention to features of the invitation (page 2 of the four pages) and the RSVP (page 3 of the four pages).

134. The last page (page 4 of the four pages) was headed 'State Donation Compliance'. It contained text and four headings. It will be necessary to look at the contents of the material under the fourth heading later. The ACTU submitted that by the time the fourth page had been reached, the fair-minded lay observer would infer that 'the Commissioner was aware that:

a. the event was a Liberal Party event;

b. the event may be attended by some Liberal politicians; and

c. the event was not only a Liberal Party event but was a fundraiser for the Liberal Party to which donations could be made to assist with the State election campaigning of the Liberal Party.' (ACTU written submissions para 57)

135. There are several reasons for rejecting the contention that the fair-minded observer might apprehend that in agreeing to give the Sixth Annual Sir Garfield Barwick Address I had any intention to raise funds or to assist in raising funds or to generate support for the Liberal Party.

136. First, there is my statement on 17 August 2015 that the email of 10 April 2014 did not state, and I did not understand it to state, that the Sir Garfield Barwick Address was in any sense a fundraiser for the Liberal Party, and my understanding at all times has been that the dinner was not to be a fundraiser. That is inconsistent with any intention on my part to raise funds for the Liberal Party. As noted above, the fair-minded observer is not bound to accept that statement but would at least take it into consideration. Its accuracy as an account of my mental state is confirmed by the conversation I had with Mr Stoljar on 13 August 2015, as recorded in ACTU MFI-11: see [60] above.

137. The applicants' submissions were that the fair-minded observer would discount my statement because it was obviously contrary to the objective facts. In particular, this was said to follow because a fair-minded observer would naturally conclude that (a) the Address was intended to raise funds, particularly having regard to the invitation attached to the 12 June 2015 email, and (b) that I read the invitation. (CFMEU submissions para 61(j); ACTU written submissions para 100)

138. The first of these two submissions – that the fair-minded observer might conclude that the event was intended to raise funds – is examined and rejected later [142]-[157]:

139. The second of these two submission – that the fair-minded observer would naturally conclude that I read the invitation, despite my denial – was developed as follows.

140. For example, it was said: 'The fair-minded lay observer might at least pause long and hard before accepting the notion that the Commissioner would not be scrupulous in reading his emails'. (ACTU written submissions para 100) This was said to follow from 'the fact that the Commissioner is not only a former High Court judge, but also a person considered by the Executive to be appropriate to be appointed Commissioner'. At another place the ACTU submitted that the holding of prior judicial offices would inform the bystander of the following: (21/8/15, T:45.11-28)

> People don't get appointed to the High Court of Australia unless they are considered truly brilliant lawyers, and what the truly brilliant lawyers have over and above truly ordinary lawyers, they have that special ability to absorb incredibly quickly and distil facts, and an ability to retain facts so absorbed and distilled, so as to fit them into the wider picture of the particular legal problem at hand. That is what a great lawyer is expected to be able to do, and that is what the person would infer the Executive thought about your abilities when they originally appointed you to this Commission and extended it. So, the reasonable hypothetical bystander is going to think you've read this email. He or she may think you have read it quickly, but they're going to think that you are very good – not a very good reader, but a person who is a very quick reader, because that is another skill that most successful lawyers have, and that even when reading quickly, you pick up the salient points.

141. The bystander is in fact likely to reason that one thing a legal background brings is a capacity to go to the point of an email – a form of communication oppressively compelling a speedy response – so that a response can be despatched, particularly where the email does not relate to particular legal problems but to an extra-curricular engagement. The emails in question did not relate to Commission business, but to a possible outside activity. The invitation did not call for my attention and there was no point in my looking at it: having glanced through the email on the first page, noting the time, date and place of the dinner, and noting that I was to be the guest of the organisers, it was not necessary for me to read the attachments explaining how those who were to pay would pay. That subject was of no concern to me. Further, the fair-minded observer would recognise that I was busily engaged in Commission work. The contention that, having regard to those matters, the fair-minded observer would necessarily infer that I read the invitation is fanciful.

142. Secondly, the problem in the applicants' submission about the party purposes of the event is that the coordinator's email of 10 April 2014, quoted and described earlier, disclosed nothing to suggest that the event had any of the postulated party purposes, let alone a purpose of raising funds. The submission did not point to anything in the email to this effect. The email is entirely consistent with the proposition that the evening was to be self-funding without any intention of profit-making.

143. Thirdly, the coordinator's email of 12 August (11.12am) 2015 is positively contrary to any suggestion that the purpose or effect of the address was to raise funds for the Liberal Party. The relevant portion of the text of the email has already been set out, as have the arguments relating to the 'Liberal Party event' submission (see [100]-[103]).

144. A key argument of the ACTU in relation to the 'Liberal Party fundraiser' submission rests on an alleged contradiction in the 11.12am email. The argument was put thus: (ACTU written submissions paras 63-65)

> For two reasons, the fair-minded lay observer would be bemused by the statement in this email that "*this is not a fundraiser*" and upon consideration would conclude that in fact the event was a fundraiser for the Liberal Party.
>
> First, the language in the email is ambiguous. Whilst the cost is said to cover the cost of the dinner it also states that people will need to disclose that amount as a donation "*if they go over the State donation limit*". That statement is, on its face, contrary to the statement that "*this is not a fundraiser*".
>
> Second, the email followed after the invitation email of 12 June 2015 where a copy of the invitation was provided to the Commissioner. As noted above, the RSVP to the invitation made clear that donations could be made and if made would be applied to State election campaigning. (emphasis in original)

145. The ACTU's argument thus is that a fair-minded lay observer would apprehend obvious inconsistency between two of the coordinator's statements. The first was that the address was 'not a fundraiser – the cost charged is purely to cover dinner including our guests and a small contingency for fixed costs in the case of a numbers collapse'. The second is the later statement that 'although of course people will disclose it if they go over the State donation limit'.

146. The ACTU did not demonstrate how the statements were inconsistent. The coordinator's first statement, including his explanation of how the $80 price was determined, is inconsistent with the notion that the purpose of the event was to raise funds. The statement does not rule out the possibility of a small profit, or even a small loss, from the event, but the fact that the price had been set to cover costs indicates that the purpose of holding the dinner and arranging for the address was not to raise funds. How, then, does the coordinator's second statement contradict the first?

