

COURT: SUPREME COURT OF TASMANIA (FULL COURT)

CITATION: *R v Carter; Ex parte Gray* [1991] TASSC 97; [1991] 14 Tas R 247;
A90/1991

PARTIES: R
v
CARTER
ATTORNEY-GENERAL
GRAY, ex parte
McQUESTIN, ex parte

FILE NO/S: M203/1991
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**THE QUEEN v CARTER AND THE ATTORNEY-GENERAL
EX PARTE GRAY AND MCQUESTIN**

REASONS FOR JUDGMENT

**FULL COURT
COX J
UNDERWOOD J
SLICER J
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Orders of the Court

Orders *Nisi* discharged.

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**THE QUEEN v CARTER AND THE ATTORNEY-GENERAL
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REASONS FOR JUDGMENT

**FULL COURT
COX J
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1 By Letters Patent dated 17 December 1990 the Governor in Council for the State of Tasmania commissioned the respondent, the Honourable William Joseph Carter, QC, ("the Commissioner"), to enquire into and report upon a number of matters in consequence of an attempt which had been made to bribe James Glennister Cox to cross the floor of the House of Assembly of this State following the general election of that House which took place on 13 May 1989. The matters to be enquired into were as follows:

- 1 The events, facts and circumstances leading to and surrounding the attempt to bribe James Glennister Cox to cross the floor of the House of Assembly following the general election for that House which took place in 1989.
- 2 Whether any person or persons other than those charged with crimes were involved, directly or indirectly, in the attempt to bribe James Glennister Cox.
- 3 If there were any such person or persons involved in the attempt:
 - (a) who, and what was their involvement; and
 - (b) whether that involvement was improper or unlawful.

The Commissioner was further directed to make such recommendations as it might appear desirable including:

- (a) recommendations for payment of legal costs incurred by any witness whose conduct had been the subject of a question before the Commission but who had been exonerated by it; and
- (b) recommendations for measures to be adopted better to ensure the propriety of donations to politicians, political parties or candidates for election.

A similar Commission was issued to the Commissioner by the Governor in Council for the State of Victoria on 24 January 1991.

2 On 7 March 1991 the Commissioner wrote to the Premier of this State requesting amendment of the terms of reference set out in the Letters Patent. Following that letter, the terms of reference were amended on 13 March 1991 by substituting, for term 2, a new term to this effect:

"2 Whether any person or persons other than Edmund Alexander Rouse and Anthony Aloï were involved, directly or indirectly, in the attempt to bribe James Glennister Cox."

and by adding a fourth term as follows:

"4 The facts and circumstances concerning the safety deposit box held at the branch of the Westpac Bank at 75 Brisbane Street Launceston from which \$10,000 was taken for use in

connection with the attempted bribery, including

- (a) the ownership of the money in the box at any time;
- (b) the means by which such money has been accumulated;
- (c) any accounting procedures used by the owner in relation to such money;
- (d) the uses of any such money including its use for the attempted bribe and for donations to politicians, political parties or candidates for election."

Similar amendments were made to the Victorian Letters Patent on 30 April 1991.

3 The Prosecutor, now the leader of the Opposition, Robin Trevor Gray, was Premier of this State at the time of the attempted bribe, that bribe having been offered to Mr Cox in certain telephone calls made by one Anthony Aloï, at the instigation of Edmund Alexander Rouse, a Launceston businessman with extensive interests in ENT Ltd ("the company"). Mr McQuestin was a fellow director of Rouse on the Board of the company and at Rouse's request made arrangements to procure for him \$10,000 in cash in used notes from a safe deposit box belonging to the company. This money was used in the bribe attempt, \$5,000 being actually delivered to Mr Cox's home and the remaining \$5,000 being sent by Rouse to Aloï's place of employment for later delivery to Mr Cox. Both Mr Gray and Mr McQuestin received summonses to appear before the Royal Commission and were there examined on oath concerning their knowledge of and participation in the events surrounding the attempted bribe. They claim that a Writ of Prohibition should issue to prohibit the Commissioner from reporting and certifying to the Executive Councils of Tasmania and Victoria pursuant to his amended commissions dated 13 March 1991 and 30 April 1991 respectively, in relation to each of the Prosecutors on the ground that the Commissioner has shown actual bias against them, or alternatively, that fair minded persons might reasonably apprehend that the Commissioner was biased against them. The Order *Nisi* was made returnable before the Full Court.

4 At the commencement of the hearing, counsel for the Respondent Commissioner announced that the Commissioner would abide the outcome of these proceedings and did not seek to be heard. This was in accordance with what the High Court described as the usual course in such proceedings in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, at p35. Thereupon the Attorney-General for the State of Tasmania sought to be joined as a Respondent thereby enabling him to contest the Prosecutors' case for relief. In view of the absence otherwise before the Court of what Lord Dunedin described as a "proper contradictor, that is to say, someone presently existing who has a true interest to oppose the (relief) sought" (*Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, at p448), the Court would have had no hesitation in hearing the Attorney-General as *amicus curiae* and such a course was not opposed by the Prosecutors. However that status was not such as to enable the Attorney to place evidentiary

material before the Court, to cross-examine the deponents relied upon by the Prosecutors, or otherwise to participate in as full a manner as he desired. After hearing argument, we made an order joining him as a Respondent in each proceeding and said we would give our reasons for doing so at a later time. We do so now.

- 5 Although Mr Graham, QC, Senior Counsel for the Attorney-General, relied in the alternative on an inherent power in the Court to permit his client to intervene in the proceedings, his primary submission that by virtue of s58(1)(j) of the *Supreme Court Civil Procedure Act* 1932 the Attorney-General should be made a party to them is, in our view, sound, and the appropriate means of giving effect to that provision is to make an order under O.18, r.11(2). Section 58(1)(j) provides:

"Subject to the provisions of subsection (4), and of section 62, and the Rules of Court, the Attorney-General shall be made a party to, or be cited to see proceedings in (according to the form of the proceeding), every original proceeding not instituted in his name –

- (j) in which any judgment or order might be given or made which would affect or concern some right or interest of His Majesty in right of this State."

The provisions of s58(4) and s62 do not bear upon the point. The primary meaning of the term "original proceeding" is given in s3 as "any civil proceeding in the Court which is not a proceeding in a pending cause or matter", while proceedings of the kind before us are clearly "civil proceedings" within the meaning of s3, by virtue of s9(4) which provides:

"All proceedings in the Court for and in connection with any writ of *certiorari*, writ of *prohibition*, writ of *mandamus*, or writ of *habeas corpus* shall for the purposes of this Act (including appeal) be deemed civil proceedings, notwithstanding that the writ relates to or affects, or would if granted relate to or affect, a criminal cause, matter, or proceeding, or a judgment, order, conviction, inquisition, or other determination made or given in a criminal cause, matter, or proceeding."

- 6 In our view the orders sought by the Prosecutors would "affect or concern some right or interest of His Majesty in right of this State". The Letters Patent issued in the Sovereign's name authorise and appoint the Commissioner to inquire into and report upon the matters set out in the terms of reference we have cited above, authorise him to call witnesses and examine them, and direct the Commissioner to reduce his findings into writing and report and certify to "Us in Our Executive Council in Tasmania" by a given date. The Crown clearly has at the very least an interest to receive a report and certificate in relation to any finding by the Commissioner concerning each Prosecutor. The orders sought would prevent the furnishing of that report and certificate so far as it related to each Prosecutor. Such orders, if either is warranted, would frustrate the full attainment of the objects of the Letters Patent by preventing the presentation of a report, whether implicating or exonerating him, concerning a person who has been examined by the Commissioner. We think it is clear that in

these circumstances the Attorney-General ought to have been made a party. Although an interesting argument was advanced on behalf of the Prosecutors against the proposition that the Court had an inherent power to permit the Attorney-General to intervene, or, should it be found to exist, against its exercise, we find it unnecessary to comment upon the differing views expressed on these points by Hutley JA in *Corporate Affairs Commission v Bradley; Commonwealth of Australia (Intervener)* (1974) 1 NSWLR 391 and by Street CJ in *Rushby & Anor v Roberts & Anor* (1983) 1 NSWLR 350.

7 We doubt that we possess any jurisdiction in relation to the Commission issued by the Governor in Council for the State of Victoria and no argument has been addressed to us that we do. However, we have been told by counsel appearing for the Attorney-General for the State of Tasmania that acting on advice received by the Attorney-General for the State of Victoria he could assure the Court that the latter did not seek to be made a party to the proceedings nor to oppose the making of an order, if that were thought appropriate by the Court, which would prevent the Commissioner reporting under his Victorian Letters Patent.

8 The effect of the order sought by way of Prohibition is to enjoin the Royal Commissioner from publishing or delivering his report to the Executive. This approach was taken because when these proceedings were instituted the Commission had concluded its task in the hearing of evidence and at the time of the commencement of the hearing of these proceedings before the Full Court, the Commissioner had heard closing addresses from counsel appearing before it. We are not therefore faced with the question as to whether the Court has power to quash a report once published, such question being left open by the Privy Council in *Mahon v Air New Zealand Ltd and Others* [1984] 1 AC 808 and see also *Reynolds v Attorney-General* (1909) 29 NZLR 24 (referred to in *Re Thomas* (1982) 1 NZLR 252 at p258).

9 Three questions arise in relation to whether this Court can grant the relief sought:

- whether prohibition can lie against a Royal Commission;
- whether the Supreme Court has power, authorised by statute, to make the orders sought;
- the standing of the parties and their entitlement to relief.

10 Historically, there was an approach that Royal Commissions were not susceptible to judicial review by way of prerogative relief. In part that was because Royal Commissions, at common law, had no coercive powers and were regarded as investigative and reporting bodies. They did not possess the characteristics of judicial tribunals. There was, additionally, a contention that they were not empowered to investigate particular questions of criminal conduct. (See *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73). But given extensive statutory powers of compellibility of witnesses, the obtaining of documentation etc., their conduct inevitably acquired judicial characteristics with the attendant requirement that regard be paid to the principles required by "natural justice". As such they became subject to judicial

review. In Australia that process has become common because of the provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (see *Ross v Costigan* (1982) 41 ALR 319) but such process did not preclude the operation of the common law. (See *Hammond v Commonwealth* (1982) 152 CLR 188; *Sorby v Commonwealth* (1983) 152 CLR 281).

- 11 In *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602 the Full Court of the High Court of New Zealand said (at p615):

"We are satisfied that dicta in earlier cases to the effect that a Commission of Inquiry is immune from *certiorari* or prohibition because it is doing no more than inquiring or reporting are now out of date, and are not in accord with the Court's responsibility to ensure that all tribunals carrying out functions (either investigative or decisive, or both) which are likely to affect individuals in relation to their personal civil rights, or to expose them to prosecution, act fairly to those concerned."

The appropriate test is not one of jurisdiction but whether or not the Prosecutor has a "right" which could be affected by the conduct of the Commission. Thus in *Mahon v Air New Zealand Ltd* [1984] 1 AC 808, the Privy Council recognized the Court's power to quash an order of the Royal Commissioner that the respondent to that appeal pay certain costs associated with the hearing before him which order had been made in breach of the rules of natural justice and procedural fairness. In Australia in *R v Collins; Ex parte ACTU – Solo Enterprises Pty Ltd* (1976) 50 ALJR 471, Stephen J adverted to "the exclusively informative function of Royal Commissions" (at p473) giving them their special character involving e.g. no determination carrying legal consequences (per Dixon J in *McGuinness v Attorney-General (Victoria)* (*supra*) and refused to grant declaratory relief on the basis that the report neither directly affected rights nor was a condition precedent to the exercise of such rights. Nevertheless in that decision Stephen J at p473 specifically referred to the case of *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509 as providing:

"A recent instance of a tribunal of inquiry and report whose report nevertheless was by this Court regarded as giving rise to legal consequences such that curial intervention should follow any failure to observe, in the process of inquiry, the requirements of natural justice."

- 12 The development of the rationale for the intervention of the courts to protect rights was extended to embrace the concept of legitimate expectations. (See *Kioa v West* (1985) 159 CLR 550 at pp626–627; *Attorney-General v Quin* (1990) 170 CLR 1 at p20; *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648).

- 13 The only authority which counsel for the Attorney-General could cite tending against the view that Prohibition lies to a Royal Commission is *Testro v Tait* (1963) 109 CLR 353 where a majority consisting of McTiernan, Taylor and Owen JJ (Kitto and Menzies JJ dissenting) held that an inspector appointed under the Companies Act 1961 (Vic) was not obliged before reporting on a

company's affairs to give the company an opportunity to answer to explain matters which might give rise to adverse findings in the report as the investigation of the inspector was not "in the nature of a judicial proceeding in which the rights of the company which is being investigated may be prejudicially affected by a report made to the Minister" (at p363).

- 14 In *Annetts v McCann* (1990) 170 CLR 596 in the joint judgment of Mason CJ, Deane and McHugh JJ their Honours said at p600:

"It is beyond argument that the view of the majority in (*Testro v Tait*) would not prevail today: see *Mahon v Air New Zealand* (*supra*); *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296."

Annetts v McCann was a case involving the judicial review, not of a Royal Commission, but of a coroner's inquest and in his judgment Brennan J expressly stated at p604:

"The focus of judicial review is a power created by statute conferred on an authority prescribed by statute. (It is unnecessary to consider whether the remedies of judicial review are available in respect of an exercise of prerogative power)."

He too however, at p609, cited Lord Diplock's dictum concerning a Royal Commission in *Mahon v Air New Zealand Ltd* (*supra* at p820) that the repository of a power to inquire and make findings and who contemplates making an unfavourable finding:

"Must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interest (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made."

His Honour applied that general principle to the coronial power to make findings on evidence taken at an inquest in the absence of any exclusion of its application in the statute relating to the performance of the coroner's functions. Although the High Court has not yet specifically determined that a Writ of Prohibition will lie to preserve the rights or legitimate expectations of those affected by the findings of a Royal Commission, we think such a view is consistent with the approach taken in the cases to which we have referred.

- 15 The statutory power for this Court to grant Prohibition is contained in ss76 and 86 of the *Supreme Court Civil Procedure Act* 1932 which relevantly provide as follows:

"S76(1) Subject to the provisions of this Act and any other statute (whether passed before or after the commencement of this Act), the Court and every judge thereof shall have jurisdiction to grant a Writ of Prohibition directed to –

- (i) any person or tribunal charged by law with the duty, or invested by law with the power, to determine judicially and not merely ministerially any question or matter whatsoever, who or which has made or given, or is about to make or give, any determination which has affected or purports to or will affect any right or property of, or has imposed or purports to or will impose any liability on, any person, or which has determined or purports to or will determine the existence or non-existence of any right or liability or any condition of any right or liability.

S86 – Nothing in this part contained shall be so construed as to

- (a) deprive the Court or any judge thereof of any jurisdiction now possessed by the Court or a judge thereof to grant any writ of *certiorari*, prohibition, or *mandamus*, ... but any such jurisdiction shall be exercised in accordance with the provisions of this Act and the Rules of Court."

Counsel for the Attorney-General submitted that the jurisdiction granted by s76 was conditional upon the respondent Commissioner being a person charged by law with the duty, or invested by law with the power, to determine judicially, and not merely ministerially, any question or matter and that the Commissioner did not have such power or duty, his responsibility being merely to enquire and report. We think there is a strong argument for the proposition that as the Commissioner is obliged by his terms of reference to make recommendations for payment of legal costs incurred by any witness whose conduct has been the subject of a question before the Commission but who has been exonerated by it, the Letters Patent do invest him with a power in the nature of a judicial power to determine a question of blame or exoneration from blame. Be that as it may, however, the Court's common law power to grant a Writ of Prohibition is expressly preserved by s86(a), and see also s2(4)(a) of the Act which preserves the jurisdiction, powers and authority possessed by the Court immediately before the enactment of the *Supreme Court Civil Procedure Act 1932* except insofar as they are taken away by express enactment. We agree with the view expressed by Green CJ in *R v The Minister of Sea Fisheries; Ex parte The National Australia Bank Ltd* (an unreported decision of the Full Court, No 42/1991 ([1991] Tas R 70)) where his Honour, speaking of s75 which deals with the remedy of *certiorari*, said at p7:

"Section 75 is contained within Part VII of the Act. Part VII comprises a comprehensive set of provisions which regulate *inter alia* the exercise of the Court's jurisdiction to grant the writs of *certiorari*, prohibition and *mandamus*. But notwithstanding the comprehensive nature of the provisions which comprise Part VII and notwithstanding the provisions of s75(1) which confer upon the Court the power to grant a writ of *certiorari* as opposed to merely preserving or confirming the Court's common law power to do so, s86(a) makes it clear that Part VII cannot be regarded as a

code."

Having regard to the view we have formed of the proper disposition of these proceedings, it is unnecessary to express a final view on the submission but as presently advised, we feel confident that the Court would have power to grant Prohibition if the Prosecutors could establish the grounds upon which they rely.

