

**IN THE MATTER OF THE ROYAL COMMISSION INTO
TRADE UNION GOVERNANCE AND CORRUPTION**

**SUBMISSIONS ON BEHALF OF THE
ACTU, CEPU, HSU, TWU, UNIONS NSW AND
THE MARITIME UNION OF AUSTRALIA**

ACTU

1. On 17 August 2015, the Commissioner directed the ACTU to file submissions in respect of an application for disqualification, which was fixed for hearing at 10.00 am on Friday, 21 August 2015. The perceived urgency in respect of any application was emphasised by both the Commissioner and Counsel Assisting. The issue of standing of the ACTU was also raised. At that time the ACTU had specific authorities to seek the relevant documents from specific unions.
2. These submissions are filed pursuant to that direction. This application is brought on behalf of the ACTU, CEPU, HSU, TWU, Unions NSW and the Maritime Union of Australia (together, the **Unions**).

The relevant test

3. The Unions apply for the Commissioner to recuse himself and resign his commission forthwith on the ground that he is unable to afford any union or any person associated with any union procedural fairness as a result of his apprehended bias.
4. The relevant legal test was set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] as follows (footnotes omitted):

...a judge is disqualified if a fair-minded lay observer **might** reasonably apprehend that the judge **might** not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both

be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial...(emphasis added).

5. In the context of a politically charged Royal Commission, Ashley J stated in *Firman v Lex Lasry QC* [2000] VSC 240 at [23]:

I agree, on the other hand, with the observation of Thomas J [in *Carruthers v Connolly* [1998] 1 Qd R 339 at 356] that the hypothetical observer would be likely to be concerned if, in a Commission raising matters which were highly politically charged-reflecting a divide between the main political parties – a Commissioner was thought to harbor political prejudice.

The political context of the Royal Commission

6. This Royal Commission has a political context and in the words of *Firman* and *Connolly* is appropriately described as politically charged.
7. The Governor-General, on the advice of the Executive being the current Abbott government, appointed the Commissioner to be a Commission of inquiry. The conduct and powers of the Commission are regulated by the *Royal Commissions Act 1902* (Cth). Whilst not express, it must be taken as implied into that statute that the Commissioner is obliged to afford all interested persons procedural fairness.
8. The union movement in Australia has always been and remains inextricably connected to the Australian Labor Party. In Australian political terms the Liberal Party and the Labor Party are natural rivals and adversaries. Since the second world war, either one of them has been effectively the Government of the day or the opposition party in the Commonwealth and most State parliaments.
9. The political context of the Royal Commission was recognised by Counsel Assisting in his opening for the 2015 stage of hearings.

10. Under the heading “*The Political Context*”, Counsel Assisting said¹:

What might be described as the political context is also important. This has been a theme behind many of the issues already examined by the Commission. By way of background, the Australian Labor Party was established because working people realised it was not sufficient merely to band together to achieve reforms in individual workplaces. They wanted a voice in the political process.

A union which is affiliated with the ALP has very specific and wide-ranging powers under the ALP’s rules. In practical terms, a union’s power is concentrated in the hands of the secretary of that union. It follows that the secretary of a union affiliated with the ALP has power well beyond his or her union. The secretary may be in a position to wield great power in terms of the selection of political candidates and the promotion of particular policies.

11. Counsel Assisting’s opening proceeded to refer to the issue of slush funds and then posed a series of questions in respect of union membership and generally as follows:

Why is it in the interests of the union to exaggerate the number of its members? The answer is because it gives persons who stand at the apex of the particular union an opportunity to exert greater power within a major political party.

A number of questions for the Commission arise from this. Is there a pattern of senior union officials involving themselves in political issues to such an extent that they are in conflict with the duties they owe to members? Is that part of the reason for the issues which the Commission has identified to date in the Interim Report? If so, what recommendations could be made about it?

12. The political context is also borne out by two witnesses called by the Commission. In the current round of hearings the Commission called Mr Bill

¹ Transcript 23 April 2015, pp 26-27.

Shorten, the Federal Member for Maribyrnong and current Leader of the Australian Labor Party, as a witness. In the previous round the Commission called Ms Julia Gillard, the former Prime Minister and former leader of the Australian Labor Party, as a witness. Serious allegations of wrongdoing were explored with each of them in circumstances of enormous publicity reflecting the public interest in such matters.

13. In a discussion paper entitled “Options for Reform” dated 19 May 2015, the Commission said at [1] that:

A core part of the Commission’s role is to make recommendations arising out of its inquiries. Indeed the Letters Patent issued by the Governor General specifically direct the Commissioner to make any recommendations arising out of his inquiry...