147. In assessing any apparent contradiction, the fair-minded observer would need to know something about State electoral law. No doubt he or she is not taken to be an expert on that matter. Nor, for that matter, would the fair-minded observer assume that the coordinator was an expert. However, the fair-minded observer would assess the coordinator's statements with reference to the 'State Donation Compliance' information sheet sent with the invitation on 12 June 2015 of which the coordinator could be expected to be aware. Under the heading 'Disclosure Warning' appeared the following:

> If you make a political donation of $1,000 or more, you must complete and lodge a declaration with the Election Funding Authority in accordance with the Election Funding, Expenditure and Disclosures Act 1981. A political donation includes a contribution or entry fee or an annual or other subscription. You must also disclose a political donation of less than $1,000 if the total amount of political donations made by you in respect of the same party (or associated parties), elected member, group, candidate or person in the same financial year is $1,000 or more. Penalties apply for failing to lodge a declaration.

148. On the basis of this information, the fair-minded observer would understand that:

(a) a person who makes a political donation to a party of $1,000 or more must disclose it;

(b) the $80 payment to attend the event might be a political donation as an 'entry fee';

(c) a person who makes a political donation to a party of less than $1,000 must still disclose it, if during the financial year the total amount of donations to the party is $1,000 or more; and

(d) penalties apply for failing to declare when required.

149. Armed with this information it is very difficult to understand how the fair-minded observer might rationally consider that the organiser's second statement undermined or contradicted his first. The first is a statement about the purposes of the organisers in arranging the function. The second is a statement about what a person who attended the function might, depending on that person's particular circumstances, have to disclose.

150. The email of 12 August, far from being 'ambiguous' and far from being one by which the observer 'would be bemused' is very clear on this particular point. There was no purpose of raising funds, because the cost of the dinner for three courses, admittedly without drinks, in a central Sydney hotel, when allowance is made for the cost of food, room hire, waiters, persons attending as non-paying guests, and so on, is so low: and the organisers specifically stated that the cost charged was purely to cover dinner and a small contingency for fixed costs. (See ACTU MFI-2 Tab 10; ACTU MFI-7 Tab 11.) If the purpose had been to raise funds, the cost would have been much higher. The publicity directed to members of the New South Wales Bar Association did not say it was a fundraiser. (See ACTU MFI-7 Tab 7, tendered at the request of the CFMEU.) If the person of the event was to raise funds, it was a very strange and extraordinarily inefficient way of going about it. There was no effect of raising funds, because even if there turned out to be a small margin of monies received over costs, the amount of money raised would be so low as not to amount to fundraising at all, in the expensive world of running a major political party. Examples from the evidence before the Commission concern the following activities intended to raise funds: charging $550 per head ($5,000 per table of 10) for a luncheon, charging $750 per person for a luncheon, and charging $5,500 per person to attend a luncheon. See Interim Report Ch 3.3. That is fundraising. The Barwick event was not.

151. Fourthly, there is another fallacy in the ACTU's argument. The fallacy centres on the contention that 'the RSVP to the invitation made clear that donations could be made and if made would be applied to State election campaigning'. (ACTU written submissions para 65)

152. That is a misreading of the RSVP which had been attached to the 12 June 2015 email and the 12 August 2015 11.12am email. The answer to the ACTU's contention applies equally even if it is to be inferred or assumed that I did read the RSVP. The RSVP did not solicit donations from those attending the Address. The RSVP to the invitation only contemplated donations being *made by persons who were not attending the Address*. That is, the only payments contemplated on the RSVP form, other than payments of $80 per person to attend the dinner and Address, were ones made by persons who were either unable to attend or uninterested in attending the dinner and address. Any such donations could hardly be described as being made because of the Address, let alone the speaker who was to deliver the Address: the donations are made independently of the Address. Rather, they were only to be made by those who were not able or did not want to attend the Address. That consideration is another aspect which tends against the conclusion that the purpose of the Address itself or the effect of the Address was to raise funds for the Liberal Party. Those who attended would pay $80 per person to have dinner and hear a legal speech, with the $80 designed only to cover the cost of the evening.

153. Fifthly, a further difficulty in the ACTU contention about political fundraising is this. Unless it is established that a fair-minded observer might apprehend that I knew that the event had any purpose or effect of fundraising, the fundraising issue has no significance. Yet one cannot have had that knowledge where there is nothing to know, ie where the event did not have the purpose or effect of fundraising.

154. Sixthly, there is the objective character of the Address. The topic was: 'The Judicial Stature of Chief Justice Barwick viewed in a Modern Perspective'. The speech was legal, not political. The event was not for Liberals only. The event was widely publicised within the legal profession. (ACTU MFI-7 tabs 7 and 11) It is notorious that every shade of legal opinion is to be found within the legal profession. These are matters which further reinforce the conclusion that the fair-minded observer could not have apprehended that my intention in agreeing to give the Address was to help assist raise funds or support for the Liberal Party. They negate a conclusion that the fair-minded observer might have had that idea.

155. Seventhly, if internal deliberations in the Commission's office are to be taken into account, the file note made by Mr Stoljar of the conversation on the morning of 13 August 2015 is further objective material which supports the conclusion that I did not believe that the Address was a 'fundraiser'.

156. Finally, it is necessary to address two related arguments. As noted above, on 13 August 2015, the Commission disclosed the coordinator's email of 12 August at 11.12am and the reply of 13 August at 9.23am. The ACTU criticised this as insufficient because it gave too little context. (ACTU written submissions paras 74-80) The ACTU also criticised non-disclosure of 'any explanation for why it was that [the Commissioner] did not clearly understand that he had committed to speaking at what could only be described as a Liberal Party fundraiser'. (ACTU written submissions para 81) One answer to both allegations is that the role of the fair-minded observer comes into play when a disqualification application is made. The Commission cannot reasonably be expected to disclose publicly every conceivable document about which some members of the press may be interested whenever there is a news story about the Commission. The particular emails released put the media release of 11.22am in appropriate context. A second answer to that last submission is that the event was not a fundraiser, was not directed to Liberal Party purposes, and had as links to the Party only the office of the coordinator and his colleagues.