16 Consistent with the decision in *Annetts v McCann* (*supra*) the question of standing is dependent upon the nature of the right or rights which could be affected by the Commission, or conversely detriments which could flow from a determination of the Commission. In the case of the Prosecutor Mr McQuestin, the following rights were advanced:

- (1) the preservation of his reputation;
- (2) a right of expectation that he would receive procedural fairness;
- (3) the right to have any possible recommendation as to the laying of criminal charges to be considered fairly (although in our view it could be described as a right to the presumption of innocence);
- (4) a right to indemnification for his legal expenses.

There can be no doubt that reputation can be regarded as a right (see *Heatley v Tasmanian Racing Commission* (1977) 137 CLR 487, and *Annetts v McCann* (*supra*)) and accordingly it is not necessary for us to determine whether categories 2 and 3 are rights or whether, consistent with the approach of Brennan J in *Annetts v McCann*, methodologies for the ascertainment of rights and the likelihood of detriment.

17 The Prosecutor Mr Gray claimed that his following rights could be affected:

- (1) reputation;
- (2) enjoyment of livelihood;
- (3) right of indemnity for legal costs, this arising out of the terms of the Commission.

and that conversely, he would be subject to possible detriment by:

- (4) the adverse impact on the above enumerated rights;
- (5) the liability to the hazard of prosecution.

On any set of criteria it is clear that Mr Gray has individual rights which could be affected by the conduct of the Commission.

18 For the above reasons we hold that the Supreme Court has jurisdiction to enjoin the Royal Commissioner from delivering his report to the Governor in Council in so far as his Commission is derived from the State of Tasmania. We refrain from making any such decision in relation to his Commission granted by the Governor in Council for the State of Victoria. We hold that both Prosecutors

have rights which could be affected by the conduct of the Commission and accordingly that both Prosecutors possess standing.

19 Before we embark upon a consideration of the grounds and particulars raised by the Prosecutors it is appropriate that we advert to the test of bias and to the standard of proof required to establish it.

20 Bias can only be considered in the context in which it is claimed or raised. In part this will be determined by the subject matter of the inquiry. A Commission set up to inquire and report into reform of procedural laws may not be held to be biased simply because the Commission is entrusted to a person with known views towards the reform of the law. (See, for example, the Commissions set up to reform the law in the early part of the 19th Century, Holdsworth *History of English Law* Vol XIII at p272). On the other hand, a Commission charged with the investigation of a particular incident such as the Erebus disaster could be seen to portray bias if a form of prejudgment could be perceived in the approach taken by the Commissioner.

21 Three decisions of the High Court establish the test. In *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 the Court was dealing with a factual situation arising out of statements of a trial judge to the effect that he would not accept the evidence of either of the parties unless such evidence was corroborated. The statement was made before either party had been examined on their respective affidavits. Prohibition was granted on the basis that the expression of preconceived views gave rise to a reasonable suspicion of bias. The approach taken in the joint judgment of Barwick CJ, Gibbs, Stephen and Mason JJ, was based on the "fundamental importance that the public should have confidence in the administration of justice" (at p263). The test propounded by their Honours was:

"... if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced and impartial." (at p262).

and

"... if it might reasonably be considered that he could not bring a fair and unprejudiced mind to the decision." (at p263).

and finally:

"The question is not whether there was a real likelihood that Watson J was biased. The question is whether it has been established that it might reasonably be suspected by fair-minded persons that the learned judge might not resolve the questions before him with a fair and unprejudiced mind." (at p264).

In his dissenting judgment Jacobs J preferred the following:

"The test is whether a real apprehension of bias would be raised in the mind of a reasonable and intelligent man in the circumstances of the case" (at p267).

- 22 Four years later, the Court had cause to consider the question in *R v Lusink; Ex parte Shaw* (1981) 55 ALJR 12 when it considered the circumstances where a judge of the Family Court made some preliminary observations concerning a maintenance and property settlement offered by one of the parties, and who subsequently declined to disqualify herself. In the course of his judgment, Gibbs ACJ said, in discussing *Watson* (*supra*):

"However in some cases the words or conduct of the judge may be such as to lead the parties reasonably to think that the judge has prejudged an important issue in the case and then prohibition may issue. Of course, the court which is asked to grant prohibition will not lightly conclude that the judge may reasonably be suspected of bias in this sense; it must be 'firmly established' that such a suspicion may reasonably be engendered in the minds of the parties or the public..." (at p14).

and concluded with:

"On the whole I consider that it could not reasonably be suspected that the learned judge had prejudged the present case." (at p15).

Stephen, Murphy and Wilson JJ agreed with the analysis of Gibbs ACJ

- 23 In the subsequent case of *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 the Court settled on the term "reasonable apprehension" in order to avoid unintended nuances of meaning. The Court stated that except in cases where there is an overriding consideration of necessity, special circumstances or the consent of the parties (see *Vakauta v Kelly* (1989) 167 CLR 568 – a case involving waiver), the test should be whether "a fair minded observer might entertain a reasonable apprehension of bias". (at p300).

- 24 The standard of proof required to prove bias, whether actual or apprehended, is the civil standard. The words of Dixon J (as he then was) in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at pp361, 362 remain apposite. His Honour said:

"The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence

of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

- 25 A tribunal called upon to determine the issue of actual bias rarely has the opportunity to properly investigate the actual state of mind of the decision maker. To do so with any degree of thoroughness would normally require the interrogation and cross-examination of that decision maker. More often, the tribunal is called upon to determine whether bias could in all the circumstances reasonably be apprehended by a fair minded observer. In determinations of that kind it has been said that the court's use of "words such as 'likelihood', 'suspicion' and 'apprehension' are round about ways of saying that the court's judgment is ultimately conjectural, leaving unsullied the court's confidence in the particular calibre of the particular decision maker concerned", (Aronson and Franklin, *Review of Administrative Action* (1987) edn p207). Even so, as has been pointed out above in the passage from the judgment of Gibbs ACJ in *R v Lusink; Ex parte Shaw* (*supra* at p14):

"The Court which is asked to grant Prohibition will not lightly conclude that the judge may reasonably be suspected of bias in this sense; it must be 'firmly established' that such a suspicion may reasonably be engendered in the minds of the parties or the public."

Where the allegation is of actual bias rather than of apprehended bias, there may be a suggestion of personal moral turpitude about which the tribunal of fact might not feel it could reach a sound and prudent judgment without more cogent evidence.

- 26 We have said that bias needs to be considered in the context in which it is claimed or raised. We are concerned with a Royal Commission. As JD Holmes QC wrote in (1955) 29 ALJ 253, Royal Commissions have great antiquity, perhaps the most famous being that of *Domesday*. The authority to issue a Royal Commission has been said to lie in the prerogative. See *McGuinness v The Attorney General (Vic)* (*supra*); *Johns & Waygood Ltd v Utah Aust. Ltd* [1963] VR 70. However, since it was established that at common law the prerogative has no power to compel testimony (*McGuinness* at pp98, 99) the power to issue a Royal Commission is no more extensive than the power every citizen has to inquire into and report on such matters as he or she considers appropriate. See *Clough v Leahy* (1904) 2 CLR 139 at p157. For coercive powers, Royal Commissions in this State are dependent upon statute, viz the *Evidence Act* 1932, PtII, Div2.

- 27 In the present case, the Letters Patent obliged the Commissioner to inquire into, report on and make recommendations with respect to the various matters set out therein. The Letters Patent prescribed no procedure for the discharge for these obligations. There are no procedural requirements imposed by statute. Accordingly, the manner in which the Commissioner went about his work was for him to determine subject only to the duty imposed by the common law, to comply with the requirements of natural justice.

- 28 The "fair minded people", referred in the majority judgment in *R v*

Watson; Ex parte Armstrong (supra at p263) would be aware that one of the Commissioner's duties was to inquire into whether any person or persons other than Rouse and Aloï was or were involved in the bribe attempt and if so to what extent. Suspicion or apprehension of bias by such people could not reasonably be entertained without their taking into account the Commissioner's obligation to investigate and inquire into the possible existence of serious crime. The Commissioner referred to this aspect of his commission in the course of his opening remarks on the first day of the public sittings. He observed that if persons other than Rouse and Aloï were improperly or unlawfully involved "it is unlikely that such persons would voluntarily assist the work of the Royal Commission by providing evidence of their own involvement." The Commissioner went on to say:

"On the contrary, in the ordinary course of human affairs, it can be expected that such persons would endeavour to conceal their involvement. It needs, therefore, to be understood that the task of the Royal Commission, from the outset, was not an easy one. On the other hand, it is required to go about the task of investigation as effectively as it can so as to address the questions committed to it by the Letters Patent."

- 29 In *R v Brewer; Ex parte Renzella* [1973] VR 375 Adam J considered the position of stewards of a racing club, the rules of which obliged the stewards to act, in effect, as investigators, accusers and judges. His Honour referred to *Ex parte Angliss Group* (1969) 43 ALJR 150; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 and *Russell v Duke of Norfolk* [1949] 1 All ER 109 as authority for the well known proposition that the requirements of natural justice will depend upon the circumstances of each case. His Honour found on the material before him, that the stewards were prepared to keep an open mind on the issue they had to determine notwithstanding that they had earlier made an affidavit deposing to the existence of facts contrary to the Prosecutor's case. His Honour said at p383 that the test was whether right minded persons familiar with the rules of racing would have reasonable grounds for suspecting that the stewards had prejudged the case. The same approach has been taken in cases concerning statutory boards charged with the duty of investigating and adjudicating upon complaints of professional misconduct. See *R v Optical Board of Registration; Ex parte Quurban* [1933] SASR 1; *R v Medical Board of South Australia; Ex parte S* (1976) 14 SASR 360. In the latter case King J (at p377) concluded his judgment with the following passage:

"It is of great importance that those who are to exercise judicial or quasi judicial functions in relation to the determination of guilt should keep themselves as free as the nature of their duties permits, from the investigation of the conduct complained of and the preparation of the case. They should, moreover, take every care not to prejudge the issue and not to give the impression that there has been any measure of prejudgment. These principles have been laid down and emphasised in many cases."

- 30 It is perhaps for that reason there has been a tendency for inquisitorial

Royal Commissioners to adopt a passive role, where evidence is led by counsel assisting the Commissioner and those with an interest in the outcome are represented by counsel. See *Procedural Aspects of a Royal Commission* (1951) 24 ALJ 386; *The Legal Position and Procedure Before a Royal Commissioner* (1961) 35 ALJ 271; Hallett, *Royal Commissions and Boards of Inquiry* p155 and following. However, Dr Hallett observes at p156:

"Whilst inquisitorial inquiries are usually conducted in such a way that the Commission or Board takes a passive role in the inquiry, it is suggested that the persons conducting such inquiries should remember that they are charged with making the inquiry and not counsel assisting. In other words, inquisitorial inquiries are, in reality, very different from the normal adversary system which is basic to English law, and attempts to adapt the standard adversary techniques to an area where they are somewhat inappropriate will not always be successful."

Dr Hallett describes the function of counsel assisting the Commission to assemble and present the relevant evidence (p214), a task which, in the present case, would of necessity involve some investigatory work.

- 31 The fair minded observer of the proceedings of the Royal Commission would bear in mind that, although obliged to comply with the requirements of natural justice, the task of the Commissioner was not the same as that of a judicial officer who has no investigative function to perform. Even in that situation the passive role recommended by Denning LJ (as he then was) in *Jones v National Coal Board* [1957] 2 All ER 155 at p159 that he should, "hearken to the evidence, only asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure" has not been espoused by Brennan, Deane and Gaudron JJ who, in *Vakauta v Kelly* (*supra*) expressed their disagreement with the commendation of judicial silence as a counsel of perfection in respect of a trial judge sitting without a jury. They said (at p571):

"It seems to us that a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated."

Thus, the fair minded person would not be quick to suspect bias if the Commissioner intervened in the cross-examination of certain witnesses in a robust way and on occasions to an extent in excess of that expected of a judicial officer. Similarly, the fair minded observer would not be quick to suspect bias upon learning that the Commissioner was, in general terms, directing counsel assisting to pursue certain lines of inquiry nor even if he learnt that the Commissioner, as his inquiry progressed, began to entertain certain tentative views about key witnesses. The Commissioner's duty to inquire as well as to report and recommend is a factor which the fair minded bystander will have to the forefront of his or her mind when considering whether the Commissioner's

conduct, relied upon by the Prosecutors reasonably gives rise to an apprehension of bias.

32 To appreciate the particulars of bias said to be actual or reasonably apprehended in these proceedings, it is necessary to give a brief history of the events preceding the sittings of the Royal Commission and an outline of its progress.

33 In April 1990 Rouse pleaded guilty to one count of offering a bribe to a Member of Parliament contrary to s72 of the *Criminal Code* and was sentenced to three years' imprisonment. He also pleaded guilty to a second count of improper use of his position as an officer of a company contrary to s229(4) of the *Companies (Tasmania) Code* in respect of the use he had made of the \$10,000 taken from the company's safe deposit box. On that count he was fined \$4,000. Later that year Alois pleaded guilty in the County Court of Victoria in respect of his involvement in the attempted bribe and received a sentence of imprisonment which he had completed serving by the time he was called to give evidence before the Royal Commission. Rouse is still serving his sentence. On 27 November 1990 the Premier announced that a Royal Commission would be held into the bribery attempt.

34 On 22 January 1991 the Commissioner gave a press conference and among other things indicated that he did not expect to take evidence in camera, and that in his view it would be a very extraordinary turn of events which would require him to do so. Asked whether he thought it improper that the Attorney-General should be involved in drawing up the terms of reference, he replied that he could not see any problem with the Attorney-General doing so as first law officer of the Crown and that he did not know whether the holder of that office would be called as a witness. The Commissioner also said that a request had been made for assistance from the Australian Federal Police as he would like to have the assistance of expert investigators who had not yet had any connection with the process to date and who could bring a new investigative mind to that process and build on what had so far been done.

35 On 24 January 1991 the "Mercury" newspaper reported that the Commissioner had spoken out the previous day to defuse a political storm involving the Premier and the Leader of the Opposition. It reported that earlier that day the Leader of the Opposition, Mr Gray, had demanded the resignation of the Premier for having allegedly misled Parliament by wrongly asserting that the Commissioner had been involved in drawing up the terms of reference for the Royal Commission. The report claimed that Mr Gray had cited the press conference of the Commissioner on 22 January 1991 as proof that the Commissioner had not taken part in setting the terms of reference. The report quoted the Commissioner as asserting (on 23 January 1991) that he had in fact been consulted about them and that he did not want to be the focus for any kind of political debate.

36 The next day the "Mercury" newspaper, under a headline, "More Flak For Bribe Inquiry Chief", reported criticisms allegedly made by the president of the Police Association of Tasmania to the effect that the Commissioner had impliedly declared that he had no confidence in the ability of Tasmanian

detectives to carry out "quality investigations".

37 On 14 February 1991 the Commissioner wrote to the Attorney-General seeking amendments to the *Evidence Act* 1910 which would grant him powers of punishment for contempt so as to "deal expeditiously with those intent upon frustrating the purpose of a Royal Commission" by failing, for example, to answer a summons, to produce documents or to give evidence. He submitted that adoption of his recommendations would increase the effectiveness of his own enquiry and would be of considerable benefit to any Royal Commission appointed in Tasmania in the future.

38 Some time prior to 25 February 1991 (the Commissioner later said in a public hearing on 22 April 1991) Commission staff approached Rouse in prison and obtained an indication from him that he was prepared to co-operate with them and that he would make a statement to them, subject to obtaining legal advice that the process of obtaining that statement was not unfair. After discussions and correspondence between Commission staff and his solicitor, Rouse refused to provide a statement. In a letter of 25 February 1991 to Counsel Assisting the Royal Commission, Mr Evans, Rouse's solicitor, wrote:

"We appreciate that you would undertake not to disclose any information obtained and have no doubt that you would use your best endeavours to honour that undertaking. Experience suggests however that inevitably anything Mr Rouse says will find its way to those who seek to vilify and humiliate him and give them further opportunities to do so."

39 On 21 February 1991 the Commissioner presided at the first sessions of the Royal Commission. He conducted a public hearing, gave leave to a number of counsel to appear on behalf of witnesses who anticipated being called, and sat to receive documents on summons, some of which were produced by Mr Gray. We will return to the circumstances of this occasion at a later time as they are alleged by Mr Gray to be evidence of bias.

40 On 7 March 1991 the Commissioner wrote to the Premier seeking the amendment of the terms of reference in due course incorporated in the second Letters Patent. The letter commenced with the following paragraph:

"Counsel Assisting the Commission have been pursuing their task for a number of weeks and it has now become clear that the terms of reference of the Royal Commission issued to me may not be adequate to enable me to complete my task without some delay. It has also become clear that every endeavour will be made – both politically and within the Commission's hearings – to obstruct my work."