14. The Options for Reform paper at [2] proceeded to identify that it was thought undesirable in the Commission’s Interim Report to reach final conclusions or make recommendations as to law reform in the Interim Report.

15. In section 2.4.4 of the Options for Reform paper, a section is entitled “Political Role”. The section begins at [77] by noting:

Another important contextual aspect when considering trade union governance is the political power and influence exercised by trade unions. The deep historical ties between the union movement and the Australian Labor Party (ALP) are well-known...Those institutional ties remain strong today.

16. The Options for Reform paper discusses the union role in the selection of ALP representatives for State and Federal Parliament. The section concludes at [94] by stating that:

Whilst there have been calls by some within the ALP for changes to the party’s existing structures, these are not matters within the Commission’s Terms of Reference. Nor is it a matter for the Commission to opine on whether these arrangements are good or bad

for the ALP and the general body politic. Rather, they are simply matters of political fact which necessarily inform any analysis of union governance. (Footnotes omitted)

17. In *Ebner* at [8], the Court identified that the person alleging apprehended bias must:
 - a. identify a matter that might lead the Commissioner to decide the case other than on its merits; and
 - b. articulate the logical connection between the matter identified in the first step and the fear that the Commissioner might not decide the case on its merits.
18. Here, the matter the subject of the first step of the *Ebner* test is, an apprehension by the fair-minded lay observer that the Commissioner might have a political persuasion or allegiance toward the Liberal Party and thereby, as a result, might harbor a political prejudice towards the Australian Labor Party and the union movement generally.
19. The logical connection required by step two of the *Ebner* test is an apprehension by the fair-minded lay observer that in circumstances where the Royal Commission has a clear and incontrovertible political context, a Commissioner that might harbor a political prejudice against the Australian Labor Party might not bring an impartial mind to the issues the subject of the Commission including, for example, issues that concern the connection between the unions and the Australian Labor Party and any recommendations for law reform as to the governance of unions that may form part of the final report.

The fair-minded lay observer

20. The fair-minded lay observer is not a lawyer. Being reasonable and fair minded, this hypothetical person, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances: see *Johnson v*

Johnson (2000) 201 CLR 488 at [53]; see also *British American Tobacco v Laurie* (2011) 242 CLR 283 at [47]; see also *Duncan v Ipp* (2013) 304 ALR 359 at [64], [155]-[156].

The Relevant Facts

21. The primary facts are a series of emails referred to below.
22. The fair-minded lay observer must be taken to have read those emails and their attachments, and to have drawn such inferences from them as are reasonably open.
23. The question of the approach that the fair-minded lay observer would take to the context or explanation provided by the Commissioner as to the proven facts is addressed below.

Letters Patent

24. On 13 March 2014, Letters Patent were issued to the Commissioner under the *Royal Commissions Act 1902* (Cth) on advice of the Federal Executive Council².
25. The Letters Patent appointed the Commissioner to inquire into a range of matters concerning or relating to employee associations.
26. Certain employee associations were named in paragraph (b) of the Letters Patent, namely:
 - a. the Australian Workers Union;
 - b. the Construction Forestry Mining and Energy Union;
 - c. the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
 - d. the Health Services Union; and
 - e. the Transport Workers Union of Australia.

² Various Letters Patent have also been issued during 2014-2015 by the Governors of Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia.

27. The Commission has subsequently adopted the name and brand “*Royal Commission into Trade Union Governance and Corruption*”.
28. The Letters Patent required the Commissioner to submit his report of the results of his enquiry and recommendations not later than 31 December 2014 (later extended).

The initial communication

29. On 10 April 2014, Mr Gregory Burton SC wrote to the Commissioner by email, which had as its subject “2015 Barwick Address”³.
30. Mr Burton referred to the Acton Lecture which the Commissioner had given that evening and stated:

[t]hank you also for an indication that you would be amenable to delivering the sixth annual Sir Garfield Barwick Address in August 2015 if the Commission has completed.

31. Mr Burton explained his role as “chair of one of the Lawyer Branches of the Liberal Party NSW Division” and stated:

[a]lthough we are formally a branch of the Party, our aim is to be a liberal-minded “bridge” to the profession rather than overtly party-political (although we trust we show the Party in a favourable light!).

32. The email continued to give some background to the event and noted:

[t]hree of the four lectures to date have been or are being published in *Bar News*: George Brandis Christmas 10; Bob Ellicott Christmas 11; Tom Hughes April/May 14...Sadly there was no transcript of John Howard’s stirring 2013 address which I had intended to offer to *Quadrant*, and John was not able with other commitments to rework from his notes.