157. For the above reasons the 'Liberal Party fundraiser' argument so far as it concerns fundraising must be rejected. But the argument is not limited to fundraising. It extends also to whether a fair-minded observer might consider that my intention was to generate non-monetary support for the Liberal Party by delivering the Address. There is no evidence which would suggest that a fair-minded observer might consider that. There is nothing to suggest that the Address in fact served the functions of encouraging non-members of the Liberal Party to become members, or encouraging increased zeal on the part of existing members. Those propositions are supported by the points made above in relation to the objective character of the Address. And there is nothing to suggest that I intended the Address to serve any of those functions.

Second reason: no logical connection between any predisposition and the issues

158. The second argument against the 'Liberal Party fundraiser' submission is similar to the second argument against the 'Liberal Party event' submission. Nothing in addition need be stated.

Third reason: no reason to find incapacity to deal with issues

159. Assuming that the arguments put in relation to the first and second reason are not accepted, the points made in the third argument against the 'Liberal Party event' submission apply to the 'Liberal Party fundraiser' submission as well.

SOME FALSE ISSUES

160. There are some aspects of the applicants' arguments which it is respectfully concluded raise false issues. One issue is as follows. The applicants submitted that while on 10 April 2014 the email records a stipulation that I would only deliver the address if the Commission had finished, I continued to respond to the coordinator's organisational activities in relation to the event after 31 December 2014 notwithstanding that the Commission had been extended until 31 December 2015. Thus the ACTU submitted: (written submissions para 43)

> [T]he fair-minded lay observer would infer that the Commissioner no longer saw it as inappropriate to deliver an address at a Liberal Party function, notwithstanding that the Commission had not completed. This is because a fair-minded lay observer would naturally assume that the Commissioner would remember that fact from the discussions and correspondence in 2014.

161. There are two possibilities. One is that I did not recollect the condition. The other is that I did recollect the condition, but decided that it need no longer be complied with.

162. As stated on 17 August 2015, I forgot the condition. There are also objective matters which support that conclusion. One is the fact that the coordinator also forgot, as

counsel for the ACTU accepted. (21/8/15, T:40.24-27; 54.14-15) Another is that between April and December 2014 the demands of duty at the Commission, as distinct from those of an extracurricular event, were heavy: as counsel for the ACTU said, there had 'been a mammoth amount of work done' (21/8/15, T:37.18-19) and counsel for the CFMEU attributed to the fair-minded observer the thought: 'The man was after all very, very busy'. (21/8/15, T:65.37) Another is the fact that if I had remembered the condition there would have been no reason not to insist on it. Since I did not insist on it, it may be inferred that I had not remembered it.

163. But for the purposes of these applications it is immaterial whether I forgot the condition, or remembered it but changed my mind. The allegation of apprehended bias depends on the applicants establishing that to my knowledge either the event was a 'Liberal Party event' or that it was a 'Liberal Party fundraiser'. Agreeing to give the Address, the argument goes, revealed that I had showed affinity with, partiality to, support to, persuasion towards, allegiance towards, or an association with the Liberal Party, or a political prejudice against the Australian Labor Party. The applicants' argument urges the conclusion that in consequence the fair-minded observer might reasonably apprehend that I might not bring an impartial mind to the issues before the Commission. A failure to recollect the condition is immaterial to either argument. And recollection coupled with a conscious change of mind is also immaterial. The applicants still have to establish that it is a 'Liberal Party event' or 'Liberal Party fundraiser' of a kind which might lead to an apprehension of bias. If the event was to my knowledge either a 'Liberal Party event' or a 'Liberal Party fundraiser' of the kind which leads to an apprehension of bias, that conclusion is not affected by either a failure to remember the condition or a decision to depart from it. And if the event was to my knowledge neither a 'Liberal Party event' of the relevant kind nor a 'Liberal Party fundraiser', again the conclusion is not altered by a failure to recollect the condition or a decision to depart from it.

164. Another false issue arises from the ACTU's submission that the imposition of the condition did not prevent the existence of apprehended bias. It was submitted that it revealed preparedness to speak at a function to raise funds for the Liberal Party in the future, and this revealed a 'persuasion or alignment toward the Liberal Party'. (ACTU written submissions paras 110-111) However, the email of 10 April 2014

recording the condition did not say that the address was to be a fundraiser. What type of event any future invitation might relate to would depend on the circumstances. If it were to be an event similar to the contemplated 2015 Barwick Address, it would not raise any apprehension of bias in the fair-minded observer. The arrangements recorded in the 10 April 2014 email did not constitute a completely open-ended promise to speak at any event, whatever its nature, once the Commission's work had ceased.

165. A third false issue arises from the applicants' submission that the headers in various emails indicate that the Address was either a 'Liberal Party event' or a 'Liberal Party fundraiser', for example the headers to the email of 12 June 2015. The substance of the three pages attached to the 12 June 2015 email nullifies any contrary implication in those headers. But the fundamental flaw in the submission as a whole is that the character of the Address as a 'Liberal Party event' or not or as a 'Liberal Party fundraiser' or not depends on its substantive elements, and the headers do not establish the substantive elements of the Address.

166. A fourth false issue concerns the fact that at various points the applicants' submissions appear to proceed on the idea that the initial decision on 10-11 April 2014 not to give the Address whilst I was Royal Commissioner, and the ultimate decision on 13 August 2015 not to give it, comprised an admission, tacit or otherwise, that to give the address would give rise to a reasonable apprehension of bias. (Thus the ACTU contended that the fair-minded observer would infer that in April 2014 I regarded it as inappropriate to speak while the Commission was sitting, 'no doubt because of the very fact that it was a Liberal Party event'. See ACTU written submissions para 35. See also the CFMEU written submissions para 62(b) and oral submissions at 21/8/15, T:65.17-25.) That idea rests on an obvious fallacy. Sometimes a decision-maker chooses not to do something, not because to do it will give rise to a reasonable apprehension of bias, but because the decision-maker for sensible reasons of risk management and self-preservation wishes to avoid the attacks of the suspicious and the malicious. That is the construction a fair-minded observer would put on the matter.

167. A fifth false issue raised by the applicants is whether or not the coordinator of the Address was personally told of my withdrawal from the Address or whether he learned

of it through the media release at 11.22am on 13 August 2015. (ACTU written submissions para 71) That issue is completely irrelevant.

DOCTORING DOCUMENTS?