The making of this statement is alleged by both Prosecutors to be evidence of bias by the Commissioner against each of them.

41 On 13 March 1991 the Commissioner conducted an in camera hearing, receiving evidence on oath from Rouse. His solicitor counsel, Mr Evans, was permitted to attend upon giving an undertaking that he would not disclose to any

person the evidence adduced in the hearing in the course of Rouse's evidence nor to discuss the same with any person other than his client, subject to his being at liberty to disclose the evidence to the Supreme Court should that become appropriate. Mr Evans submitted that to require him to give such an undertaking amounted to a denial by the Commissioner of natural justice in the sense of procedural fairness to Rouse. In the course of his submissions, Mr Evans claimed that in his presence the Chief Superintendent of the prison had advised Rouse that pursuant to a request from the Commissioner, sent by facsimile to the prison, Rouse was not to see or communicate with any person outside the prison, other than Mr Evans, until he had concluded his evidence, and protested at the fact that such a request should have been made. The Commissioner acknowledged that on 13 March he had made a request to the prison authorities that Rouse not be permitted to communicate with anybody who might have an interest in the Royal Commission, with the exception of his solicitor, until that day. He made it quite clear that the restriction was not intended to operate longer than the close of business that day. The letter is in evidence, although Mr Evans did not see it until after the commencement of these proceedings, and contains a request in these terms:

"I am writing to request that you deny Mr Rouse all visitors – with the exception of his solicitor, Mr Peter Evans – until he appears before the Commission on Wednesday the 13th March 1991. I understand that this is not a course of action normally followed in the Prison; however, it would greatly facilitate the work of the Commission if it could be done."

42 The examination in camera of Rouse continued and concluded on 14 March. On that day his wife also gave evidence in camera in response to a subpoena. Mr McQuestin likewise gave evidence in camera on that and the following day. He had also declined to make a statement to Commission staff. The manner in which Mr McQuestin was treated on that occasion is also the subject of complaint by him before this Court.

43 The fact that the Commissioner conducted in camera hearings was the subject of criticism in the press, as was the statement of the Commissioner in his letter to the Premier of 7 March, which had been released to the public on 13 March. The Commissioner had on 8 March, by letter to Mr Evans, advised that he would conduct such hearings, that all evidence given in private would be made public at a later time, and that he would give his reasons for the Royal Commission sitting in private session at an appropriate time. Before he had given those reasons (which he publicly announced on 22 April 1991), "The Australian" newspaper of 14 March under the headline, "Rouse Inquiry Chief Fears Political, Legal Obstruction", reported on the letter to the Premier and cited the Commissioner's concern about obstruction we have set out above. The report claimed that counsel for both Prosecutors had attempted the previous day to gain entry to a "secret hearing of the Commission to take evidence from Rouse". They were reported as having said they wanted to support Rouse's counsel, Mr Evans, that Rouse's evidence should be heard in public, and that refused entry, they had contacted senior Counsel Assisting the Commissioner, Mr Chesterman, QC, demanding a retraction of the Commissioner's allegations of political and legal obstruction and to complain at their lack of notice and

access to hear Rouse's evidence. They were also reported as saying that it was unsatisfactory for Rouse to give evidence in secret and that only by hearing Rouse *viva voce* could his answers be correctly understood. The "Mercury" newspaper of the same date carried a similar story and alleged that counsel for the two Prosecutors "were strongly critical of the decision to hold the Rouse hearing in private and of the terminology used by Mr Carter in his letter".

44 Thereafter Mr Porter, counsel at the Commission for Mr Gray, wrote a number of letters to Commission staff seeking a public disclaimer of any suggestion or implication that he or his client was the subject of the Commissioner's comment. The Secretary to the Commission replied on 18 March saying that the Commissioner did not intend to reply to Mr Porter's letter other than to say that it contained a number of errors of fact and that the conclusions expressed were unjustified. On 8 April Mr Porter took the matter up again with Mr Chesterman, QC, and received an assurance that "he cannot see under any circumstances how anything in the letter to the Premier or indeed (Mr Porter's) letters will raise any difficulty or is going to affect any views of credit or form the basis of any decision making process as far as it relates to (Mr Gray) but if that is going to be the case he gives (Mr Porter) a categorical assurance that (the latter) will be given proper and adequate notice."

45 By early April the Commissioner's recommendations for the amendment of the *Evidence Act* were receiving the attention of the legislators. On 6 April the "Mercury" newspaper, under a headline, "Bribe Probe Boss Under Fire", reported that Mr McKay, MLC, had said he would move to have the Commissioner brought before the Bar of the Legislative Council to be cross-examined about his claims of political interference and that the Legislative Councillor was critical of the decision to hold hearings in private with Rouse. The newspaper also reported that Tasmanian lawyers had condemned the proposed changes and quoted objections to them allegedly raised by the president of the Law Society. Further criticisms from Mr McKay were reported in the "Mercury" of 8 April.

46 On 16 April Mr Evans prepared a memorandum, contending that the amendments to the *Evidence Act* were unnecessary, for delivery to Mr Stopp, MLC and such other MLCs who might be interested. In it, he asserted that the Commission had sent a request to the prison that Rouse not be allowed to see or communicate with any person outside the prison, save for his solicitor, "until he had concluded giving his evidence to the Commission". So far as the duration of such state of isolation was concerned, this was clearly in conflict with the Commissioner's statement made at the in camera hearing of 13 March when Mr Evans had protested, and with the letter in fact sent which we have quoted. It was furthermore misleading because Rouse had not yet given evidence in public, the public sessions were not due to commence until 22 April, and it could reasonably be anticipated that Rouse would not conclude his evidence until some time thereafter. The clear implication of such an assertion was therefore that the Commissioner had requested that Rouse be left *incommunicado* for quite a substantial period of time – far more than the two days he had requested in his letter of 13 March. In addition, Mr Evans asserted that Mrs Rouse has been summoned to give evidence and to produce bank statements and deposit slips at a "secret" hearing of the Commission on 14

March and that "her belief was that, like others who were summonsed (sic) to produce documents, her involvement would be formal although she might subsequently be required to give evidence at the public hearing. She was in fact cross-examined for two hours, unrepresented by counsel. She believes she was ambushed."

47 On 19 April "The Australian" newspaper under a headline, "Rouse Counsel Attacks Inquiry", reported that Mr Evans had alleged to Members of Parliament that the Commission had "allowed Rouse's wife, Mrs Dorothy Rouse, to be cross-examined for two hours at a secret hearing, without counsel, when she believed she was just there to produce documents and misused its position by asking Hobart prison authorities to isolate Rouse so he could not speak to anyone outside the prison except his lawyer until he had completed giving evidence to the Commission, knowing full well it had no power to do so." The article contained other criticisms attributed to Mr Evans. At the hearing before us, Mr Evans conceded that his memorandum given to Mr Stopp, MLC, was undoubtedly the source of "The Australian" report.

48 On 22 April the continuous public hearings of the Royal Commission began. After taking some additional appearances, the Commissioner commenced proceedings by delivering reasons for his decision to conduct the in camera sessions of the Commission. He pointed out that if persons other than Rouse and Alois had been involved in the bribe attempt they would be unlikely to voluntarily assist the work of the Commission. Rouse was the only person known to the Commission to have full knowledge of the facts and circumstances leading to the attempted bribe, but in the investigation leading to his being charged, had exercised his right to silence and had provided no information to the police. In view of his plea of guilty he had also not given evidence to the court which sentenced him. The Commissioner had regarded it as vital that Rouse's version of events be obtained before the Royal Commission could properly commence its task. An approach had been made to him; he had, subject to the satisfaction of legitimate concerns, appeared willing to give a statement to the Commission, but despite procedures being devised to enable him to give such a statement without the risk of exposing himself to further criminal charges, he had declined to furnish it, ultimately on a ground which cast doubt upon the ability of the Commission and its staff to conduct its affairs efficiently and with probity. The Commissioner referred to Mr Evans' letter of 25 February, the thrust of which he said was that officers of the Commission, once in possession of Rouse's version, would improperly disclose it to others. The Commissioner had accordingly determined that the only way in which such version could be procured was by compulsion of law, but at a private session, so that if others had been involved they would not be made aware of that version and would be unable to tailor their own evidence so as to be consistent with it. He relied on the authority of *Clough v Leahy (supra)* as justification for the reception of evidence in camera by a Commission of Inquiry. He also adverted to the fact that he had previously indicated he intended to announce his reasons for holding sessions in camera and said that he regarded it as unfair that the Commission should be criticized for proceeding as it did without the critic knowing those reasons. In a brief reference to Mr McQuestin, he said that he appeared to the Commission to be a witness in possession of much information relevant to para(1) of the terms of reference, and that it was important that a

statement be obtained from him. He, too, had refused to co-operate with the Commission staff and refused to provide it with any information. For the same reasons as had impelled the Commissioner to act in relation to Rouse, Mr McQuestin was also summoned to give evidence in camera.

- 49 He then defended himself against one of the criticisms made of him by Mr Evans in his memorandum to Mr Stopp, MLC, and which had been quoted in "The Australian" of 19 April. He referred specifically to the report in that publication that Mr Evans had criticized the Commission because he had allowed Mrs Rouse to be cross-examined without counsel when she believed she was present only to produce documents. He said he did not know her state of mind when she attended; she had been summoned to give evidence and to produce documents; the Commission had at no time been asked to give leave for her to be represented by counsel; but that a firm of solicitors, shortly after she had given that evidence, had, purporting to act on her behalf, requested and been supplied with a transcript of her evidence and had raised no concern in relation to her having given evidence. He then said:

"It is that kind of baseless criticism which is being part of a concerted attempt to damage the reputation of this Royal Commission."

It is said that these words indicate bias on the Commissioner's part against the Prosecutors, suggesting that the Commissioner believed they were involved in that concerted attempt.

- 50 Turning to the amendment of his terms of reference and his letter to the Premier of 7 March, the Commissioner said that at the time Messrs Rouse and McQuestin had refused to supply the Commission with information, it had become apparent that the Commission might be legally prevented from following a legitimate line of enquiry in connection with para(1) of the terms of reference by the refusal of certain other (unnamed) persons interviewed to answer questions relevant to it, justifying that refusal by a restrictive interpretation of the terms of reference. He sought to eliminate controversy and consequent delay by having the terms state explicitly what was thought to be implied. Furthermore, he said:

"The refusal of Rouse and McQuestin to answer questions was also likely to be productive of delay as was the stated intention of others to refuse to respond to all of the lines of enquiry upon which the Commission was intent. The refusal of Rouse and McQuestin to co-operate was to some extent unexpected. Perhaps the reasons for their want of co-operation was based on other factors."

It was submitted on behalf of Mr McQuestin that these words amounted to a rebuke of him for failing to co-operate and suggested some sinister motive for his doing so, thereby demonstrating or giving rise to the reasonable apprehension that the Commissioner was biased against Mr McQuestin.

- 51 The Commissioner then turned to a new topic, namely his treatment by sections of the media. He said:

"Nothing is more calculated to discredit a Royal Commission than to involve it and the Commissioner in political controversy or to create the perception that the Commission and the Commissioner may be seen to be involved politically. Despite an earnest desire on my part to avoid this and to develop a healthy working relationship with the media based on mutual respect for our respective roles and functions I was soon to learn that this was not possible. My agreement to submit to a wide ranging press conference in January in a desire to co-operate ended with a section of the media falsely reporting to the media what I had said and falsely attributing to me things which I had not said and about which I had never been asked. If by this crude, false and mischievous process it was intended to attempt to involve me in political controversy or to use me to discredit others politically, it was entirely successful. As a consequence my resolve became a two-fold one. Firstly to avoid contact with any section of the media and secondly to ensure as far as possible that the Commission in its work was not obstructed politically or otherwise. Whether the refusal of relevant witnesses to co-operate with the Commission was the result of what had occurred I cannot be certain. What I do know is that since that time it is the regrettable fact that I, those who assist me and the work of Commission staff have been subjected to a series of political actions concerted or otherwise which have hampered the Commission's preliminary work. It is unnecessary to recall the details. They are too well known. Political action of the kind which has occurred can fairly be described as political obstruction, as can the attempt to involve me in political controversy based on what I had not said in the press conference. What I said to the Premier in my letter dated 7 March was based on that experience. I was speaking in general terms because of what I considered to be an attempt to involve me politically. It was not a reference to the actions of specific individuals be they likely witnesses before the Commission or their legal advisers. Nor did I have in contemplation any of the several political personalities with whom the Commission has had contact."

- 52 We think that a fair reading of the Commissioner's remarks we have set out or summarized above do not indicate prejudgment of either of the Prosecutors nor that they are likely to lead to an apprehension of bias against them. It is true that his comments concerning Rouse's refusal to co-operate contained a degree of criticism of Rouse and/or his legal advisers and may be thought to suggest that the Commissioner thought that attitude an unreasonable one. Nevertheless, what was said occurred in the context of explaining why it was that he had felt impelled to adopt a course he had not originally contemplated, had wished to avoid if possible, and had been publicly criticized for doing, namely taking evidence in private. He at no stage denied Rouse's right to take the stance he did, but if that caused some irritation in the Commissioner, that was understandable, and his remarks cannot lead to any fair inference of predisposition against Rouse. In the case of Mr McQuestin, the Commissioner likewise referred to his refusal to co-operate, but there was in no

sense a linking, express or implied, of McQuestin in any criticism of Rouse over such refusal. No reference was made so far as Mr McQuestin was concerned to any reasons which might be thought by the Commissioner or any one else to be lacking in cogency for his taking such course. On the contrary, the comment that the reasons for their want of co-operation might perhaps be based on other factors has no connotation of sinister motivation in either of them, as is explained in the lengthy quotation we have just set out. In that criticism of the media, the Commissioner suggested that the refusal of relevant witnesses to co-operate with the Commission might well have been the result of what the Commissioner perceived to be an inappropriate involvement of the Commission in political controversy by sections of the media. Thus he conceded such refusal by Mr McQuestin may well have been actuated by an understandable concern not to be similarly unwittingly involved.

- 53 The criticism of the Commissioner's comment in his letter to the Premier of 7 March must also be evaluated in the light of events occurring before that date including media reports, and of the disclaimer by the Commissioner on the first public hearing on 22 April of any intended reference to any specific individuals "be they likely witnesses before the Commission or their legal advisers", or any political personalities with whom the Commission had had contact. Prior to the date of that letter there had been, in the view of the Commissioner, an improper attempt by sections of the media to involve him in political controversy over whether or not he had been consulted about the form of the original terms of reference, that involvement being fostered by inaccurate accounts of what he had said at his press conference; he had, according to press reports, been criticized by the Police Association; he had been unable to procure a statement from Rouse whose solicitor had, in the Commissioner's view, suggested that if such a statement were given, the Commission staff would improperly disclose it to others; and other potential witnesses than Rouse and McQuestin had declined to make statements, adopting an attitude that the lines of enquiry directed to them were outside the original terms of reference. There was, in our view, some basis for an apprehension by the Commissioner when he wrote the letter of 7 March that his work might be deliberately obstructed both politically and within the Commission's hearings. That apprehension, whether correctly held or not, and even if overstated, served as a preface to his request for amendment of the terms of reference in order to minimise argument as to the relevance of some lines of enquiry and to obviate possible delay to which any disputed ruling might give rise. On its face, the passage complained of did not refer to either of the Prosecutors nor could it, in our view, be reasonably seen to be directed at them or at a class of persons which included them. The express disclaimer by the Commissioner of any reference to the likely witnesses (including the Prosecutors) is strong evidence against the contention that this passage reveals bias against either of them. To accept that it does requires the objective observer to conclude that the disclaimer was mendacious. Such a conclusion is quite unwarranted. It also overlooks the assurance given by Mr Chesterman, QC, to Mr Porter that he could not see how anything in the letter could cause any concern regarding Mr Gray's credit. The apparent curtness of the reply from Commission staff to Mr Porter's correspondence is explained by a further statement of the Commissioner at the commencement of the public hearing on 22 April that he had chosen not to respond to what had been reported as having been said in the media by legal practitioners and others of a variety of

matters, nor to engage in contentious correspondence with them. He continued:

"The only correct and proper course ever available to me was to deal with those matters in the course of the public hearing."

It would be wrong, in our view, to attach any significance to the fact that Mr Porter's correspondence did not produce the result he desired.

54 In conclusion, before inviting Mr Chesterman, QC, to present his opening address, the Commissioner dealt with the criticisms Mr Evans had made concerning the communication he had had with the prison authorities in substantially the same way he had dealt with it in the private session when Mr Evans first raised them.