³ ACTU MFI-2, tab 1, p 1.

33. Pausing there in the chronology, the fair-minded lay observer would immediately be cognizant that the Commissioner was aware of the following matters:
- a. that the event was being put on by a branch of the Liberal Party NSW Division; and
 - b. that past speakers included the now Attorney-General (Mr Brandis), two former liberal Attorneys-General (Mr Ellicott and Mr Hughes) and a former long serving Liberal Prime Minister (Mr Howard).
34. It is apparent from the text of the 10 April 2014 email that Mr Burton and the Commissioner had had some communication prior to the email where they agreed that the Commissioner's attendance was dependent upon "the Commission [having] completed".
35. Thus, the fair-minded observer would infer that in April 2014 the Commissioner regarded it as inappropriate for him to speak at a Liberal Party event during the period in which the Commission was sitting, no doubt because of the very fact that it was a Liberal Party event.
36. On 11 April 2014, the Commissioner confirmed that he could deliver the Barwick address in August 2015⁴.

Ms Gillard

37. On 10 September 2014, the former Prime Minister Ms Gillard was called by the Commission to give evidence.

The amendment of the Letters Patent

38. On 30 October 2014, the Letters Patent were amended to add a further term of reference and extending the date for reporting to 31 December 2015.

The events in March-April 2015

39. On 2 March 2015, Mr Burton wrote again to the Commissioner⁵.

⁴ ACTU MFI-2, tab 2, p 3.

40. The email from Mr Burton was part of a “chain” which included Mr Burton’s initial 10 April 2014 email and the Commissioner’s response. As noted above, the initial email from Mr Burton made it clear that the function was connected to the Liberal Party and that the Commissioner’s indication was that his agreement to give the address was subject to the Commission’s work having completed.
41. Mr Burton asked in his email of 2 March 2015 that the Commissioner confirm the date that he would be available to give the address. The following is stated:

...I am proposing that “save the date” emails for the 2015 Barwick address, which you have kindly accepted for, should go out in March.
42. The fair-minded lay observer would be cognizant of the fact that by 2 March 2015 the Commissioner had agreed to give the 2015 Barwick Address. The inference would be drawn by the fair-minded lay observer that the acceptance by the Commissioner had occurred at some time between 10 April 2014 and 2 March 2015 when the fact of that acceptance was recorded in Mr Burton’s email.
43. In addition, the fair-minded lay observer would infer that the Commissioner no longer saw it as inappropriate to deliver an address at a Liberal Party function, notwithstanding that the Commission had not completed. This is because the fair-minded lay observer would naturally assume that the Commissioner would remember that fact from the discussions and correspondence in 2014.
44. Mr Burton concluded his email by making a gentle suggestion of a possible topic.
45. On 25 March 2015, the Commissioner sent a reply to Mr Burton indicating a possible topic and also indicating that he had no preference as to the date being 12, 19 or 26 August⁶.
46. Later on 25 March 2015, Mr Burton responded to the Commissioner’s email about the topic of the address and concluded:

⁵ ACTU MFI-2, tab 4, pp 8-10.

⁶ ACTU MFI-2, tab 5, p 11.

If you have no preference on dates I'll try to aim for a non-Parliamentary sitting week to give the politician-lawyers less excuse not to turn up!

47. On 4 April 2015, Mr Burton wrote⁷:

We have gone for Wednesday 26 August 2015 subject to venue availability...which is a non-sitting week for Federal and NSW Parliaments...

48. At this point, the fair-minded lay observer would infer from Mr Burton's emails of 25 March and 4 April that a fact known to the Commissioner, in addition to it being a Liberal Party event, was that part of the intended audience of the address was parliamentarians from the Liberal Party (both federal members and NSW State Members).

49. The Commissioner sent an email to Mr Burton on 7 April 2015 confirming that he had entered the event into his diary for 26 August⁸.

The invitation

50. On 12 June 2015, Mr Burton sent the Commissioner a copy of the formal invitation⁹. From this email it can be seen that a "save the date" email had been circulated to persons unknown some months before.

51. Significantly the email is entitled:

"FW: Liberal Party of Australia (NSW Division) – Lawyers Branch and Legal Policy Branch Barwick Invitation – August 2015 (1).docx; State Donation Compliance.docx".

52. The email indicated that the cost was \$80.00 incl GST.

53. The invitation attached bore the Liberal Party Logo.

54. The RSVP attached to the invitation:

⁷ ACTU MFI-2, tab 7, p 13.