168. At the hearing on 21 August there was some controversy about the Commission's production to the CFMEU on 20 August 2015 of a 'standalone' version of the email sent by the coordinator to me at 11.12am on 12 August 2015. Submissions were made that other versions of the subject email (as part of email chains) produced by the Commission on 17 August 2015 as ACTU MFI-2 would be perceived to have been 'doctored' or 'edited to exclude the reference to attachments by this Commission'. The alleged conduct was said to infect the mind of the fair-minded lay observer and allow adverse inferences to be drawn. The truth is that there was no doctoring or editing, that it cannot be concluded that the fair-minded observer might think that there had been, and that no adverse inference of any kind could be drawn.

169. It is important to set out the circumstances in which the submissions were first made and then how they were responded to when challenged.

The correspondence on 20 August 2015

170. At approximately 9.10am on Thursday, 20 August 2015 the solicitors for the CFMEU emailed an 'urgent' letter to the solicitor assisting the Commission. The references in the letter to 'tabs' are references to the tabs in ACTU MFI-2: each of the emails and other documents in that Exhibit has a separate tab. The letter said:

> I refer to the documents tendered on Monday 17 August 2015 (ACTU MFI-2) and Direction No. 3 made by Commissioner Heydon on the same day. I am instructed to request that copies of the following be delivered by 4:00 pm today to the offices of Slater and Gordon at Level 5, 44 Market St, Sydney:
>
> (a) The full email trail of which the email at tab 5 of 25/3/15 at 4:19 pm appears to be the culmination, noting from its content that it seems to be a reply to [the coordinator's] email of 2/3/15 at 1:16pm (tab 4) and noting the prefix "RE" in the subject line; and
>
> (b) The actual email and any attachments thereto from [the coordinator] to Commissioner Heydon of 12/8/15 at 11:12 am which appears as part of

the email trail which is tab 10 and is also part of tab 11 and tab 14, noting that in the email trail that is tab 10, the subject line changes from that in the email from Robert Carey of 12/8/15 at 10:58 am ("FW: Liberal Party of Australia (NSW Division) – Lawyers' Branch and Legal Policy Branch") to that in the email from [the coordinator] at 11:12 am ("Final arrangements Barwick dinner address 26 August 2015") and noting that the email from [the coordinator] to Commissioner Heydon of 12/8/15 at 11.14 am which is the culmination of the email trail which is tab 10 does not include as attachments the attachments referred to in the email from … of 12/8/15 at 10.58 am which is an earlier part of the email trail, and noting that the email from [the coordinator to Commissioner Heydon of 12/8/15 at 11.14 am does not include an attachments line, even though the earlier Robert Carey email refers to attachments.

I further seek confirmation that tab 11 and tab 14 are the actual email trail culminating in the … email 13/8/15 at 9:23am, noting that [that] email appears from its content to be a reply to [the coordinator's] email of 12/8/15 at 11:14 am (which asks whether Commissioner Heydon will be accompanied) and not [the coordinator's] email of 12/8/15 at 11:12 am. If it is not the actual email trail, we request the actual email trail.

In light of the above, I also seek electronic copies of all the material included in ACTU MFI-2 in its native format in accordance with the Royal Commission's Practice Direction 1.

171. At approximately 11.40am on Thursday, 20 August 2015 the solicitor assisting the Commission caused to be hand delivered to the solicitors for the CFMEU a response to their letter in the following terms:

I refer to your letter dated today. I assume from your reference to the Commissioner's third direction made on 17 August that you act for a "*person to whom authorisation to appear at this Commission has been granted, and who wishes to pursue an application for disqualification*". Please confirm which party that is.

In answer to your questions, using your numbering:

(a) The email at Tab 5 is complete. There is nothing additional to produce.

(b) A hardcopy of the email dated 12 August 2015 (sent 11.12 am) from [the coordinator] to Commissioner Heydon, with attachments, is *enclose*d. This email is saved as Tab 10.1 on the *enclosed* USB.

> In answer to the penultimate paragraph of your letter, the emails at Tab 11 and Tab 14 are the actual email trails.
>
> I note for completeness that neither at Selborne Chambers nor at the Royal Commission, does Commissioner Heydon have a computer. All email correspondence is sent and received via [his personal assistant].
>
> *Enclosed* is a USB with each of the relevant emails in their native format. I will email you the password for the USB. (emphasis in original)

172. A further copy of the letter together with the password for the USB enclosed with the original hand-delivered letter was emailed to the solicitors for the CFMEU at approximately 11.41am on 20 August 2015.

173. At approximately 2.00pm on 20 August 2015 the solicitors for the CFMEU served the CFMEU's written submissions. At paragraph 42, those written submissions in part state:

> The formal invitation and RSVP form said to be attached do not appear in the material marked ACTU MFI2 Tab 10. Nor is there an attachment line listing the names of the electronic files attached to the email in the email from the organiser to the Commissioner of 12 August 2015 at 11.14 am which is part of ACTU MFI-2 Tab 10.

174. At the 21 August 2015 hearing, Counsel Assisting tendered without objection the exchange of correspondence dated 20 August 2015 between the solicitors for the CFMEU and the solicitors assisting the Commission. It was marked as ACTU MFI-6. Senior Counsel for the ACTU fairly noted that he had not previously seen the correspondence and was proceeding on the basis that ACTU MFI-2 'was complete'. (21/8/15, T:26.21-29)

The oral submissions of senior counsel for the ACTU

175. Senior counsel for the ACTU submitted that: (21/8/15, T:45.30-46.19)

> Could I then go forward to page 21. Just to remind you, that was June. We now move forward to 12 August and in the usual way of emails, [the coordinator], using the chain, sends you the email at the top of the page, forgetting to ask if your wife was coming, but in enclosing the chain, what's

happened is he has changed the title, but if you look at the next email down the page on page 21, that has the same title but this is the one which we don't have an original of. That's right. The way this seems to work, I'm sorry, Commissioner, I've got myself confused, is that [the coordinator] *has sent two emails two minutes apart and it would seem that your assistant has printed them off as one, and that is why we don't have a standalone copy of the one at the bottom of the page. I'm told that there is now the standalone email. It doesn't matter*. They were obviously both given to you, it would seem, inferentially, that you received them in this way.

Let's look at the two emails. The one at 11.12, the first one, says that he's enclosing the information for your reference, but nowhere on the document does it suggest that there was an enclosure, and we can infer by reference that no enclosure was produced by the Commission; that [the coordinator] forgot to do the thing that he said he was doing, and the invitation wasn't enclosed. Mr Stoljar will tell me if I've got that wrong.