55 Both Prosecutors complain of the Commissioner's statements "it is that kind of baseless criticism which is being part of a concerted attempt to damage the reputation of this Royal Commission" and "what I do know is that since that time it is the regrettable fact that I, those who assist me and the work of Commission staff have been subjected to a series of political actions concerted or otherwise which have hampered the Commission's preliminary work. It is unnecessary to recall the details. They are too well known." The first such statement came upon the heels of the Commissioner's reference to the reported criticisms of him by Mr Evans in "The Australian". He directed his comments to the criticism of his having allowed Mrs Rouse to be cross-examined without representation. In our view, having regard to the Commissioner's account of what happened at that time, that criticism was quite rightly characterised by him as baseless. Later in his opening remarks, he defended himself against criticism for writing to the prison authorities, especially the criticism attributing to him a request that Rouse should be isolated until the conclusion of his evidence. Whether or not the request he in fact made to those authorities was appropriate in the circumstances, we need not determine, but the last part of the criticism was, in our view, likewise baseless. In addition to the sources of apprehension preceding the making of these remarks and to which we have adverted as at the time of the letter to the Premier of 7 March, the Commissioner had been subjected to the adverse publicity of reports suggesting he might be called before the Bar of the Legislative Council and to reports of a number of other criticisms. It is not for us to make findings as to whether or not there was a concerted attempt to damage the reputation of the Commission, or that he and his staff had been subjected to political actions which hampered the Commission's preliminary work, but the fair minded observer, in our view, could be expected to accept that the Commissioner might honestly and reasonably apprehend that this was the case and might do so without harbouring any preconception that either of the Prosecutors was in any way a party to the behaviour of which he complained, still less that he might not bring to an assessment of their involvement in the events he was investigating an impartial mind.

56 At the conclusion of the Commissioner's remarks, senior Counsel Assisting the Commission, Mr Chesterman, QC, made an opening address some aspects of which received wide media coverage. While emphasising that he did not intend to give a precis of all the evidence he anticipated being called, but merely to give, at that stage, a summary of the more important events which

occurred in connection with the attempt to bribe Mr Cox, he did outline some matters capable of suggesting involvement by Mr Gray and which he said needed to be investigated. These included the propositions that Mr Gray stood to gain if the attempt were successful, and that there had been contacts between Rouse and Mr Gray at about the time Rouse, with Aloï's assistance, was engaged in preparing for and carrying out the bribe attempt. These included a telephone call a few hours before Aloï was arrested on 22 June 1989 while making his last telephone call to Mr Cox, and one the following day. Mr Chesterman said in his opening that Rouse had already given evidence to the Commission that when he spoke to Mr Gray on the evening of Aloï's arrest it was in order to make Mr Gray understand that he would be approached by a defector from the Parliamentary Labor Party and that Rouse had brought about that defection. Some time before the Royal Commission was even announced, Rouse had released a public statement from the prison, the thrust of which was to exculpate any person other than Aloï. In his earlier evidence taken in camera, Rouse had not departed from this stance, and had said specifically that Mr Gray was not involved in the bribe attempt. During the examination in private, this exchange had taken place:

"Chesterman: Am I right in thinking that you didn't instruct Aloï to tell Cox when he rang Gray he was not to mention anything about the bribe?

Rouse: I don't think I – I don't think I said anything to Aloï, I don't think.

Chesterman: Well, what did you think Gray's reaction would be if Cox had said or hinted that he was being bribed and that was the reason he was making the call?

Rouse: I think his hair would have stood on end."

Mr Chesterman did not advert in his address to this kind of evidence having been given.

57 On 23 April Aloï gave evidence. The following day the three Tasmanian daily newspapers contained headlines, "Gray Link: Aloï Tells", "Aloï Claims Gray 'Knew'" and "Robin Gray Knew of Bribe Bid: Aloï" respectively. The "Mercury" newspaper contained the report that Aloï "told the hearing yesterday that Rouse had told him Mr Gray was expecting a call from Mr Cox". Mr Gray's counsel, Mr Porter, in the company of Mr Chesterman, QC, attended upon the Commissioner in private Chambers before the hearing commenced at 10.00am and requested him to release publicly the transcript of Rouse's in camera evidence. Mr Porter was already in possession of an edited version of that evidence which included the denials of Mr Gray's involvement referred to above. This had been provided to him by the Commission on 18 April. It had not been forwarded on a confidential basis, and he had not been asked for, nor given, any undertaking not to disclose its contents. Mr Porter submitted that Mr Chesterman's opening had been selective and lacking in balance, and that publication of Rouse's denials of Mr Gray's involvement would achieve some balance. He also told the Commissioner that his client was very upset over what had occurred and that if the Commission did not release the transcripts, then

events might take place which were out of Mr Porter's control. The Commissioner said he would consider the release of the edited transcript, but was reluctant to do so, having said publicly two days earlier that the in camera evidence would not be released until such time as the witness concerned was called to give evidence.

- 58 That morning when the Commission commenced its sittings, Mr Evans made a similar request, drawing attention to the reports of Aloï's evidence and to the damaging inferences to which they might give rise, especially if Rouse's evidence were not revealed until he gave evidence in public in several weeks' time. He submitted that there was no continuing advantage to the Commission's investigations in keeping it secret, as it had been made available to other witnesses whose interests it might affect. The Commissioner said he could not control how the press reported the evidence, and was not prepared to respond "in a knee jerk fashion" to the report of the previous day's evidence by releasing evidence obtained in the course of his investigation in confidence. Such a course might not be in the best interests of his investigation but, he said, he would study the reports and consider the matter further. After the luncheon adjournment he announced that Rouse's evidence would not be disclosed that day but at a time considered more appropriate to the Commission's enquiry. He delivered a number of reasons for the course he had decided upon, and asked counsel to proceed with the evidence of the witness then being examined. Almost immediately, Counsel Assisting the Commission rose to say that he had just been informed by other counsel at the Bar table that apparently copies of the transcript of Rouse's evidence in camera had been released. He continued:

"I don't know how it could have come about because the only copies of the transcript are either held by the Commission or by those who undertook solemnly not to reveal them."

He said he had been told that a number of journalists had been given a copy of the transcript but that he did not know by whom. The Commissioner's only response was, "Oh well, I'll deal with that matter in due course." In view of the facts that he regarded the material as having been gathered in confidence, and that whether they regarded it as confidential or not, Messrs Porter and Evans, by asking him to release it, might be thought to have treated it as material not to be made public without the Commissioner's consent, his response to finding, moments after his ruling, that it had already been released, was commendably restrained.

- 59 The circumstances in which the edited transcript was released were that Mr Gray called a press conference at 2.00pm that day, half an hour before the afternoon sitting of the Commission commenced, at which he complained that there was no justice in the way Mr Chesterman "is delaying calling me to allow me to give my side of the story whilst any witness can claim or imply wrong doing on my part and there is no justice in not bringing out other evidence which supports my side of the story – evidence which has already been formally given to the Royal Commission on oath". He detailed a number of other complaints of Mr Chesterman's opening speech and released the transcript, drawing attention to Rouse's exoneration of him cited above. He said that neither he nor his counsel was in breach of any undertaking not to release this evidence, not having been asked for nor having given one, and that the

documents had not been provided on a confidential basis.

60 It is not for us to determine the wisdom or propriety of Mr Gray's decision to call that press conference and to say there what he did say, save that in releasing the edited transcript, he was not in breach of any obligation imposed upon him to treat it as confidential, still less in breach of any undertaking not to release it. The facts remain, however, that in doing so he adopted a course the Commissioner had clearly indicated he did not wish, and did not expect, to be followed, and that he launched a strong attack upon the professional conduct of senior Counsel Assisting the Commission, accusing him of behaving in such a way as to give the appearance that the Royal Commission itself was a "stunt".

61 At the commencement of proceedings on the following sitting day (Anzac Day having intervened) Mr Evans submitted that the comment of Mr Chesterman to the effect that the only copies of the transcript released were either held by the Commission or by those who solemnly undertook not to reveal them, had inevitably led to the inference that he had released the transcript, and that in doing so he had breached his undertaking not to disclose or discuss Rouse's evidence other than with the latter. He said "that most damaging slur results from Mr Chesterman's untruthful statement about who had transcript copies". He pointed out that in addition to the copies he and Rouse had, copies of portions of the evidence had been supplied by the Commission to at least Mr Porter, and through him to Mr Gray, and to Mr Gunson, solicitor/counsel for Mr McQuestin, and through him to his client. He said that at the time of Mr Chesterman's statement the true situation was that at least five people had copies of all or part of the transcript, and none of them had given any undertaking not to disclose or discuss it. He expressed the hope that in future Mr Chesterman would take some care about what he said, and then made submissions of procedural unfairness to his client in that whereas some witnesses had been supplied in advance with proofs of evidence of other witnesses potentially adverse to them, he had not been supplied with any proof at all, notwithstanding that evidence from some witnesses known to be adverse to Rouse had already been led. He concluded by saying:

"I respectfully suggest that it is in the interests of the integrity of your Commission to act fairly as between all interested parties and where possible have proofs or outlines in one form or another of adverse material to be called from a witness provided to all interested parties as much time in advance as is possible."

62 Mr Gunson thereupon made submissions joining in what Mr Evans "has said so far as to the comments concerning the release of the Rouse transcript are concerned" and saying that he had not been asked to give any undertaking about it. He submitted that the slur to which Mr Evans referred was equally applicable to him. He also joined in "the comments he has made with respect to the provision of proofs of witnesses in advance". Mr Porter then rose and said he had given no undertaking about the transcript which he had sent to his client to deal with as he saw fit in the circumstances, pointing out that it had not been sent to himself under cover of any confidentiality.

"I, and I am sure Mr Chesterman, for the moment at least, would prefer to ignore the many untruthful slurs which have been levelled against this Commission and staff and the many attacks which have been made upon the integrity of this Commission. Mr Chesterman has quite fairly indicated, and clearly indicated, the fact that the procedures adopted by this Commission are consistent with the procedures adopted by Commissions – Commissions of Enquiry and Royal Commissions the length and breadth of this country."

He then terminated the exchange and asked Mr Chesterman to continue with the examination of the witness then before the Commission.

This whole episode concerning the refusal to release the transcript of Rouse's in camera evidence, its release by Mr Gray, and the responses by the Commissioner and Counsel Assisting him, is relied on by both Prosecutors as evidence of actual or apparent bias. On behalf of Mr Gray, it is submitted first, that the refusal to release the material is, in itself, indicative of bias. He perceived the opening speech of Mr Chesterman and the publication of Alois's hearsay statement that he (Mr Gray) was expecting Mr Cox to telephone him as very damaging to his reputation and wanted Rouse's exoneration of him made public to redress the balance. It is submitted that the Commissioner showed unjustified indifference to Mr Gray's reputation and that the request was a reasonable one to which he ought to have acceded. However, it was clearly a matter for the Commissioner to determine when the transcript should be released. He considered the submissions put to him by Mr Porter and Mr Evans, and publicly gave seven reasons for taking the course he did. It was not submitted to us that those reasons were so patently erroneous that we could infer they were not honestly held views. The fact that before giving consideration to the requests made, the Commissioner expressed reluctance in private Chambers to alter the course he had recently said he would follow (i.e. to only release in camera evidence when the witness was finally called at the public hearing) in no way suggests that the seven reasons later advanced were not genuine. We are of the view that there is no substance in this aspect of the complaint.

It was put to us that Mr Chesterman's remark of 24 April amounted to a public accusation that the Rouse transcript had been released by a person who had solemnly undertaken not to do so, and that the Commissioner treated the protestations on 26 April of Mr Evans, and of counsel for both Prosecutors, that neither they nor their clients had broken any undertaking as untruthful slurs upon both Mr Chesterman and the Commission itself. Mr Chesterman's choice of words was unfortunate, and to the counsel who then heard them no doubt suggested that the transcript had been released by someone who had undertaken not to do so. In the heat of the moment, engendered by the sudden revelation that the document the Commissioner had just ruled he would not release had already been given to the press, the fact that the document had been provided by the Commission to more than one person without requiring a formal undertaking or unequivocally indicating that it should be treated as confidential, seems to have been ignored. In an exchange of correspondence which thereafter ensued, Mr Chesterman made it quite apparent that he regarded the behaviour of

Mr Porter and Mr Gray as lacking in propriety, and said he would not provide any further exhibits or proofs without Mr Porter's written undertaking that he would use them for the purposes only of obtaining instructions, and would not give the document provided, or a copy of it, or an extract from it, to Mr Gray or any member of his staff. On the evidence before us there does not seem to have been any justification for this view, nor for the imputation complained of. If that was deliberate it was a remark made by counsel in the heat of the moment in no way attributable to the Commissioner.

66 The submissions of Mr Evans as to Mr Chesterman's alleged mis-statement of the facts and his approach to the giving in advance of proofs of evidence potentially adverse to Rouse, were couched in strong terms. Mr Gunson, as counsel for Mr McQuestin, adopted them in substance by "joining in" Mr Evans' comments on both topics. There is nothing in the material before us to suggest that any attack, express or implied, had been made against Mr Gunson or his client, Mr McQuestin, over the release of the Rouse transcript. The only consequence claimed by him of a failure to deliver advance proofs of evidence had been one involving some inconvenience rather than prejudice in cross-examining a witness, Mr McKendrick, an adjournment being necessary to obtain instructions. Fortuitously, there had been sufficient time to accomplish this and to proceed with the cross-examination before that witness had left the country. Mr Porter, on behalf of Mr Gray, had done no more than affirm the absence of any breach of undertaking or of confidentiality by him or his client.

67 Against this background the Commissioner had spoken of "untruthful slurs" levelled against the Commission and its staff and "the many attacks" upon the integrity of the Commission, and had defended Mr Chesterman's *modus operandi* so far as the delivery of proofs of evidence was concerned. It was an unhappy incident, but could it be said to justify a finding of bias or the reasonable apprehension of bias against either of the Prosecutors? It would seem that the Commissioner regarded his Counsel Assisting as having been unfairly attacked by counsel for some of the material witnesses. We find it hard to see that any reasonable and fair minded person would have seen Mr Porter as having been included in the Commissioner's criticisms in view of the nature of his submission, although we note that he was not specifically excluded from them. If Mr Gunson was the subject of that criticism, and if that criticism was not merited by him, we cannot see, how it, even if without justification, in any way reflected a predisposition against Mr McQuestin. He was not involved and was never mentioned in the episode. We do not think that a fair minded person would reasonably see in this unhappy incident any more than an altercation between the legal personalities involved – a fleeting incident in which any partiality shown by the Commissioner was confined to a too ready defence of counsel assisting him against those counsel criticizing them. We are of the view that such a person would not see the Commissioner's response as reflecting any bias or predisposition against either Rouse or the two Prosecutors. As the incident resulted from Mr Gray's decision to release the Rouse transcript, it might be thought that he might have been in the contemplation of the Commissioner when he made the remarks complained of. Even were this so, or perceived to be so, and even were the Commissioner's remarks unwarranted, they do not, however, demonstrate a likely lack of partiality in assessing, when the time in due course came, the evidence of Mr Gray's involvement, or absence

of it, in the events under investigation. Even a display of unjustified irritation at the course adopted by him does not, in our view, amount to evidence justifying the conclusion of bias, actual or apprehended.

68 Another incident about which both Prosecutors complain arose out of the disclosure by Rouse in the course of his cross-examination by Mr Chesterman, QC, at a public hearing on 23 May that he had had possession for some time of a transcript of interviews of Mr Gray by Mr Chesterman conducted on 7 and 8 March 1991. The following day the Secretary to the Commission wrote to Mr Porter confirming that the latter had received from the Commission a copy of such transcript on 19 March, and asking Mr Porter whether he knew who had supplied Rouse with a copy of it. Mr Porter replied, also on the same day, explaining that he had received a request from Mr Gunson for a copy of that transcript, and that having obtained authority from Mr Gray, he had delivered one to Mr Gunson on 26 April. Enquiries made by Mr Porter since Rouse's revelation had disclosed to him that Mr Evans had ascertained from Mr Gunson that the latter had a copy, that Mr Evans had requested Mr Gunson for a copy and had been supplied with one by Mr Gunson. The Commission also wrote to Mr Evans seeking an explanation as to the circumstances in which Rouse had procured the transcript. It appears that Mr Evans, having acquired it from Mr Gunson, had supplied a copy of it to Rouse in a sealed envelope handed to the latter's son, Mr David Rouse, for delivery to his father.

69 Also on 24 May Mr Gray held a press conference to announce the intention of his party, as soon as the current Royal Commission should be finalised, to introduce a Bill to lay down what he described as fair and proper guidelines for the conduct of all future Royal Commissions in Tasmania. After having delivered a prepared statement detailing the measures proposed, he was asked a number of questions by reporters. This exchange occurred:

"O'Byrne: Do you know how Edmund Rouse ended up with your proof of evidence?

Gray: No I have no idea, Tom.

O'Byrne: Did you give any authority to anyone to give it to him?