⁸ ACTU MFI-2, tab 8, p 15.

⁹ ACTU MFI-2, tab 9, p 17.

- a. provided for payment of the \$80.00 or for a donation to be made;
 - b. noted that Cheques should be made payable to: Liberal Party of Australia (NSW Division); and
 - c. stated that a receipt would be issued and that all proceeds from this event will be applied to State election campaigning.
55. The RSVP also included the following warning entitled “IMPORTANT – Disclosure Warning”:

All gifts and receipts of money, regardless of purpose, greater than the value of \$12,100 are required under the Commonwealth Electoral Act to be reported to the Australian Electoral Commission. There may be further requirements for disclosure by donors, details of which can be found at ...

56. A separate page was a significant compliance statement regarding State Donations. The statement included text under the headings:
- a. Political Donation Requirement;
 - b. Limitation on Donations to Political Parties;
 - c. Prohibited Donors; and
 - d. Disclosure Warnings.
57. By this time, the fair-minded lay observer would infer from the invitation email that the Commissioner was aware that:
- a. the event was a Liberal Party event;
 - b. the event may be attended by some Liberal politicians; and
 - c. the event was not only a Liberal Party event but was a fundraiser for the Liberal Party to which donations could be made to assist with the State election campaigning of the Liberal Party.

58. Moreover, the fair-minded lay observer would infer that despite the Commissioner's reluctance in 2014 the Commissioner now saw no problem in lending his name to the event and speaking at the event notwithstanding that the Royal Commission was ongoing.

Mr Shorten

59. On 8 and 9 July 2015 Mr Shorten was called by the Commission to give evidence.

The events in August 2015

60. On 12 August 2015, Mr Burton sent the Commissioner a further email¹⁰.
61. The email said that the invitation was being sent for the Commissioner's reference, although it is not clear from the email produced whether such an attachment was indeed included.
62. The email also stated:

The NSW Attorney has kindly agreed to give a brief vote of thanks if she is able to get away from Parliament for the dinner and address...

As you know, although nominally under the auspices of the Liberal Party lawyers' professional branches, this is not a fundraiser – the cost charged is purely to cover dinner including our guests and a small contingency for fixed costs in case of a numbers collapse (which doesn't look like happening at present!) although of course people will disclose it if they go over the State donation limit. It is not open to the media. I shall compere questions and there won't be any on the Royal Commission.

In the absence of hearing from you we have proceeded on the basis you are happy to go ahead even though the Commission is still in hearing (not expected when originally arranged) and thought it presumptuous to do other than leave that up to you...

¹⁰ ACTU MFI-2, tab 10, p 21.

63. For two reasons, the fair-minded lay observer would be bemused by the statement in this email that *“this is not a fundraiser”* and upon consideration would conclude that in fact the event was a fundraiser for the Liberal Party.
64. First, the language in the email is ambiguous. Whilst the cost is said to cover the cost of the dinner it also states that people will need to disclose that amount as a donation *“if they go over the State donation limit”*. That statement is, on its face, contrary to the statement that *“this is not a fundraiser”*.
65. Second, the email followed after the invitation email of 12 June 2015 where a copy of the invitation was provided to the Commissioner. As noted above, the RSVP to the invitation made clear that donations could be made and if made would be applied to State election campaigning.
66. In any event, the fair-minded lay observer would be left in no doubt that the event was a Liberal Party event. After all:
 - a. the body of the email referred to the “auspices of the Liberal Party”;
 - b. the body of the email referred to the NSW Attorney giving a vote of thanks;
 - c. the fair-minded observer would have known that the NSW Attorney was a member of the Liberal Party;
 - d. part of the email chain includes an email which had the title “FW: Liberal Party of Australia (NSW Division) Lawyers’ Branch and Legal Policy Branch”;
 - e. the fair-minded observer would naturally infer that the Commissioner read emails and attachments sent to him, in particular those to which he responded; and
 - f. the fair-minded observer would infer that the Commissioner remembered the circumstances of the discussions and correspondence in 2014.

67. Ms Barbara Price responded on behalf of the Commissioner on 13 August 2015 at 9.23am¹¹. The response said that:

if there is **any possibility** that the event could be described as a Liberal Party event he will be unable to give the address, at least whilst he is in the position of Royal Commissioner. (Emphasis in original)

68. At this point, the fair-minded observer would be bewildered because, on any view of the events up to that point, the only sensible description of the event could be that it was a Liberal Party event and that must have been known to the Commissioner and Ms Price – yet this email suggests that this obvious fact was not known to them. Moreover, the fair-minded observer might wonder why the phrase “any possibility” was in bold, and might think that particular thought had been given to that phrase and the fact that it should be emphasised.