I will proceed. *Apparently what has been produced today does have produced with this email the invitation which I have to say surprises me because usually you can tell on emails whether there is something attached to it, but there you have it. It would seem that we can proceed on the basis that [the coordinator] in fact did manage to attach it*. You've got the invitation again but importantly what the email says is he's giving you a running sheet and then the second paragraph …. (emphasis added)

The oral submissions of counsel for the CFMEU

176. After indicating that he accepted the ACTU's submissions save in one respect, senior counsel for the CFMEU developed the following submission: (21/8/15, T:60.39-62.8)

What we do not see anywhere in ACTU MFI-2 is the full email of 12 August 2015 that was sent at 11.12am. That was the subject of the correspondence that was tendered this morning and when we go to that correspondence we see the email of 12 August 2015 at 11.12am, but it has one additional line which is not included in the email of that time and that date at tab 14 of ACTU MFI-12, the documents produced by the Commission on Monday, and that line is the line which reads:

Attachments: Barwick Invitation - August 2015 (1).docx; State Donation Compliance.docx

And then we see the rest of the email. There is no explanation as to how it might be that an exact copy of that email, absent the reference to "Barwick Invitation - August 2015" and "State Donation Compliance", has an annexure or an attachment that can be found in ACTU MFI-2 and why it is that this email appears in a different form absent that line of information in MFI-2.

Beyond that, the document produced yesterday in response to the CFMEU's request through Messrs Slater & Gordon includes the email … of 12 August 2015 at 10.58am, which includes as its subject, "[Forward] Liberal Party of Australia (NSW Division) - Lawyers' Branch and Legal Policy Branch", which again makes plain that the event was a Liberal Party function.

The first of these emails in the material produced yesterday makes clear that connected with the invitation to the Barwick lecture was a state donation compliance requirement which clearly identifies the function as one which might be called a fundraiser.

The fairminded observer, in our respectful submission, would very likely conclude that if the Commissioner was able to, in his glancing or reading of the email, see that it was from the organiser, that it was addressed to him, that it referred to the final arrangements for the Barwick dinner address on 26 August, that is also referred to state donation compliance.

The fairminded observer would, in our respectful submission, have serious concern as to why it was that this email, which was produced yesterday, and the form in which it was produced, didn't find its way into ACTU MFI-2 and that the copy of it which did find its way into that bundle deleted the reference to attachments and the information that follows the word "attachments", and the email which followed that, that is, the email from Robert Carey of 12 August 2015, 10.58am, was also not attached to the 12 August 2015 email that forms part of the MFI.

In our respectful submission, the omission to include the email that was provided yesterday and the form in which it was provided has great significance on the question of the opinion of the fairminded observer. We submit – and I think it is beyond any doubt - that the fairminded lay observer would apply commonsense that she would be entitled to draw inferences from facts disclosed but not just from facts disclosed, but also from the fact of non-disclosure or incomplete disclosure or disclosure which was of itself misleading.

177. Counsel for the CFMEU continued: (21/8/15, T:62.37-63.13)

The fairminded observer, now in possession of the version of the email from 12 August at 11.12am, would now know that that email made it plain that the event involved the concept of a donation and that, together with the information that the event was a Liberal Party event, would, in our respectful submission, give the fairminded observer cause for concern that the information that was released on 17 August was accurate.

Concern[ed] that the information that was released was at best a partial disclosure, if not *a disclosure of a doctored document which had been edited* to remove the reference to "State Donation" and also would be concerned

about the incomplete disclosure, the independent fairminded observer, would, in our respectful submission, have great concern as to the claim that you, Mr Commissioner, had not recalled the earlier caution that you had expressed in April of 2014 and would be concerned that this email of 12 August at 11.12 really makes unacceptable the context that is put forward for the email that is referred to at the top of page 14 in which your assistant Mr Commissioner, was asked to send an email if there is *any possibility* that the event could be described as a Liberal Party event. (emphasis added to first passage but not second)

178. Finally, he concluded: (21/8/15, T:67.1-24)

> We would pray in aid what fell from the Full Bench of the Federal Court [in *Gaisford v Hunt* (1996) 71 FCR 187], that a relevant matter to be taken into account in these assessments is the fact that when first released - actually, when the email of 12 August at 11.12am was released, on two occasions it did not include any reference to an attachment which clearly identified donations as being relevant to the talk.
>
> Those two occasions are the public release of the email, which is the substance of tab 14 of ACTU MFI-2, and then secondly, the release of that same email *which the fairminded observer would be entitled to conclude had been edited* to exclude the reference to attachments by this Commission which is at tab 10 of MFI-2.
>
> There is now on the record no explanation as to the *apparent editing* of the email of 12 August at 11.12am. There is no record of any explanation as to what effect, if any, the reference in the attachment to "donation note" had upon the Commissioner and there is perhaps an available inference that the absence of any explanation in relation to that is because there is in fact no explanation for it consistent with a denial of knowledge of the true nature of the event. (emphasis added)

Counsel for the CFMEU is supported by counsel for the AWU

179. After counsel for the CFMEU completed his address, counsel for the AWU said he supported the written and oral submissions of the CFMEU save in certain respects. The doctoring issue was not one of those respects.

Counsel for the CFMEU responds to Ms McNaughton's SC's explanation

180. One of the Senior Counsel assisting (Ms S McNaughton) spoke to counsel for the CFMEU whilst senior counsel for the AWU was addressing. After senior counsel for the AWU completed his submissions, senior counsel for the CFMEU then raised the following matter: (21/8/15, T:74.19-75.15)