Gray: I have given no authority for my evidence to be released to anybody. I have not released my evidence. I have not sought other people's evidence and I have not sought to influence other people's evidence.

O'Byrne: Were you surprised that it actually has arrived in Edmund's hands?

Gray: I am never surprised at anything that happens in the State of Tasmania.

O'Byrne: Does it surprise you though that Edmund Rouse has seen your proof of evidence?

Gray: Nothing surprises me in the State of Tasmania particularly with the present Government."

On Monday 27 May Mr Porter was served with a summons to give evidence before the Commission the following day. It appears that like summonses were also served on Messrs Gunson and Evans. On 28 May the Commissioner commenced proceedings by saying:

"Gentlemen, there is the risk that misunderstanding may attend the course which the evidence is about to take this morning and it is therefore necessary that I explain why I consider it to be necessary to take this course. At the same time I should add that I would have preferred to have avoided having to take it."

He adverted to Rouse's statement that he had access to the transcript of the recorded interview had between Mr Chesterman and Mr Gray on 7 and 8 March, and to the fact that the Commission had written to both Mr Porter and Mr Evans the previous Friday seeking information as to the circumstances in which it found its way from Mr Gray to Rouse. He then said:

"The Commission has information now that at about 12.30pm on Friday Gray gave a press conference in the course of which he stated that he had not given authority for the typewritten record of interview to be given to or released to any person. On Friday afternoon at about 12 minutes to 5 the facsimile copy of Mr Porter's reply to the Commission's letter was received in its office. Mr Porter's statement on Friday that he had given it to Mr Gunson on the instructions of his client Gray is at variance with his client's public statement on the same day. That matter needs to be investigated as does the reason for Gray's authorised release of the document to Mr Gunson the solicitor for McQuestin. There is no apparent reason for Gray to want to give any of his material to McQuestin nor is there any apparent reason for McQuestin to want to know what Gray had told the Commission. None of the evidence so far suggests any relevant link between Gray and McQuestin. On the other hand, the evidence does suggest a close link between Mr McQuestin and Rouse. This has been and will be further investigated. Indeed Rouse's evidence on Thursday also revealed the exchange of material between himself and McQuestin. Therefore there needs to be investigated by me the circumstances whereby this material on the same day having found its way from Mr Porter to Mr Gunson was then given to Mr Evans and shortly after then given by Mr Evans to Rouse. The delivery of the material by such a circuitous route from Gray to Rouse is puzzling as is Gray's public assertion that he had not authorised its release to anyone. The fact that the material which Gray gave to the Commission thus found its way to Rouse is a matter relevant to the relationship between Rouse and Gray not only in the matter of the bribe attempt but also to this Commission's investigation of that

attempt."

70 Mr Evans then, seeking to make the point that in his understanding Mr Gray, in his exchange with the press, had been asked about his "proof of evidence" whereas the document which Rouse had was a copy of the transcript of an interview conducted by Commission staff with Mr Gray, invited the Commissioner to take evidence as to what had in fact been said by Mr Gray and the reporter. The Commissioner declined saying that what was in the press statement was a matter of record and directed Mr Porter to be sworn. It was submitted that this was a peremptory dismissal by the Commissioner of Mr Evans' attempt to explain that there might not be a discrepancy between Mr Gray's statement to the press and Mr Porter's letter, as they may not have been talking about the same document.

71 There then followed a cross-examination of Mr Porter in which the Commissioner made it clear that what was of interest to him was why the process had been put in place, of transmitting the transcript of the interview to Rouse through McQuestin. He said:

"It seems to me to be a matter I need to enquire into as to whether or not this was simply something which happened accidentally or whether it was something which was concerted."

72 He then said that he accepted Mr Porter's evidence that he was only concerned to transfer the document to Mr McQuestin's counsel and that was the extent of his knowledge and the extent of his instruction, and that had he known that the document was ultimately to find its way to Mr Evans on the same day, he would have advised Mr Gray not to let it be released.

73 Towards the conclusion of his evidence Mr Porter returned to the point Mr Evans had sought to raise suggesting that the exchange between Mr Gray and the reporter should be seen in the light of the first question, "Do you know how Edmund Rouse ended up with your proof of evidence?". The Commissioner then said, "I don't think there is any doubt – I mean – let's not play with words". Mr Porter said that he was not playing with words and that a proof of evidence was an entirely different thing. A colloquy between the Commissioner and Mr Porter followed as to the substance of the exchange between Mr Gray and the reporter, the Commissioner suggesting that the subject matter was the document which Rouse said he had access to. Acknowledging that Mr Gray had referred to his "evidence", the Commissioner said it was really a matter of construction and that he did not intend to play with words.

74 The Prosecutors complain about the Commissioner's interpretation of Mr Gray's discussion with the press and whether, on the face of it, there was a discrepancy between his denial of authorising the release of his evidence and Mr Porter's letter and later evidence of being authorised to release the transcript of the interview with Commission staff. We do not think there is any substance in this complaint. It was a legitimate course to examine what was said between Mr Gray and the reporter in the light of the references to Rouse being in possession of material emanating from Mr Gray and not to restrict its proper understanding by a literal interpretation of the phrase "proof of evidence". A fair reading of the exchange was capable of leading to the conclusion that there was

a discrepancy between it and Mr Porter's statement. While the reasonable possibility of such discrepancy existed, there was added justification for the Commissioner's concern to investigate the matter in the way he did. We do not regard his approach to the interpretation of the exchange as unreasonable nor do we regard his disinclination to take formal evidence first of what had passed between Mr Gray and Mr O'Byrne and of what each might have understood by it, but rather to proceed with his questioning of Mr Porter as peremptory or inappropriate.

75 The second matter of complaint concerning the Commissioner's decision to examine the three counsel on oath was that it suggested that there was some sort of conspiracy in which the Prosecutors were involved. It was submitted that the Commissioner, in stating his intention to investigate how and why material had passed from Mr Gray to Rouse in a circuitous route which included Mr McQuestin or his counsel, was demonstrating the willingness to draw adverse inferences against the Prosecutors. Again we find no substance in this complaint. The Commissioner made no finding in the passages complained of. He simply indicated that the circuitous route followed by the material excited his interest and that he considered it appropriate to take evidence as to how it came about. It was a perfectly legitimate line of enquiry and in no way presupposed any conclusion whether adverse to the Prosecutors or not.

76 The 26 June marks the start of an incident strongly relied upon by both Prosecutors, but especially by Mr McQuestin, as evidence of bias. At the conclusion of his cross-examination by Counsel Assisting the Commission, he was questioned by his own counsel. The last series of questions put by Mr Gunson set the incident in train. According to the affidavit of Mr Gunson filed in these proceedings, Mr Chesterman, QC, and Mr Thompson, his junior counsel, and Mr Gunson met on 20 March at Mr Chesterman's instigation. The substance of what he then put to Mr Gunson was that he and Mr Thompson did not believe that Mr McQuestin was telling the truth about a number of matters, that they thought he was "right up to his neck in it", that his evidence already given in camera would be shown to be demonstrably wrong in some areas when other witnesses gave evidence, and that he faced a number of charges such as perjury in relation to his evidence in camera, a charge contrary to s229 of the *Companies (Tasmania) Code*, and one of aiding and abetting Edmund Rouse, as previously charged but not proceeded with by the Director of Public Prosecutions. Mr Chesterman indicated to Mr Gunson that under the *Evidence Act 1910* there was power for the Commissioner to give a certificate which would stop any prosecution of his client for any alleged offences if he gave a full and frank disclosure. Mr Chesterman said that if Mr McQuestin gave full and frank disclosure, and in particular told the Commissioner who else was involved, the Commissioner would give him a certificate. Discussing the procedure for achieving this, Counsel Assisting indicated that they would recommend to the Commissioner that there be such a certificate. Mr Gunson put the proposal to his client and was instructed to reject it outright.

77 The series of questions asked by Mr Gunson was planned as the last subject of his examination, the first question was written out by him in advance, and he had taken his client through all the questions he intended to ask him.

These were the questions asked:

"Q I want to take you finally to the evidence that you gave in the private session. Following the evidence that you gave in secret to the Royal Commission, were you advised by me that I had been approached by Mr Chesterman and advised that the Commission had other evidence to implicate you in the bribe attempt and if you changed your private evidence and implicated other persons that it would be arranged that you would get an indemnity from the Commissioner for any prosecution?

A Yes.

Q Did you instruct me to respond to Mr Chesterman's offer?

A Yes I did.

Q And what was your response?

A I think I told you that it was a contemptuous offer and I dismissed it out of hand.

Q No further questions."

It is necessary to set out the transcript of the remaining relevant discussions.

"Commissioner: Yes Mr Chesterman.

Mr Chesterman: I don't know of course what Mr Gunson said to Mr McQuestin but I do wish to have it placed on record that I did not speak to Mr Gunson in the terms that he has just mentioned.

Commissioner: Yes.

Mr Gunson: Oh, well if there is going to be a dispute about that you might have to hear evidence about that because I am quite clear in my own mind about the discussions with my learned friend.

Commissioner: Well I am not going to resolve disputes between you and counsel. It's not relevant to my enquiry.

Mr Gunson: Well I'll make the same comment that I will also –

Commissioner: Make the same comment and you will agree to differ.

Mr Gunson: We agree to differ then.

Commissioner: Precisely, end of story.

Mr Gunson: Well it's a question of what weight you put on it though. If you make a finding that there was or was not –

Commissioner: Mr Gunson I have been listening to a lot of irrelevant evidence and a lot of irrelevant suggestions, some out in the form of leading questions and some out otherwise but I have deliberately avoided interrupting even though it seems to me to be irrelevant to my enquiry simply for the purpose of avoiding contention. Now the matter that you raise is from my point of view entirely non-contentious and irrelevant and I don't wish to hear anything further about it.

Mr Gunson: If I could just make one observation and that is that I would have thought that if an inducement was offered to change one's evidence that that was a matter if it was rejected that you would make – perhaps find of some relevance.

Commissioner: I will make my mind up in relation to what evidence I accept and what evidence I don't accept having regard to what I regard as the appropriate criteria.

Mr Gunson: Well I may want to address you further as to that but I – at this stage I will reflect on the position.

Commissioner: Thank you.

Mr Chesterman: Mr Commissioner I wish to say in the strongest possible terms that no inducement was held out or offered to Mr Gunson or Mr McQuestin. A private conversation was held with Mr Gunson after Mr McQuestin's evidence and certain features of the evidence were discussed with Mr Gunson. No offer no inducement and no suggestion that Mr McQuestin might change his evidence to favour himself was ever made. I wish to make that quite clear because what Mr Gunson has said perhaps inadvertently is the most scandalous suggestion and quite untrue and quite groundless.

Mr Gunson: Well I totally reject that. Now we are getting into the very argument that you wanted to avoid. I totally reject that. I have notes of the conversation.

Commissioner: Well actually –

Mr Gunson: With Mr Chesterman and Mr Thompson. I am quite surprised to hear the allegation being resisted so strongly.

Commissioner: Mr Gunson I can assume that the response that you have got was simply based on the fact that you were so it seemed to me and presumably so it seems to Mr Chesterman raising allegations against him and

his behaviour, his professional behaviour.

Mr Gunson: I am sorry. I am putting a proposition that my client was specifically asked by me to –

Commissioner: I can – I understand what you are saying. I am simply – the way in which you put it simply raised implications in relation to Mr Chesterman's professional behaviour. I said I can understand his responding in those terms. I regard the issue as closed Mr Gunson.

Mr Gunson: I am not suggesting impropriety. Let me make that quite clear. It may be quite a proper method to induce somebody to tell you something to offer something in return. Now it's used by the police all the time. I am not suggesting this equates with that. What I am suggesting is – and I stand by what I said – what I put to my client was what was put to me.

Commissioner: Mr Gunson the incident is closed. Thank you. Thank you Mr Chesterman."

78 As Mr Gunson left the hearing room, he was approached by the press but declined to make any statement concerning what he had said at the hearing. A little later he was talking to Mr Evans in a group containing journalists when both Mr Chesterman, QC, and Mr Thompson approached, and Mr Thompson asked Mr Gunson if they could discuss the matter further. Mr Gunson declined to do so in the presence of the press but Mr Thompson, without moving away from the press, then asked whether Mr Gunson had been alleging in the public session of the Commission that Mr Chesterman had asked Mr Gunson to ask Mr McQuestin to give false evidence. Mr Gunson, who had already told the Commissioner, as recorded above, that he was not suggesting impropriety, said that he was not for one moment suggesting that Mr Chesterman and Mr Thompson had asked him to ask Mr McQuestin to give false evidence. Between then and the start of proceedings at 10.30am the following day there was some media publicity of the incident thus far, though what precise form it took is not clear on the evidence before us.

79 The Commissioner commenced proceedings on 27 June by making a statement in which he asserted what had occurred at the meeting on 20 March between Messrs Chesterman, Thompson and Gunson. That version is not significantly different to that we have set out already from Mr Gunson's affidavit, but the Prosecutors invite us to infer that the Commissioner had that morning consulted with Mr Chesterman and Mr Thompson in private Chambers and adopted as truthful and accurate their version without giving Mr Gunson any opportunity to challenge it if he were so minded. The Commissioner then said that following the adjournment of the hearing the previous day he was informed that in response to the intervention of Mr Thompson and in the presence of several media representatives, Mr Gunson confirmed that at no time had it been suggested that Mr McQuestin should do other than give truthful evidence and in raising the matter in evidence with Mr McQuestin he was not

intending to imply differently. The Commissioner then said:

"Since this Royal Commission commenced to function, I and those who are working with me – not only Chesterman and Thompson, but others as well – have been subjected to a variety of criticism – both in public and in private, in the face of which we have deliberately preferred to maintain a dignified silence. So much of that criticism has been beneath contempt and not worthy of comment. The focal point for it has shifted from time to time.

Having regard to the treatment of yesterday's incident by some sections of the media and the fact that the person who provoked it, a solicitor of the Supreme Court of Tasmania, has seen fit to pursue it by speaking to the media outside of the hearing, I am not prepared to stand by any longer and allow good people to be subjected to an obviously orchestrated and plainly ruthless and co-ordinated campaign of denigration. I am not a fool or so naive as not to have expected, when I reluctantly agreed to accept this commission, that there would be a process of misinformation and baseless criticism. Therefore, it was critical for me and for the integrity of the Royal Commission to ensure that the right people were engaged to assist me. Chesterman and Thompson were deliberately selected because of their known probity and objective professionalism and because of their professional skills, but above all because of their widely recognised reputations for integrity and professional honesty.

The manner in which they approach an intensely sensitive issue in such a proper and purely professional way deserves credit rather than opprobrium. They were intent on pursuing, by only legitimate means, an attempt to discover the truth and that has to be the dominate pursuit of any Royal Commission. The type of approach made to Mr McQuestin's solicitor has happened before in other Royal Commissions and it will happen again, quite properly.

Given the known factual background to what occurred, the whole issue became a closed one before this Commission commenced its public hearing. Once the solicitor, so I am informed, indicated in general terms, a lack of response from his client, the issue was finalised. It was no longer regarded as relevant and became an irrelevancy well before this public hearing commenced. I will so regard it in the final analysis – as I said yesterday, I will make my own findings on all relevant issues by use only of appropriate criteria. Given the retraction made by Mr Gunson to Thompson yesterday outside of the hearing, there cannot have been any legitimate reason for raising it in the hearing. In the context in which it was raised and in the form in which it was raised, the true motive perhaps becomes painfully obvious.

I would prefer now to pursue the matters of evidence which have

been arranged for today. Yes, continue to examine Mr Clark, please."

80 We think it is reasonable to draw the inference invited by the Prosecutors. Clearly the Commissioner was not present himself at the meeting in March and there is evidence that Mr Chesterman and Mr Thompson had the opportunity to meet with the Commissioner before he commenced the hearing some half hour after the usual starting time. The Commissioner's statement amounted to a clear rebuke of Mr Gunson and one which we find was accompanied by a number of unfair features. It seems clear that both the Commissioner and Mr Chesterman interpreted the question asked by Mr Gunson of his client as containing the implication that Counsel Assisting had invited Mr McQuestin to give false evidence or at least to change his evidence so as to implicate others, they not caring whether such changed evidence was true or false. In our view, the question asked contained no such implication. It is true it was an abbreviated version of the conversation in question which, while reflecting the substance of it, did not contain a preamble making it clear that Counsel Assisting sought a change from Mr McQuestin's private evidence because they did not believe that to be true. Nevertheless, if there was any ambiguity it was removed within minutes of the question being asked by Mr Gunson's clear statement that he was not suggesting any impropriety. It was not correct to say, the following morning, that Mr Gunson had made a retraction the previous day to Mr Thompson, for he had nothing to retract, and while he had confirmed, in response to Mr Thompson's intervention and in the presence of several media representatives, that at no time had it been suggested that Mr McQuestin should do other than give truthful evidence, his statement at the public hearing that he was not suggesting any impropriety made both that intervention by Mr Thompson and confirmation by himself unnecessary. In our view it was unfair of the Commissioner to suggest that the treatment of the incident by some sections of the media had been provoked by Mr Gunson or that he had seen fit to pursue it by speaking to the media outside of the hearing when it appears from the evidence before us that he spoke to the media at Mr Thompson's insistence and that what he said confirmed that he was not criticising Counsel Assisting the Commission.