> There is one matter that has been brought to my attention by my learned friend Ms McNaughton which I feel, in fairness to you, Mr Commissioner, I should address. It is a correction based upon some facts that Ms McNaughton has told me *which I accept from her*. It deals with the material that was produced yesterday.
>
> Mr Commissioner, I am informed that the reason why the email which one sees on page 21, dated 12 August 2015, at 11.12am, does not *disclose the attachment line and the information after the word "Attachment"*, that we see in the email that was disclosed yesterday, was because as presented in this folder at tab 10, this email, or this version of the email, is part of a chain. Ms McNaughton tells me that the way in which the system apparently works is that it *drops off any attachments when an email forms part of a chain*. That is not anything that was explained to us yesterday when, for the first time, *we received a copy of the email with the attachment line present and, indeed, with the attachments that now form part of ACTU MFI-6*.
>
> That additional information, *if we accept it for the sake of argument*, does not, however, impact upon our submission which was, in essence, that on 12 August 2015, at 11.12am, the email which was received contained an attachment line and attachments, which attachments can now be found in MFI-6.
>
> It doesn't in any way detract from our submission that that information was available to the Commissioner on 12 August at 11.12am and that its availability to the Commissioner was not disclosed either in the email of Adrian Kerr of 13 August 2015, at 3.11pm, which is at page 29 and following of MFI-2, and was not disclosed at tab 10 of MFI-2, page 21, and was not disclosed until specific inquiry was made yesterday. It does not detract from our submission that there has been no explanation, much less a full explanation, as to why it was that the attachment line did not come to attention prior to the email which was sent out at 9.23am the following morning. Thank you. (emphasis added)

Counsel for the ACTU disassociates himself from the CFMEU

181. Senior Counsel for the ACTU made it clear that his client's position was different from that of the CFMEU and the AWU: (21/8/15, T:75.31-35)

> I want to make it clear that I do not adopt any submission to the effect that any documents have been doctored, or that there has been any, and that there could be on the state of the information, any basis for making such a submission.

Counsel Assisting's statement

182. Senior Counsel Assisting indicated his position as follows: (21/8/15, T:76.28-77.9)

> Can I just make the following observations: at 11.40am yesterday, the solicitors for the CFMEU were given at their request an electronic copy of all emails the subject of Mr Agius's address this morning. I tender that electronic copy.
>
> [ACTU MFI-8 - ELECTRONIC COPY OF ALL EMAILS THE SUBJECT OF MR AGIUS'S ADDRESS ON 21/08/2015]
>
> That electronic copy should have been produced to the solicitors for the ACTU and the AWU. By oversight of Commission staff it was not, that was an error. However, while not excusing the error, firstly, it is clear from the face of the email that the invitation was enclosed or attached and, secondly, copies of the email and the invitation were in evidence on Monday, all that was missing was the standalone version of the email.
>
> The electronic native format of the email at tab 11 of MFI-2 is identical to the hardcopy version produced by the Commission on Monday, 17 August. This is obvious on a cursory examination of the electronic record.
>
> There is no basis whatsoever for the serious allegation that the version of tab 11 produced by the Commission was altered or doctored in any way. That is all I wish to say, Commissioner.

Counsel for the CFMEU's final position

183. Senior Counsel for the CFMEU concluded: (21/8/15, T:77.35-78.20)

> Mr Commissioner, two things arising from what my learned friend has said. I did not make the submission that the copy was doctored or altered. I said that a fair-minded observer might form that conclusion, which is a different matter.
>
> The documents that were in evidence prior to the receipt by us of the hardcopy of the email yesterday did not disclose that that email had an attachment to it. They did not disclose the word "Attachment", or the words that follow the word "Attachment" in the email, in the forms in which it appeared in ACTU MFI-2.
>
> We did not know, until yesterday, that that email in its native form when it would have been received at 11.12am on 12 August contained the attachments, nor do we have the attachments; nor were those facts revealed in ACTU MFI-2.
>
> I have not suggested that you, Mr Commissioner, have altered that email. What I have suggested is that given that the emails that were in MFI-2 were said to be the record of email exchanges, that representation was not accurate. MFI-2 cannot be a complete record of the emails because it did not include the email in its native form which we received for the first time yesterday; nor did we receive any explanation as to why it differed in the very critical respect in which it does from the emails in MFI-2.
>
> In our respectful submission, the fair-minded observer would be entitled to draw such conclusions as were available from that which *includes that for some reason there was or there may have been some deliberation in that process*. (emphasis added)

Principles concerning non-disclosure

184. In dealing with the issue of 'non-disclosure' it is necessary to first set out the relevant law on the subject.

185. In oral argument, senior counsel for the CFMEU referred to and relied on the decision of the Full Federal Court in *Gaisford v Hunt* (1996) 71 FCR 187 at 202. Senior Counsel appeared to rely on a statement in that case to support the proposition that a failure by a decision-maker to make a 'full and true disclosure' when challenged about a matter said to give to an apprehension of bias could be used by the fair-minded observer to draw adverse inferences against the decision-maker. (21/8/15, T:63.25-65.3)

186. In my view, the correct legal position is this. In an application to disqualify for apprehended bias, there is no basis upon which a judge can be cross-examined or any

form of documentary disclosure, such as by discovery, subpoena or notice to produce, can be sought: *Locobail (UK) Ltd v Bayfield Properties* [2000] QB 451 at [19]; *Helow v Home Secretary* [2008] 1 WLR 2146 at 2426 [39]; *Makucha v Sydney Water Corporation* [2011] NSWCA 234 at [9]. As Aronson notes with reference to authority (M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook, 2013) at p 621):

> There is, in effect, no voir dire of the judge. It follows that the failure of a judge to answer questions from parties about such issues cannot provide either evidence in support of a bias claim or the basis for a reasonable apprehension.

187. Those principles must apply equally to Royal Commissioners. That is because they have in the exercise of their duty as Commissioners, the same protection and immunity as a Justice of the High Court of Australia: *Royal Commissions Act* 1902 (Cth), s 7(1). The High Court has held that an equivalent provision in the *Migration Act* 1958 (Cth) confers the entire general protection and immunity of a High Court judge, not merely immunity from civil suit: *Herijanto v Refugee Tribunal* (2000) 170 ALR 379.

188. Nothing in *Gaisford v Hunt* is to the contrary. Rather, that case concerns a situation where a decision-maker discloses information to the parties which may found a basis for an allegation of apprehended bias. In that situation, *Gaisford v Hunt* supports the view that a conscious and deliberate decision by the decision-maker to abstain from disclosing matters which support the case of apprehended bias and which if not disclosed could create a misleading impression may properly allow the fair-minded observer to reason that the decision-maker is seeking to conceal matters, which reasoning may exacerbate any reasonably held apprehension of bias.

189. Although the statement in *Gaisford v Hunt* was not expressed in terms to be limited to a case of conscious or deliberate non-disclosure, both principle and the facts of the case support that limit. An inadvertent (eg through mistake) or unknowing (eg where the information was not known to the decision-maker) non-disclosure could not rationally support an inference of concealment. In *Gaisford v Hunt*, the decision-maker in effect

disputed the contents of a media article, but did not reveal that in fact he had given an 'off the record' interview with the journalist who had written the article.