81 The question itself was a matter relevant to the credit of Mr McQuestin. Its weight is another matter. If Mr McQuestin were guilty of some wrong doing, the opportunity to procure an indemnity from prosecution in respect of it might be attractive. By the same token a retraction of earlier evidence and the implication of others would not be likely to endear him to his business associates, the shareholders in the company of which he was a director, or the public at large. Nevertheless it was a legitimate question and Mr Gunson was entitled to have its weight considered by the Commissioner. He should not, in any event, have been publicly rebuked for asking it without being given the opportunity to defend himself.

82 The Commission was a lengthy process, its preliminary investigative stages lasting from the middle of January until late April. The public hearings extended from 22 April until 11 July when final addresses concluded. The Commission sat on 42 days to take evidence in public and to hear addresses. It is perhaps not surprising that from time to time incidents occurred which

demonstrated impatience or annoyance by some of the participants, or that there were on occasions some misunderstandings of arrangements made or thought to be made and of things said. The Commissioner's treatment of Mr Gunson proceeded, as we have said, from a misconception of the import of the question, a misconception which upon further reflection may well have been reversed by him. Certainly there was nothing to stop counsel for Mr McQuestin, in his final address, making submissions to correct the wrong impression the Commissioner seems to have formed that Mr Gunson's motive in asking the question was in some way improper and emphasising the relevance of the question and urging that Mr McQuestin's response to the possibility of procuring indemnity was worthy of substantial weight.

83 However, given the views we have expressed, the question still remains whether this incident justifies a finding that the Commissioner showed bias towards either Prosecutor or whether such bias might be reasonably apprehended. Had the Commissioner been correct in his view that Mr Gunson was deliberately calling the integrity of his staff into question, his defence of them would have been understandable. It could well have been prompted by the way in which the media dealt with the incident of the previous day if they had treated it as suggesting some gross impropriety on Mr Chesterman's part. Of itself it was not, in our view, indicative of a predisposition against the Prosecutors. In particular, notwithstanding that his counsel had been the subject of this rebuke, we are of the view that the Commissioner's comments were not reflective of any attitude towards Mr McQuestin. He had not been present at the meeting with Mr Chesterman and Mr Thompson, and whatever his belief as to the import of their approach was (whether "contemptuous", as he said, of him, or contemptible in them as he may have meant), it was a belief which must have been dependent on Mr Gunson's account of it to him. Nothing which the Commissioner or Counsel Assisting said on either day could reasonably be seen as suggesting any deliberate misrepresentation by Mr McQuestin. The perceived impropriety was laid at Mr Gunson's door alone. The fair minded observer would see the Commissioner as regarding it as an unprofessional attack by one legal practitioner upon another, not involving the client at all, nor colouring the Commissioner's attitude towards that client. It should be noted that it in no way directly reflected upon Mr Gray.

84 It is submitted by the Prosecutors that the Commissioner's statement that he and those who assisted him had been subjected to a wide variety of criticisms, some beneath contempt, and that those who assisted him were being "subjected to an obviously orchestrated and plainly ruthless and co-ordinated campaign of denigration" indicates or would be reasonably understood by fair minded people as indicating that he might include the Prosecutors in that campaign and might thereby be so disposed against them as not to resolve the questions before him with a fair and unprejudiced mind. As we have noted earlier in relation to the apprehensions of a concerted attempt to damage its reputation expressed on 22 April, there had been quite a number of criticisms made of the Commissioner and of Counsel Assisting him in relation to the conduct of the Royal Commission. That had been a general assertion not directed to any particular person and we see no reason for the fair minded observer to see in the Commissioner's remarks of 27 June an assertion that either Prosecutor was party to any campaign of denigration. It was submitted

that as Mr Porter had been engaged in correspondence with the Commission a few days earlier in which he had raised the possibility that (*inter alia*) the issue by the Commission of a media release on 14 June (to the details of which we will return) "might reasonably engender in the minds of some a suspicion of preconception and/or bias", the Commissioner's remarks might reasonably be seen to be directed at Mr Gray. The correspondence sought an explanation from Mr Porter, there was dispute as to whether he was unable to give one or merely considered it inappropriate to enter into debate about the matter and finally on 24 June the Secretary to the Commission made the following two points:

"6 ... the Commission perceives it to be its duty to consider any allegation of bias that may be made against it. Although you had made such an allegation, you had chosen not to substantiate it in any way at all.

8 On the basis of the media response to your client's words on the afternoon of 13 June 1991, I do not believe that my letter to you of 14 June 1991 was in any way unreasonable. Your response, which alleged that there may be evidence of bias, and your subsequent refusal to substantiate that claim in any way, must be of concern to the Commission. Under those circumstances, it is surely not unreasonable for the Commission to ask an explanation of you."

Mr Porter's reply to this came on 1 July after the Commissioner's remarks now under consideration. In our view, the fair minded observer cognisant of the relevant facts including the nature of this correspondence would not reasonably interpret the Commissioner's remarks about "a process of misinformation and baseless criticism" as being a reference to the concerns raised by Mr Porter nor see any of his remarks as evidence of a bias against Mr Gray.

85 We have mentioned a media release by the Commission on 14 June. Mr Gray gave evidence before the Commission between 4 and 13 June. After leaving the hearing room at its conclusion, he was approached by journalists and this exchange occurred after a preliminary question from journalist Rod Wallis, the details of which we have no evidence of:

"Gray: Yeah, I'm satisfied with the way its all gone. As I said yesterday, sometimes there are days when you have to give you fellows the flick and today's one of them.

Wallis: Are you happy that your name is clear out of this, Robin?

Gray: Oh, I've never had any doubts about that Rod but I think we ought to leave it. Ought to leave it. Ought to leave comments till later on sometime.

O'Byrne: Are you satisfied the Royal Commission was the way to go?

Gray: What did I say. Sometimes I have to give you the flick. See

you later. See you later Tom."

On the television news that night, the reporter claimed that outside the Commission Mr Gray "said he believed his name had been cleared". In the "Mercury" newspaper of the following morning, Friday 14 June, under the heading, "My Name Cleared, No Doubt, Says Gray", he was reported as having said that the "bribery royal commission has cleared him". That same day the Secretary to the Commission wrote to Mr Porter and said:

"Media reports following your client's evidence at the Commission indicate that he said, albeit impliedly, that the Commission had cleared his name. Such a statement is patently untrue as the Commission is still hearing evidence and the Commissioner has reached no conclusion which either implicates or exonerates any person.

In so far as such remarks appear to pre-empt the findings of the Commission and may appear to influence those findings, your client may well have committed a contempt under s17D(3)(c) of the Evidence Act 1910.

The Commission does not propose to take any action on this occasion; however, you may wish to warn him of the danger of making such remarks."

Also on 24 June the Commissioner made the following media release:

"The Royal Commissioner, Hon W J Carter QC, said today that assertions in the media that the Commission had cleared the Opposition Leader, Hon R T Gray MHA, were without foundation.

The Commissioner said that evidence was still being taken and no person has yet been implicated or cleared by the Commission.

He said that no person will be able to reach such conclusions until he has been able to consider all the evidence and his Report is published.

The Commissioner warned that such statements may be construed as interference in the Commission's activities and may constitute a contempt punishable by the Supreme Court."

86 It was submitted on Mr Gray's behalf that the Commissioner showed bias towards him by making the media release and by writing to his counsel, in effect rebuking Mr Gray, and threatening him with contempt proceedings. The very fact that the Commissioner had made a release with such promptness was urged on us as evidence of bias. His action in doing so was contrasted with his refusal to release the Rouse transcript when Mr Gray considered himself the subject of unbalanced publicity. We do not think there is any substance in these criticisms. The Commission did not normally sit on a Friday and a long week-end was intervening. Rather than wait until the next public session on the

following Tuesday to make any comment on the matter, the Commissioner determined to make a release on Friday 14 June immediately after the reports had been published. His promptness in doing so does not justify the inference of bias sought to be drawn against him. In our view, the Commissioner was entitled to correct the impression created by the press' and television news' somewhat free translation of Mr Gray's words. The release was not a rebuke of Mr Gray but rather of the media. Whether an accurate record or not, it was wrong of the media to suggest that the Commission had, at that stage, exonerated any person or found anyone wrongfully involved in the bribe attempt. The Commissioner was perfectly entitled to remind the public that no findings one way or the other had been made. In our view, it could not reasonably be inferred from the fact of or the content of that release that the Commissioner wished to reprimand or denigrate Mr Gray in any way or otherwise show bias towards him.

87 Nor, in our view, is the letter to Mr Porter indicative of a willingness to make adverse findings against Mr Gray as submitted. The media reports (admittedly inaccurate) to which we have referred did indicate that Mr Gray had said, impliedly in the case of the TV news report and expressly in the "Mercury" report, that the Commission had cleared his name, and such a statement was untrue, as the Commission was still sitting and had made no findings. It appears from later correspondence from the Secretary to the Commission that the Commission was not aware at the time of that letter of the precise terms of Mr Gray's exchange with Mr Wallis, but having been made aware of them by Mr Porter, the Secretary to the Commission stated the Commission's position on the words used as follows:

"These remarks were clearly susceptible of interpretation as a statement by your client that his name had been cleared by the Royal Commission. That such an inference was drawn from them is clear from the attached transcript of ABC TV news of 13 June 1991 and the report published on page 2 of the Mercury of Friday 14 June, 1991, a copy of which is also attached. Having considered these reports the Commission wrote to you on 14 June 1991 expressing its concerns. The correspondence noted that, on this occasion, the Commission did not propose to take any further action."

We consider that this view was open to the Commission, although it was certainly not the only view which might reasonably be taken. The words complained of were virtually put in the mouth of Mr Gray by the reporter, and Mr Gray indicated a desire not to be drawn into any further discussion on the matter. Perhaps it would have been wiser for him not to have responded to the suggestion that his name was clear or cleared at all. But in the circumstances it was at least understandable. He could hardly be expected to have replied, "I would like to point out that my name has not been cleared". This may have been the reason why the Commission decided against taking any action by way of proceedings for contempt. However, even if the Commission's attitude was unnecessarily censorious in the circumstances, we do not think the episode reasonably leads to the view that the Commissioner harboured feelings of bias against Mr Gray. We think the only reasonable inference is that uppermost in the

Commissioner's mind was the need to correct the notion the public may have been labouring under that some final view had already been formed by him about any of the material witnesses before the conclusion of his enquiry, and to impress upon Mr Gray and his advisers the need to avoid any public suggestions of that kind.

88 The correspondence to which we have referred culminated in a letter from Mr Porter to the Secretary to the Commission dated 1 July. By reason of its date it is not relevant to the issues arising out of the incidents of 26 and 27 June with which we have already dealt but it may be thought to be relevant to that arising out of the media release and its aftermath.

89 Having been requested by the Commission to supply particulars of the matters pertaining to the perception of bias, Mr Porter raised in it in detailed form a number of areas of concern. He set out the basis of the legal position as he saw it, including the responsibility of counsel of raising the issue before the tribunal before seeking prerogative relief. The letter then raised in detail many of the issues upon which reliance was placed in the hearing before this Court.

90 Failure to respond, adequately and fairly to the concerns raised by counsel, may well induce in the mind of the observer a perception of disinterest in legitimate concerns of legal advisers to one of the main parties involved in the proceedings before the Commission. That perception could lead to a suspicion or apprehension of bias. However, the Commission was not afforded time to make a considered response (if indeed it intended making one) since Mr Gray filed an originating application on 3 July 1991 which was supported by affidavits sworn by him on 2 July and by Mr Porter on 2 and 3 July. In addition four other affidavits sworn on 2 and 3 July were filed. On 4 July the Orders *Nisi* were made and it can be assumed that the Commission had notice of the proceedings shortly thereafter. Thus it cannot be said that there was failure to respond to the concerns raised by counsel. Indeed the timing of the letter dated 1 July, when considered in relation to the dates of attestation of lengthy affidavits, is capable of leading to the inference that the letter was written as a precursor to the institution of legal proceedings.

91 These particulars of bias have not been made out in our view.

92 A discrete matter of complaint raised on behalf of Mr Gray involves a consideration of the circumstances surrounding the obtaining of a proof of evidence from Mr Paul Lennon MHA, his subsequent evidence, and the continuing employment to date by the Commission of the solicitors who had compiled the proof of evidence.

93 Mr Lennon became a Labor Member for the electorate of Franklin in the House of Assembly in October 1990, on a recount following the resignation of Mr Wreidt. In May 1989, he was the Secretary of the Tasmanian Trades and Labor Council. It was Mr Lennon's practice to meet Mr Gray when he was Premier about once a month to discuss matters affecting the Tasmanian Trades and Labor Council. There was such a meeting on 19 June 1989. The purpose of that meeting was to discuss a proposed appointment to the Industrial Commission. There was some conversation between the two men about the

current political situation.

- 94 On 5 April 1991, Mr Allston and Ms Hopcroft, solicitors to the Commission, interviewed Mr Lennon about this meeting. Both solicitors took notes and later, from those notes, a proof of evidence was prepared. It was sent to Mr Lennon for approval and signature. The proof read in part:

"I recall that the discussion also turned to the question of whether there were individuals within the Labor Caucus who might not be able to live with the Greens. I referred to Michael Polley in this connection. Michael Polley is a close friend of mine, and I well knew his philosophical difficulties with a Labor/Green alliance. Robin Gray referred to Lance Armstrong, but I do not remember what was said about him. He also referred to Jim Cox. I do not remember what was said about Jim Cox, other than that his name was mentioned by Robin Gray. I myself knew very little about Cox. I had first met him only a year or so before when he was pre-selected for Bass, the pre-selection being by the left faction within the ALP, rather than the right faction, of which I am a member."

- 95 Two weeks later, Mr Lennon told Mr Allston on the telephone that the proof was erroneous in its assertion that Mr Gray referred to Lance Armstrong and Jim Cox. Mr Lennon said he could not remember who first mentioned those names, nor what was said in connection with them. Mr Allston asserted that the proof, as sent, correctly recorded what Mr Lennon had told him and Ms Hopcroft on interview. Mr Lennon disagreed. In result, Mr Lennon signed a proof containing, instead of the foregoing paragraph, the following:

"I recall that the discussion also turned to the question of whether there were individuals within the Labor Caucus who were concerned about the Accord with the Greens. I referred to Michael Polley in this connection. Michael Polley is a close friend of mine, and I well knew his philosophical difficulties with a Labor/Green alliance. The names of Lance Armstrong and Jim Cox were mentioned in this discussion, but I am not sure who first mentioned each of them and what was said about them. I myself knew very little about Cox. I had first met him only a year or so before when he was pre-selected for Bass, the pre-selection being by the left faction within the ALP, rather than the right faction, of which I am a member."

- 96 Mr Lennon gave evidence at a public hearing on 26 April 1991. He maintained that his discussion with Mr Gray had covered a number of political topics including whether there were people within the Labor Caucus who might not be favourably disposed to a Labor/Green Accord but that he was unable to say whether Mr Cox's name had been raised in this context nor whether it was he or Mr Gray who first mentioned it. He asserted that although Mr Cox's name had been mentioned somewhere in the conversation, he could not say by whom nor what was said about him or Mr Armstrong. Junior counsel assisting the Commission questioned Mr Lennon very closely about what was suggested to him was a change that he had made from his first statement to Mr Allston and

Ms Hopcroft. It was put to him, in effect, that he had discussed his proof with another or others and consequently changed it. This Mr Lennon denied. He said he saw the error as soon as he received the first proof and maintained that the solicitors were mistaken about what they say he had told them.

97 During the course of this questioning, junior counsel assisting the Commission put in evidence two affidavits, one by Mr Allston and one by Ms Hopcroft. They deposed that the statement set out in the first proof was an accurate reflection of what Mr Lennon had told them on interview, original notes being annexed tending to prove that this was so. At the time the affidavits were tendered, junior counsel said it was not proposed to call either deponent for cross-examination but, "if any counsel or person wishes an opportunity to have them cross-examined on their affidavits then both will enter the witness box for that purpose and I make that especially clear to Mr Lennon."

98 On being confronted with the affidavits and questioned about their contents, Mr Lennon adhered to his evidence that the first proof did not accurately reflect what he had said to the solicitors at interview. Accordingly, there was a conflict between the evidence of Mr Allston and Ms Hopcroft on the one hand, and Mr Lennon on the other as to whether Mr Lennon had earlier said who first mentioned the names Lance Armstrong and Jim Cox in a conversation between him and Mr Gray on 19 June 1989 on the topic of whether or not there were individuals within the Labor Caucus who had concerns about a Labor/Green alliance.