Was the failure to disclose a material deficiency?

190. In considering these events, it is important to deal separately with the issues, and not to conflate them. The first issue is whether the disclosure of documents on 17 August 2015 was materially deficient by reason of the non-disclosure on that day of the stand-alone version of the 12 August (11.12am) email from the coordinator. Related to that is the question of what materiality the 'attachments' to the 12 August (11.12am) email from the coordinator have.

191. The attachments to the 12 August (11.12am) email include material on which the applicants rely to demonstrate that the event was to be a Liberal Party fundraiser. They were not produced as attachments to the 12 August (11.12am) email on 17 August, but those attachments were tendered in evidence on that day as part of ACTU MFI-2 as attachments to the email of 12 June 2015. It was on the strength of the 12 June attachments that the ACTU developed written arguments on 20 August and oral arguments on 21 August, both adopted by the CFMEU and the AWU, with a view to demonstrating that the event was to be a Liberal Party fundraiser and that I was aware of that fact. The re-despatch of those documents on 12 August, the day before I withdrew from the event, added nothing to the force of those arguments presented in relation to the 12 June 2015 email attachments. Hence the failure to disclose the attachments to the 12 August (11.12am) email until 20 August was not a failure to disclose anything material. No claim was made by any counsel that their course of conduct was affected by the fact that disclosure of the attachments to the 12 August (11.12am) email was not made until 20 August. At one point counsel for the ACTU submitted that the attachments to the 12 August (11.12am) email, which he had never seen until the morning of 21 August 2015 when the email was tendered, revealed that I had received the invitation twice. He said that was 'very important'. (21/8/15, T:77:20-30) But earlier he said that it seemed that the coordinator 'has sent two emails two minutes apart and it would seem that your assistant has printed them off as one, and that is why we don't have a stand-alone copy of the one at the bottom of the page. I'm told that there is now the stand-alone email. It

doesn't matter.' He thereafter continued: (21/8/15, T:46.10-15) 'Apparently what has been produced today does have produced with this email the invitation which I have to say surprises me because usually you can tell on emails whether there is something attached to it, but there you have it. It would seem that we can proceed on the basis that [the coordinator] in fact did manage to attach it.' The receipt of a second invitation, whether it was read or not, has no significance given that the withdrawal from the event took place less than 24 hours later.

Was the failure to disclose innocent?

192. The second issue is whether the non-production of the attachments was innocent and bona fide. It was, in circumstances where Commission staff were trying to comply by 11.30am with an urgent request brought to my attention shortly after 9.42am on 17 August, even though it was not obliged to, while an unrelated hearing was being prepared for and conducted. The non-production arose from an aspect of the performance of the email system not appreciated by the relevant human agents. This prevents any adverse significance being attached to it.

Were the emails doctored?

193. The third issue is related to the second issue. The third issue is whether any of the documents produced on 12 or 17 August had been doctored. Associated with that is the question whether a fair-minded lay observer might believe the emails produced on 12 August (11.12am) or on 17 August had been 'doctored' or 'edited' to remove the attachment line. It is hard to conceive that the observer might form the latter view. The question of the 'missing' attachment line was clearly in the minds of the legal representatives for the CFMEU when they wrote to the Commission on the morning of 20 August – that is the plain purpose behind paragraph (b) of their letter. Within two and a half hours the Commission had responded with both a hard copy of the subject email (with attachments) and an electronic version (in native format) of each relevant email including the standalone version of the 12 August (11.12am) email from the coordinator. In order to test their theory that the documents produced at the hearing on 17 August which form ACTU MFI-2 had been 'doctored' all that was required was for

the CFMEU's lawyers to compare the electronic version of each email against its printed version forming part of ACTU MFI-2. If that had been done, it is difficult to see how the 'doctoring' submission could have been made in the hearing the next day. Further, it would appear that the ordinary fair-minded user of email would have appreciated that the 'attachment' line would not have appeared on the relevant email chain and that the attachments would not either. That was the point explained by Ms McNaughton to counsel for the CFMEU.

194. Counsel for the CFMEU said that 'we' were aware on 20 August that the email in its native form when it would have been received at 11.12am on 12 August contained the attachments. At no time before the 'doctoring' allegation made in oral address did the legal representatives for the CFMEU notify the Solicitor for the Commission or Counsel Assisting that that allegation would be made. If notification had been given, then the issue could have been resolved simply before the allegations were made. Even though they have now fallen flat, potentially they were very damaging for members of the Commission staff.

The remaining significance of the 'doctoring' question

195. The 'doctoring' question arose out of a misunderstanding. The misunderstanding has now been cleared up by those who are familiar with emails – a class of which I am not a member. The matter was explained, and explained fully, at the close of the 21 August 2015 hearing. But that does not deprive the 'doctoring' question of significance. There is an issue between senior counsel for the CFMEU and Senior Counsel Assisting about whether the former was alleging the relevant email had actually been 'doctored or altered'. On the one hand, senior counsel for the CFMEU denied that he had said that; on the other hand, he said that he had not suggested 'that you, Mr Commissioner, have altered that email', which leaves open the possibility that someone else did so. These points are not exhaustive of the competing considerations. Incidentally, once it is conceded that if anyone altered the email, it was not me – an inevitable and completely proper concession in view of my complete incapacity to do any such thing – the whole 'doctoring' submission collapses. That is because what the applicants are alleging is an apprehension of bias on my part, not anyone else's.

196. But the issue whether the CFMEU was alleging that someone other than me was engaged in doctoring is not important in relation to the current applications. What is important is the use which senior counsel for the CFMEU said he had made of the point: 'I did not make the submission that the copy was doctored or altered. I said that a fair-minded observer might form that conclusion, which is a different matter.' Actually the submission went further. He also said (21/8/15, T:67.12-13) that the email was one 'which the fair-minded observer would be entitled to conclude had been edited'.

197. It is necessary to remember that the fair-minded reasonable observer must be a single person with a single mind. An observer who felt 'entitled to conclude', knowing all the facts as they have now emerged about the doctoring issue, that the email had been edited would not be a fair-minded person. Rather that observer would be a reckless, irrational, perhaps even malevolent-minded person. Now fair-mindedness, like peace, is indivisible. If the CFMEU's observer is reckless or irrational in one respect which it sees as major, that undercuts the observer's fair-mindedness in all respects. The same applies to the AWU's observer, for the AWU adopted the CFMEU submissions, though not the CFMEU's partial retreat from them.