99 In an affidavit filed in these proceedings and sworn after the Order *Nisi* for a Writ of Prohibitio half of Mr Gray is as follows:

- (a) whether or not the Commissioner reports that Mr Gray knew or was involved in the bribery attempt depends entirely upon his assessment of circumstantial evidence;
- (b) such assessment necessarily involves a consideration of the conflicting evidence just referred to;
- (c) as the deponents of the affidavit evidence are not only still in the employ of the Commission but assisting the Commissioner to write his report, a fair minded observer would think that the Commissioner will prefer the evidence of the Commission's employees to that of Mr Lennon and this is likely to give rise to a suspicion of bias against Mr Gray.

100 In support of this proposition counsel for Mr Gray relied upon *Stollery v The Greyhound Racing Control Board* (1972) 128 CLR 509. In that case, the Board charged a greyhound owner and bookmaker with conduct detrimental to the proper control and regulation of greyhound racing. The charge arose out of a sum of money offered to the manager of a greyhound owner's association allegedly to ensure the appellant's dogs were selected to race. The manager was also a member of the Board. The Board heard from the manager and the appellant who claimed that the money was given for a legitimate purpose. The appellant then retired from the meeting of the Board but the manager remained. The manager took no part in the Board's deliberations which resulted in a

finding of guilt. Barwick CJ said at p519:

"What justice requires will ever depend on circumstances, and the degree to which it should be manifest that it is being done will likewise be related to the particular situation under examination by a supervising tribunal. But in my opinion, dissatisfaction engendered in the mind of an observer aware of the facts, by the continued presence of Mr Smith in this boardroom, having regard to his personal connection with the matter in hand, is not extravagant or far fetched. As I have said, a reasonable man could very properly suspect that the clear opportunity which Mr Smith had for influencing the decision of the Board might well have been used."

101 McTiernan J agreed with the judgment of the Chief Justice.

102 Menzies J said at p520:

"A long line of authority establishes that the decision of a tribunal, whose duty it is to act judicially, will be invalidated if, while the tribunal deliberates and reaches a finding adverse to a person whose conduct is under scrutiny, there is present some person who, in fairness ought not to be there; [his Honour referred to a number of authorities].

Authority further establishes that a person who has an interest adverse to, or in such proceedings, has been opposed to, the person on trial, is within the category of persons who in fairness ought not to be present at the deliberations of the tribunal; [his Honour referred to a number of other authorities]."

103 Gibbs J said at pp526, 527:

"The principles of natural justice are not rigid or technical. 'The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth': *Russell v Duke of Norfolk* [1949] 1 All ER 109 at p118. It is, however, clear that it would not be in accordance with the principles of natural justice for a person who was in truth the accuser to be present as a member of the tribunal when the charge which he had promoted was heard even if he took no actual part in the proceedings: *R v London County Council; Ex parte Akkersdyk* [1892] 1 QB 190 at pp195–196; *Dickason v Edwards* (1910) 10 CLR 243 at pp252–253, 256, 263. The very presence of a person who has brought forward a complaint may, even unconsciously, inhibit the discussions and affect the deliberations of the other members of the tribunal."

104 We have referred to the judgments in that case at some length because it is clear from them that whether conduct constitutes a breach of the rules of

natural justice will depend upon all the circumstances of each case. Where the allegation is contamination of the decision making process, the identity of the contaminator, the nature and extent of the possible contamination and the decision that has to be made all need examination to see if the contamination would reasonably engender a suspicion of bias. Where the contaminator is one of the parties or a representative of one of the parties the slightest degree of contamination is sufficient to infringe the rules of natural justice. See *Re JRL Ex parte CJL* (1986) 161 CLR 342; *The City of St Kilda v Evindon Pty Ltd & Ors* [1990] VR 771; *R v London County Council Ex parte Akkersdyk & Anor* (*supra*); *Dickason v Edwards* (*supra*). However, even where the alleged contaminator is a person with a substantial interest in the decision to be made by the tribunal, if the extent of the apparent contamination was minimal, and occurred in circumstances that would not excite the mind of the reasonable bystander to suspect bias, the decision will not be impugned. Cf. *R v Coburn; Ex parte Fomin* (1981) 9 N.T.R. 1.

105 Examination of the relevant parts of the proceedings in the Royal Commission shows that the question of who first mentioned the names Lance Armstrong and Jim Cox during a conversation between Mr Gray and Mr Lennon and in what context was given little significance at any time thereafter. The Commissioner said he regarded the alleged prior inconsistent statement as relevant to the credit of Mr Lennon and did not suggest that it was capable of proving the truth of the earlier statement if made as alleged by the two solicitors. Counsel for Mr Gray was present when the affidavits were tendered and, although he mentioned that perhaps Mr Lennon should be given a little time to consider them, he did not seek to cross-examine either deponent. The matter did not receive much attention from counsel assisting the Commission when he cross-examined Mr Gray. He asked Mr Gray whether he discussed with Mr Lennon the possibility of Mr Cox being disaffected with the Accord. Mr Gray said:

"I think there was some general discussion about the political situation and general talk about defectors and people were unhappy with the Accord. It was just a political discussion. There wasn't any suggestion there was going to be any defector. It was, as I recall it, you know just – he came – he made the appointment to come and see me, sort the meetings. I thought he was just coming to find out what we were about."

106 In answer to the next two questions Mr Gray told the Commission, "I don't believe that I mentioned Cox's name, no". Mr Chesterman QC then asked, "Do you agree that Cox's name was mentioned?" and Mr Gray replied, "I can't say that with absolute certainty". Mr Gray again repeated that there was a general discussion about the political situation and there the matter was left.

107 The only reference to this conflict of evidence made by Mr Chesterman in his closing address was when he was submitting that it was curious that Mr Gray seemed to have some interest in Mr Cox and in the possibility that someone might defect to the cross benches or to the Liberal side of Parliament. He referred to evidence from Mr Ray Groom that Mr Gray had mentioned Mr Cox as a nominee for the Speakership and had said that such a nomination was

not "a silly idea". Mr Chesterman then said:

"On the 19th of June, Mr Gray discussed with Mr Lennon, a political opponent, the question of Cox and whether he was disaffected with the Accord."

108 Of more significance, Mr Gray's counsel made no direct submissions in his closing address about this conflict of evidence between Mr Lennon and Mr Allston and Ms Hopcroft. He referred to this part of Mr Lennon's evidence in the following passage:

"There can no doubt be many instances in many general situations where, looking back with the benefit of hindsight and in a particular context, an innocent remark can be made to look at the least peculiar. Similar considerations apply to the conversations with Mr Lennon, *even if it was in fact Mr Gray who mentioned Cox's name.*" [Our emphasis].

109 A useful insight into the mind of the hypothetical fair minded bystander is gained from the fact that the submission put in relation to this matter was apparently not perceived by the legal advisers to Mr Gray until after the hearing in this Court commenced. As particularised, the circumstances surrounding the obtaining of a proof of evidence from Mr Lennon complained of the fact that, apparently, the Commissioner and/or the Commission's solicitors were resolved not to accept the word of Mr Lennon thereby demonstrating an undue anxiety to find involvement by Mr Gray in the bribery attempt. The submission that apparent bias arises from the fact that the Commissioner has one of the witnesses, allegedly adverse to Mr Gray's interests, assisting him write the report did not surface until several days after this hearing began. Accordingly, the retention of the services of Mr Allston and Ms Hopcroft to assist the Commissioner write the report apparently did not excite a suspicion of even apparent bias in the minds of the legal advisers to Mr Gray until very late in the day.

110 It is entirely appropriate for the Commissioner to have assistance in the preparation of his report. Such assistance would no doubt include the assembly and marshalling of various aspects of the evidence and even the drafting of the formal or non-contentious parts of the report. Cf *Dale v New South Wales Trotting Club Ltd & Ors* [1978] 1 NSWLR 551. There is nothing in the affidavit of Mr Allston to suggest that his expression "the Commissioner is presently writing his report with assistance from all of the members of the staff just mentioned" refers to any more extensive role than that or to suggest that the Commissioner's decision making process has been contaminated by or delegated to another. Unlike many of the cases referred to earlier, the Royal Commissioner sits alone and accordingly his decision making process does not of necessity require the debate necessary when the decision making process is vested in more than one person.

111 In these circumstances we have reached the conclusion that the retention of the services of Mr Allston and Ms Hopcroft to assist write the report is not a circumstance that offends the rules against natural justice and is not a matter

reasonably likely to engender a suspicion of bias.

112 We have dealt with the principal matters of complaint raised by the Prosecutors but there are a number of other instances said to be indicative of a predisposition in the Commissioner against one or other of them.

113 Mr Gray relied upon an allegation that he was not given adequate notice of a requirement to attend a public hearing on 21 February 1991 even though there had been a number of prior discussions between junior counsel assisting the Commission and Mr Gray's counsel with respect to the possible hearing times for witnesses.

114 Mr Porter deposed that on 23 January 1991 he discussed with junior counsel assisting the Commissioner "various things such as the identity of witnesses to be called, the order of calling such witnesses, order of cross-examination and so forth." Mr Thompson said that he would consider the matters and speak to Mr Porter about them as soon as he could. Mr Porter heard nothing for over three weeks. On 18 February he noticed a newspaper advertisement to the effect that there would be a public hearing in Hobart in three days' time. Mr Porter rang Mr Thompson to express his concern and annoyance that Mr Thompson had not spoken to him in response to their discussion over three weeks previously. Mr Thompson told Mr Porter that "something was happening towards the end of the week and that [Mr Gray] would find out about it in due course but he was not able to say anything about it at the time." In another conversation later that day Mr Thompson told Mr Porter that on 21 February there would be a formal opening and other matters would take place which would involve Mr Gray and others but which Mr Thompson was not at liberty to reveal what they were. Within hours of that phone conversation Mr Gray was served with a summons to appear at the inquiry on 21 February and produce certain documents specified in the summons.

115 On the face of it, a fair minded person might consider this rather clandestine approach by the Commission to be strange. However, it is explained by the following paragraph in the affidavit of the solicitor assisting the Commission, Mr Allston:

"The decision to sit on 21 February to receive documents on summons was not made until the latter part of the week preceding 18 February. There were many witnesses from whom we wished to obtain documents to assist in the initial investigation. We decided that no one would be given advance warning of the fact that he or she was to be served with a summons, and that the summonses would be served on short notice, to lessen the risk of documents being destroyed. The concern that documents might be destroyed did not relate to any particular person."

On learning that all the witnesses who were required to attend on summons to produce documents were treated in the same manner as Mr Gray, a fair minded person could not, in our view, apprehend bias by the Commissioner towards Mr Gray.

116 Mr Gray's next complaint is that the Commissioner's demonstrated attitude towards him on the return of the summons to produce documents was one that would be likely to reasonably engender a suspicion of bias in a fair minded person.

117 On 21 February 1991, Mr Gray produced a number of documents to the Commissioner in response to the summons which required him to produce:

"... any of the following books, documents and records in your custody or control:

- (a) all diaries and appointment books for yourself for 1989;
- (b) all letters, memoranda and notes recording or evidencing meetings or conversations between:
 - yourself and Edmund Alexander Rouse;
 - yourself and John Eugene Gay;
 - yourself and Peter Wade;
 - yourself and William Paisley; and
 - yourself and Robert Frederick Cliffordbetween 4 June 1989 and 30 June 1989;
- (c) all letters, memoranda and notes written or made in consequence of any meeting referred to in (b) above;
- (d) any copies or extracts from any of the documents referred to in (b) or (c)."

In answer to questions from the Commissioner Mr Gray said that he had in his possession, but not produced to the Commission, files of documents "relating to the Rouse matter". Mr Gray explained that they contained such documents as copy newspaper clippings and correspondence with his legal advisers and he did not consider that the terms of the summons required him to produce them. In a somewhat peremptory manner Mr Carter said to Mr Gray:

"In other words, what you've done is selectively taken from the file the ones you believe answer the summons?"

118 Mr Gray responded to the effect that he believed that he had answered the summons "as it is worded", but would be happy to produce all his files. Later that day he did so and Mr Chesterman QC looked through them. In public hearing Mr Chesterman said that he had looked through the papers and that he was satisfied that "There is nothing in either of [those two folders] that answers the description in the summons".

119 Just before the Commission adjourned for the day Mr Porter said he wanted to clear away any suggestion that there might have been selective interpretation of the summons and withholding of documents. The

Commissioner cut in and denied that, by his use of the word "selective" he had intended anything inappropriate and said, "You may have read more into that than you should have and I don't think on that account you should entertain any concern."

120 There the matter should have ended, but Mr Porter continued it by saying that it seemed to him that there was an inference that the summons may have been interpreted carefully and that some documents may have been withheld. He added, "I infer that any implication that arose this morning has been withdrawn and any such suggestion [withholding of documents] is unwarranted." The Commissioner responded by saying that there was no implication, "Certainly not from myself, and I don't understand from counsel either". He continued:

"Commissioner: I would insist Mr Porter, that you be somewhat careful in the way in which you address the question. I have valued your co-operation so far, indeed that of Mr Gray's and I would expect further co-operation and I propose to terminate the conversation now because I don't think there are any other relevant matters that you can assist me with. As I have indicated to Mr Gray, he may be required at a later stage and if you have any specific concerns, would you raise them with Mr Chesterman?

Mr Porter: Can I say sir, not by way of answering you back, but that Mr Gray and I are committed to assisting you sir and will remain so.

Commissioner: Yes of course, thank you."

121 Some tempering by the Commissioner of his form of expression might have avoided this whole incident. However, it was the first hearing of the Commission and, no doubt, the Commissioner wanted to make it clear from the beginning that the investigation and inquiry would be conducted on his terms. At all events, the exchange at the conclusion of the day would put to rest any temporary disquiet that might have existed in the minds of fair minded people that the Commissioner was biased against Mr Gray.

122 Mr McQuestin had a similar complaint about the way he was treated by the Commissioner when he first appeared before him at an in camera hearing on 14 and 15 March. He too had received a summons, a copy of which is not before us, but it appears from references to it in the transcript of the Commission hearings, that a number of individual documents were particularised such as "all cheque requisitions, cheques, cheque butts, payments vouchers, receipts and bank statements evidencing or relating to donations by yourself and/or ENT Ltd to any political party" in the period 1 January 1982 to 30 June 1989. In the course of his examination, a document was produced which took the form of a reconciliation. When the Commissioner asked where were all the documents that were used for the purposes of the reconciliation, Mr

McQuestin said, "I would think at ENT". Later the questioning continued thus:

"Commissioner: ... Well what can you tell me about all that Mr McQuestin?

McQuestin: That is a journal that was drawn up by the accounts department on where the money had been spent.

Commissioner: Where are the documents which were used for the purpose of preparing that document?

McQuestin: I don't know.

Commissioner: Well Mr McQuestin –

McQuestin: I'm sorry, but I brought every document that we have been able to find.

Commissioner: Every document that you were given, presumably?

McQuestin: Yes.

Commissioner: By whom?

McQuestin: By Ron Farrell the company secretary.

Commissioner: Just have a look at that document yourself – just look at it. And bear in mind you are the managing director of this company – just look at it.

McQuestin: Yes.

Commissioner: That document plainly assumes the existence of other documents.

McQuestin: Well I'm sorry if it does, because that was what I was given. I haven't been given –

Commissioner: Just don't worry about what you were given. Look at the document. Does not that document assume the existence of other documentation of some kind, of a financial nature?

McQuestin: Yes, I suppose it does.

Commissioner: Oh, you suppose it does. It plainly does with great respect. Let's be frank. If you look at the two entries that I've – please Mr Gunson.

Gunson: Yes, well –

Commissioner: If you look at the document, the two entries that I have referred to, let alone the rest of the document, showing a debit of – in the debit column of the journal entry of forty six thousand dollars and then another entry of thirty eight thousand dollars, and there are digits or symbols there which obviously relate to something else, that document on its face is unintelligible as a financial document. It therefore

assumes, plainly the existence of other documents – do you agree?

McQuestin: Well I'd have to agree.

Commissioner: Where are the other documents?

McQuestin: I don't know.

Commissioner: Mr McQuestin, I'm concerned about that, and you of course will need to come to the witness box again at a later stage, but Mr McQuestin, I am drawing your attention to those matters. I regard them as serious because it is plain to me from those documents that there are other documents which haven't been – which haven't been given to you for the purpose of answering the summons. Now, I'm sure you would recognise your responsibilities. I don't know whether or not that fact or the facts that I'm pointing to you now were apparent to you before. It's obvious now from what your evidence is that it is apparent there are other documents. And I intend to use every power at my – which is available to me to make sure that I get the other documents. Now, would you undertake to assist me in discovering within your company, the company of which you are managing director, all the documentation which is referable to that document at least, and any others that may be seen to be relevant in that context.