198. It would be wrong to undercut the fair-mindedness of the ACTU's observer by reference to the 'doctoring' issue, for the ACTU explicitly refused to allege doctoring. But there are other respects in which the ACTU's observer cannot, with respect, be described as fair-minded. For example, the ACTU observer did not appear to have analysed and isolated which meanings were to be assigned to many expressions like 'Liberal Party event' and 'fundraiser' and others used interchangeably, which do not appear to have identical meanings. Further, the ACTU submitted that the 'fair-minded lay observer' would be left in 'no doubt at all' from the 12 August (11.12am) email that the address was a Liberty Party event and that I appreciated this. (ACTU written submissions, para 62; ACTU second submissions, para 12) This submission is clearly falsified by the fact that on its face the email stated that *nominally* the address was under the 'auspices of the Liberal Party's professional branches'. It has also been falsified by considerations mentioned elsewhere. The ACTU also submitted that the fair-minded observer '*would* infer from the invitation email that the Commissioner *was* aware that … the event *was* not only a Liberal Party event but *was* a fundraiser for the Liberal Party to which

donations could be made to assist with the State election campaigning of the Liberal Party'. (ACTU submissions, para 57, emphasis added) The submission takes no account of what the coordinator said on 10 April 2014 and 12 August 2015 about the purposes of the Address or of the actual language of the three pages annexed to the 12 June 2015 email, which the submission was supposedly based on but which contradicted it, or of what I said my belief was, which was confirmed by what Mr Stoljar recorded on 13 August 2015 (ACTU MFI-11).

199. The ACTU's repeated exaggerated submissions about the conclusions of the fair-minded lay observer cannot be dismissed as mere rhetorical flourishes. Rather they point to the fact, that like the CFMEU's and the AWU's observer, the ACTU's observer was not fair-minded.

FURTHER RELEVANT DOCUMENTS?

200. Finally, on this topic it is necessary to address the additional submissions filed by the applicants on 28 August 2015 about the documents that were requested and provided on 27 August 2015: see [25] and [60]-[61] above.

201. In essence, there were two submissions. The first was that the documents were relevant in that they provided additional support for the fair-minded observer's conclusion that I knew the Address was a Liberal Party event and a Liberal Party fundraiser. (ACTU further written submissions, paras 12–13; CFMEU supplementary written submissions, paras 9–12; AWU supplementary written submissions, paras 5–7) The second was that the non-disclosure of relevant documents and information permitted inferences to be drawn against me which would exacerbate any apprehension of bias. (ACTU further written submissions, paras 5 and 15; CFMEU supplementary written submissions, para 14; AWU supplementary written submissions, para 8)

202. For the following reasons, those submissions must be rejected.

203. First, neither the email from Mr Winslow nor the reply is of any relevance to any issue in the applications. An important issue is what the fair-minded lay observer might apprehend about my state of mind. What Mr Winslow or Mr Stoljar thought, or might have thought, about the Address is irrelevant. The irrelevance of the emails is confirmed

by the fact that none of the additional written submissions sought to explain how the content of those emails was relevant to the applications. Since the emails are irrelevant, neither the documents themselves, nor their 'non-disclosure', has any bearing on the applications.

204. Secondly, the file note adds nothing to the arguments in favour of the applications; in fact it is damaging to the applications because it is further objective support for the view that I did not consider that the Address was a Liberal Party fundraiser, and hence could not have had an intention to raise funds or generate support for the Liberal Party. The ACTU submitted that the note confirms that I read the text of the emails from the coordinator of 12 August. That was already evident from the terms of the email reply at 9.23am on 13 August. The other submission put was that the file note demonstrated that the 9.23am email was 'disingenuous' because I must have known that the Address was a Liberal Party event. That submission has at least two fundamental flaws. First, it ignores the fact that on the face of the 12 August (11.12am) email the Liberal Party connection with the Address was unclear: the coordinator had said the event was *nominally* under the auspices of the Liberal Party lawyers' professional branches. Secondly, the file note confirms, if confirmation were needed, that the 9.23am 13 August email was clarifying the nature of the connection. The 9.23am email was not asserting or assuming that the event was a Liberal Party event, it was seeking to ascertain whether or not it could even be described as a Liberal Party event. Thus, the file note adds nothing to the force of the applicants' argument, rather the reverse. A failure to disclose a document which harms the applicants' cases cannot exacerbate any apprehension of bias on my part. This is so even if it is assumed that the file note was known to me on 17 August 2015. In fact, its existence was unknown to me until 27 August 2015.

205. Thirdly, neither the emails nor the file note were caught by any of the categories listed in the ACTU's 17 August 2015 letter.

206. Finally, any suggestion that the contextual account given by me on 17 August 2015 was, or might be thought, to be incomplete or misleading (ACTU supplementary written submissions, para 5) is rejected. Even the suspiciously minded observer would regard it as incumbent on the ACTU to identify how the statement was or might be misleading. Yet the submissions provided no hint of detail. In my contextual statement of 17 August

2015 I did not advert to my conversation with Mr Stoljar SC referred to above because I did not regard that level of detail as necessary or, given the timing of the conversation, relevant. A fair-minded person could not reasonably expect the provision of an account by me of every detail and conversation touching on all matters concerning the Sir Garfield Barwick Address over a period of a number of years. A trial judge hearing an application for disqualification on the ground of apprehended bias typically states only the salient matters necessary to put the application in context, without going into exhaustive detail of every consideration or deliberation that might have occurred. That approach was followed here. The statement on 17 August 2015 was stated to provide 'some contextual background' to the relevant objective documents. (17/8/15, T:11.19) That background included all the salient matters relevant to the issues.

NECESSITY

207. The ACTU, in particular, and Counsel Assisting, provided submissions on the existence of the doctrine of necessity and on whether, if it existed, it applied to the present circumstances. This would only arise if the conclusion just stated had been different. Hence it is not necessary to deal with the submissions.

RELIEF

208. The ACTU, the CFMEU and the AWU differed to some degree as to the extent of relief in the event that apprehended bias had been established, and the ACTU wavered about it. Since apprehended bias has not been established, that issue too need not be resolved.

209. I dismiss the applications.

31 August 2015