Commissioner: Do I have that undertaking from you?

McQuestin: You do. Could I make an explanation?

Commissioner: If – if – if, please – please – please – if it helps me, please make it.

McQuestin: Well I received a summons on Tuesday night. I'd been in the Broadcasting Tribunal all day Monday and all day Tuesday. I had to be down here for a Bank Board meeting for the amalgamation of the banks on Wednesday and you asked us to go back until 1982 to get documents and consequently most of these documents that have been got out have been faxed down because we basically just haven't had time to get them all out.

Commissioner: I can understand Mr McQuestin that you, in your position, would have other commitments. I am not so naive as not to understand that. Nor am I not so naive as to understand that a company like ENT must have considerable resources, personnel and other resources available to it. Now I can understand your inability to produce the documents personally,

but I have some difficulty in fully understanding why those who are responsible to you have not given me anything other than that simple – single document.

McQuestin: No

Commissioner: Now, for that reason – please Mr Gunson – for that reason Mr McQuestin, I assume that you will ensure, by virtue of your office in the company, that all of the documentation referable to these matters – in other words, all of the books of the company and that's what I'm talking about – all of the books of the company are produced to the Commission for the purpose of my being able to properly enquire into the matters which it is my onerous obligation to enquire into. Is that clear?

McQuestin: Yes.

Commissioner: Thank you. Yes Mr Gunson you are irritated.

Mr GUNSON: Well with the greatest of respect, Mr Commissioner I submit that part of your criticism of Mr McQuestin, if it can be characterized as that, is unfair.

Commissioner: Please – please – please – please, I have asked – Mr McQuestin has adequately explained to me his inability to produce the documents himself. What I have said should not be construed as a criticism of Mr McQuestin. What I am plainly concerned about is the fact that the documentation produced is sketchy only. That document is one such document which is plain, on its face, presupposes the existence of a large body of other documentation. If that document can be produced, I simply enquire why can't the rest of it?"

123 There followed some discussion as to whether the documents not produced had been covered by the summons, the Commissioner suggesting that they "not have a technical discussion" and Mr Gunson protesting that no selective analysis of documents had been made and that all documents believed to be required by the summons had been produced to the Secretary to the Commission. It was submitted to us that the Prosecutor was shown to have produced everything required of him and that the Commissioner had ungraciously omitted to acknowledge that fact. Without the benefit of seeing either the documents themselves or the summons, we find it impossible to say that the Commissioner acted in some way unfairly or ungraciously. He demonstrated that he was intent on procuring all relevant material and that, while recognising the competing calls on Mr McQuestin's time and attention, he expected his full co-operation as the managing director of the company in ensuring that the Commission received them. He said he accepted Mr McQuestin's explanation and that what he had said should not be construed as criticism of him. We do not think that the fair minded observer would

reasonably apprehend from this episode that the Commissioner was in any way biased against Mr McQuestin.

124 Both Prosecutors rely upon "the circumstances surrounding the failure to supply proofs of evidence and copies of exhibits" as evidence of actual and/or apprehended bias. The position of Counsel Assisting the Commission, Mr Chesterman QC, was made clear in a statement he made at the commencement of the second day of the public hearings, 23 April 1991. Counsel referred to some criticism that had appeared in the press the preceding day to the effect that the procedures adopted by the Commission would lead to an unsatisfactory result. Apparently, the criticism was of the Commission's decision not to give proofs of the evidence to be given by witnesses to any counsel who had been given leave to appear before the Commission. The thrust of the criticism was that lack of advance notice of the evidence to be given denied counsel an opportunity to take instructions and adequately probe, by cross-examination, evidence adverse to their clients interests.

125 Counsel assisting the Commission told the Commissioner that, to allay any fears in this respect, the following course would be adopted:

- 1 Counsel would be supplied with a list of witnesses intended to be called "in the near future". He said, "in the nature of this enquiry it is likely that that is sufficient notice that someone ought to come along if they have an interest or an apprehension that something might be said adverse to them."
- 2 Any witness in respect of whom there may be reason to think an adverse finding may be made, will be called towards the end of the proceedings after any evidence adverse to that person has been given.
- 3 Any application for an adjournment to take instructions to cross-examine a witness who has given "adverse" evidence would not be opposed.

126 Later that day, Alois gave evidence. The following day, after the florid headlines to which we have already referred, counsel for both Rouse and Mr Gray sought the public release of the transcript of Rouse's in camera evidence and, before the Commissioner delivered his ruling declining to do so, Mr Gray had taken it upon himself to release to the Press the edited transcript in his possession. On 26 April Mr Evans had complained of a damaging slur upon him due to Mr Chesterman's allegedly untruthful statement and the Commissioner had terminated the incident with a reference to "untruthful slurs" levelled against the Commission and its staff. Later that day, Mr Chesterman wrote in acrimonious terms to Mr Porter advising:

"You and your client have amply confirmed the reasons why I was not prepared to provide you with copies of proofs of evidence of the witnesses who will be called to give evidence."

127 The letter concluded with a statement that copies of any exhibits or proofs would not be given unless Mr Porter undertook, in substance, to use them only for the purpose of getting instructions and not to let them or a copy of them out of his hands. Mr Porter responded by a letter which firstly dealt with the

acrimonious tone of Mr Chesterman's letter and which continued, "I am happy to accommodate and to be accommodating in respect of the release of proofs." There followed a refusal to give the undertaking in the terms specified by Mr Chesterman's letter and the reasons why an undertaking in such terms could not be given. There followed a further exchange of correspondence between Messrs Porter and Chesterman which concluded on 6 May 1991 with Mr Porter agreeing to give an undertaking in terms identical to those apparently given by that stage, by other counsel appearing before the Commission.

128 It is clear from the foregoing recital of the events relied upon under this particular, that the circumstances surrounding the supply of proofs of evidence and copies of exhibits to the Prosecutors' counsel were exactly the same as the circumstances surrounding the supply of these documents to all other counsel appearing before the Commission. Apart from the acrimonious tone of Mr Chesterman's letter, there was even handedness between all witnesses. There is nothing to suggest that the Commissioner adopted or even knew of the tone used by Mr Chesterman in his letter to Mr Porter of 26 April 1991. Accordingly, this particular, is neither evidence of actual bias nor evidence from which bias might reasonably be apprehended.

129 A further particular, relied upon by Mr McQuestin as evidence of actual and/or apprehended bias, asserted that the Commissioner's attitude towards witnesses who might be seen as supportive of him was one of hostility, scorn and disdain. It was claimed to be in marked contrast to his attitude towards witnesses who might be seen to be adverse to Mr McQuestin's interest. Mr Gunson's affidavit sworn 29 August 1991 deposes that, during the course of his examination of Mr McQuestin, the Commissioner only looked at the witness once and that was when he made his only interruption to the evidence Mr Gunson was leading. Mr Gunson also deposed that throughout his leading of evidence from Mr McQuestin the Commissioner either looked at the roof of the hearing room or turned his chair to the left or right of the Bench looking at the far walls. On other occasions he was said to have placed his elbows on the Bench in front of him and rested his head on his hands, covering his face with his hands. Mr Gunson also said that these postures were not adopted by the Commissioner when Mr McQuestin was cross-examined by Mr Chesterman QC.

130 Counsel for Mr McQuestin conceded that there was little by way of evidence to sustain this complaint but submitted that Mr Gunson's evidence should be taken into account when considering the other matters of complaint. Examination of the transcript of the evidence led from Mr McQuestin by Mr Gunson discloses that many of the questions were in an extremely leading form and it would not be surprising if the evidence of the witness given in answer to such questions put by his own counsel did not command the highest level of attention from the Commissioner.

131 The evidence simply does not warrant any suggestion that the Commissioner treated witnesses who might be seen as supportive of McQuestin's interest any differently from any other witness.

132 As evidence of actual and/or apprehended bias Mr Gray relied upon a statement by Mr Chesterman QC to Mr Porter on 7 May 1991 to the effect that

there are clear circumstances of suspicion surrounding Mr Gray and that "if he gives a satisfactory explanation he will get a clean bill of health."

133 In his affidavit, Mr Porter deposed that on 7 May 1991 he had a discussion with Messrs Chesterman and Thompson. He observed to Mr Chesterman that "it was plain that they were conducting a case against my client." Mr Chesterman's response was to say that there were clear circumstances of suspicion surrounding Mr Gray and if he gave a satisfactory explanation of these circumstances "he would get a clean bill of health".

134 Had the bribery attempt been successful Mr Gray, on one view, would have benefited – at least in the short term. He, of course, maintained that he had been confident he could get a fresh election and that a defection would have deprived him of the opportunity of procuring one. Nevertheless in one sense he and his party might be said to be the immediate beneficiaries of Rouse's bribe attempt. His conduct was a central matter for the Commission to consider. The correctness of Mr Chesterman's observation to Mr Porter on 7 May 1991 was acknowledged by Mr Porter in his closing address to the Commission on 10 July 1991 when he said:

"A substantial part of this inquiry has centred on Mr Gray and whether he was involved. That has necessarily and properly been so." [Our emphasis].

135 In these circumstances Mr Chesterman's observation to Mr Porter in May 1991 could not possibly have given rise to a suspicion of bias in the mind of a fair minded person.

136 As further evidence of actual and/or apprehended bias Mr Gray relies upon an alleged failure by Mr Chesterman to lead evidence from Mr Neil Batt which was favourable to the Prosecutor. This particular also relies upon "the calling of Mrs Dalywell which may be seen as an attempt to denigrate the evidence from Mr Neil Batt which constituted character evidence in favour of the Prosecutor." Officers of the Commission took a proof of evidence from the former Leader of the Labor Party, Mr Neil Batt. Mr Batt was an unsuccessful candidate at the election held on 13 May 1989 and, at the time of giving evidence before the Commission, was the Ombudsman for the State of Tasmania. Mr Batt knew Mr Gray well. The proof of evidence referred to a meeting between Mr Batt and Mr Gray and, with respect to that meeting said, "I recall that Gray was confident that he had constitutional advice that would enable him to obtain another election." A copy of this proof was given to Mr Porter before Mr Batt gave evidence.

137 In examination-in-chief Mr Chesterman asked Mr Gray what was said at the meeting between him and Mr Gray. Mr Batt's answer to the question was responsive but did not include the observation that Mr Gray was confident that he had advice that would enable him to secure another election. Mr Porter's fourth question in cross-examination was, "Do you recall any mention of the potential of a fresh election being made at the first meeting?" Mr Batt responded in accordance with the terms of his proof and added that in his view Mr Gray was so committed to the proposition he had the advice which would enable him to obtain another election that the possibility of there being a defector would

have been foreign to his thinking. This was explored further by Mr Porter and Mr Batt elaborated on his view in terms favourable to Mr Gray. The complaint, as we understand it, is that Counsel Assisting the Commissioner failed to lead from Mr Batt evidence favourable to Mr Gray, a matter, which together with the other matters, would be likely to engender a reasonable suspicion of bias. There are several answers to this proposition. The first is that the Commissioner did not fail to lead the evidence at all. The witness did fail to give the evidence in response to an appropriate question in evidence-in-chief. The second is that by delivery of the proof prior to the evidence being given it would be clear to the fair minded bystander that counsel assisting the Commission did not intend to hide from the Commissioner the piece of evidence that in Mr Batt's opinion Mr Gray was confident he had the advice that would enable him to secure another election. Thirdly, there is no evidence to suggest that counsel assisting the Commission had any idea that Mr Batt would elaborate on his evidence in the manner that he did when cross-examined by Mr Porter. This complaint was first articulated by Mr Porter in a letter to the secretary to the Commission on 10 May 1991 and is answered by the secretary on 14 May 1991 in the acrimonious tone which by now, seemed to stamp much of the correspondence passing between officers of the Commission and counsel representing Mr Gray. The letter said in part:

"The purpose of calling Mr Batt was to put an end to the rumour that Mr Gray and Mr Batt had been discussing the possibility of Mr Batt's [sic] crossing the floor and supporting the Liberal Party in return for a ministry or the speakership. The question of Mr Gray's view of the constitutional position has been clearly put before the Commission by other more authoritative witnesses and is a matter to be explored further."

There is no substance in this matter of complaint.

138 The remaining particulars of complaint do not require detailed attention. Particulars 15 and 19 advanced by Mr Gray were abandoned and no separate argument was addressed in respect of Particulars 16 and 18, the former of which complains of the tone of correspondence and statements emanating from Counsel Assisting the Commission or other of its officers. Unfortunately as time passed, this acrimonious tone became more pronounced and mutual. The particular does not however demonstrate an attitude on the part of the Commissioner himself and bias in him could not reasonably be apprehended by the fair minded observer. Particular 18 relates to the allegedly biased way in which Mr Gray's proof of evidence was prepared but the evidence presented to us in affidavit form does not substantiate this, nor as we have said, was argument addressed on it save that counsel for Mr Gray placed some reliance on the fact that the proof was prepared by a solicitor employed by the Commission, Mr Connolly who, like Mr Allston and Ms Hopcroft, was said to be rendering some assistance to the Commissioner when he was engaged in the writing of his report. This involvement of Mr Connolly was referred to as "a further pollutant in the decision making process". It appears that Mr Connolly had compiled that proof from a variety of materials including statements made and information given by Mr Gray on a number of occasions, both in the original police investigation and during the Commissioner's own investigative work. For the

reasons already advanced in respect of the involvement of the other two solicitors, we think that there is neither substance nor merit in this argument. Particular 17 pleads:

"The hostile attitude and the scornful and disdainful way in which certain witnesses were regarded and dealt with by the respondent during the course of the public hearings. The witnesses referred to were supportive of the prosecutor's interests or perceived interests and their treatment is to be contrasted with that of witnesses who gave adverse or non-supportive evidence. The prosecutor relies further on the fact of the respondent's seemingly unnecessary and peremptory interruptions and directions to witnesses whose evidence was supportive of the prosecutor's interests or perceived interests in comparison with the treatment of witnesses whose evidence was non-supportive or adverse."

Counsel did not abandon this particular but addressed no separate argument in its support. It suffices to say that we are of the clear view that the evidence does not support it. Mr McQuestin also relied on a similarly drawn particular and we can dispose of that with the same comment.

- 139 Counsel for both Prosecutors argued that if the Court were not satisfied that any individual ground of bias had been established nonetheless it should have regard to the cumulative effect of such facts as we found proved and that on that basis, there was ample evidence that the fair minded observer might reasonably expect that the Commissioner might not resolve the questions before him with a fair and unprejudiced mind. We would first observe that the fair minded person referred to in *The Queen v Watson; Ex parte Armstrong (supra)*, although not equipped with any legal or other specialist knowledge, is as well informed about the whole of the proceedings of the Royal Commission as is this Court. As to the level of sophistication of this observer see the comments of Kirby P in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at pp375–376, cited by Toohey J in *Vakauta v Kelly (supra)* at p585). His knowledge does not come from media accounts but he is aware of those accounts, for they serve to explain some of the events that occurred in the proceedings. Understandably, the Royal Commission attracted extensive media coverage. Inherent in the business of reporting any current event for the media, is the tendency to dramatise and highlight single issues, often bestowing on them an urgency and importance they do not warrant with a view to captivating a potential audience. Hence, the vocabulary of the media is well stocked with words such as beleaguered, embattled, crisis, lash and hit. Words such as these used to report proceedings inquiring into allegations of bribery of a politician no doubt serve to inflame the minds of those whose only knowledge was derived from the media accounts. It is apparent that they did, at times, inflame the minds of counsel appearing before the Commission from time to time and consequently dictated their conduct in the Commission. It would also appear that on occasions, media reporting of the work of the Commission affected the Commissioner's actions and words. This is to be regretted for dispassionate scrutiny of the events often reveals a discrepancy between the facts and the reports. In result, the valuable role of the media in keeping a community informed became distorted on some occasions perhaps creating false

impressions in the minds of fair minded but ill-informed bystanders.

140 There were on some occasions, as we have found, instances where the words used by the Commissioner were unnecessarily florid and where his perception of the conduct of counsel in particular, was inconsistent with the facts. With the wisdom of hindsight and in the less volatile atmosphere of a Court reviewing the procedures of a lengthy enquiry into the highly sensitive and complex areas covered by the Commissioner's terms of reference, it is easy to assert that some words might have been better left unsaid and some things done in a different way. Individually, as we have in our view demonstrated, the matters complained of are susceptible of explanation consistent with an absence of any bias on the Commissioner's part and we are not persuaded that they either show actual bias or might reasonably lead to the apprehension of it in the fair minded and properly informed observer. Collectively, when viewed in proper perspective they, in our view, have no greater capacity to prove bias and have failed to persuade us that any such bias exists.

141 Accordingly, the Orders *Nisi* will be discharged.