The media communications

69. Later on 13 August 2015 at 11.22am a statement was issued by the Commissioner through the media and communications director of the Royal Commission which said¹²:

The Commissioner Dyson Heydon will not be delivering the Sir Garfield Barwick address.

As early as 9.23 this morning (and prior to any media enquiry being received) he advised the organisers that “if there was **any possibility** that the event could be described as a Liberal Party event he will be unable to give the address, at least whilst he is in the position of Royal Commissioner”. (Emphasis in original)

70. There is no indication that between 9.23am and 11.22am Mr Burton responded to Ms Price’s email. Nor is there any communication to indicate that the Commissioner advised Mr Burton that he would not be delivering the address.

¹¹ ACTU MFI-2, tab 11, p 24.

¹² ACTU MFI-2, tab 13, p 28.

71. The fair-minded lay observer would not know whether Mr Burton was personally told of the withdrawal or whether Mr Burton learned of the Commissioner's withdrawal from the address through the public statement made at 11.22am.
72. Nor would the fair-minded lay observer have any understanding of what it was that triggered the decision of the Commissioner to withdraw from the event by issuing a media release to that effect.
73. To the extent the media release might have been thought by the fair-minded lay observer to convey an impression that the 9.23am email was itself a communication to Mr Burton to the effect that the Commissioner would not be delivering the address, that impression might lead the fair-minded lay observer to form a view that it was misleading. This is because, on a cursory review of the entire email, it is clear that the Commissioner, at the time the email was sent, was intending to deliver the address subject, apparently, to Mr Burton telling him that there was a possibility that it was a Liberal Party event – a fact that the fair-minded observer would think, at the time, was known to the Commissioner. At this point in time, the fair-minded observer would be confounded.
74. Later on 13 August 2015 at 3.11am, the media and communications department of the Royal Commission released an email which included the above statement but added the following:¹³

In answer to media enquiries, and to put the words quoted above in context, the Commissioner is releasing an email exchange of 12 and 13 August 2015 regarding the Sir Garfield Barwick address.

Email addresses have been redacted.

75. By releasing the 12 and 13 August 2015 emails, the earlier media release would now be understood by the fair-minded observer in the context of the emails. He or she would remain unsettled as to the content of the first media release but may well put it down to confusion and people within the Commission operating

¹³ ACTU MFI-2, tab 14, p 29.

under great pressure. However, a new issue would immediately come to his or her mind.

76. He or she would immediately notice that the email exchange of 12 and 13 August 2015 does not in fact put the earlier media statement into its full and proper context, because it overlooks the full historical context dating back to the events of April 2014.
77. The version of the emails released appears at ACTU MFI-2 tab 14 at pages 29 and 30. When the version at pages 29 and 30 is compared to full exchange which appears at ACTU MFI-2 tab 11 pages 24 and 25, it is apparent that the full email chain was not released.
78. The second page of the email exchange (ACTU MFI-2 tab 11 page 25) included the email dated 12 August 2015 from Mr Carey to an unknown distribution list which had the subject heading “FW: Liberal Party of Australia (NSW Division) – Lawyers’ Branch and Legal Policy Branch.”
79. The fair-minded lay observer might have assumed that, when the director of media for the Royal Commission said he was releasing the email exchange of 12 and 13 August 2015 for the purpose of providing context, the entire chain would be provided rather than only part of the chain.
80. An explanation may be that the Commissioner regarded the email exchange of 12 and 13 August as being limited to those emails that were addressed to him from Mr Burton and to which he replied. However, if that were the case, then the fair-minded lay observer might have thought that the fact that a partial exchange was being released would be specified in the director’s email.
81. In any event, importantly, what the Commissioner did not disclose on 13 August 2015 was any explanation for why it was that he did not clearly understand that he had committed to speaking at what could only be described as a Liberal Party fundraiser.

Conclusions from the objective material

82. At this point, the fair-minded observer would reflect on all of the facts as a whole that had unfolded before him or her, and take into account his or her own various states of mind as they had occurred to him or her throughout that process, so as to consider whether he or she thought that the Commissioner might not bring an impartial mind to the resolution of most, if not all, of the questions required to be decided by the Commission.
83. In summary, leaving to one side for present purposes any subsequent explanation or context, a recitation of the above facts to a fair-minded lay observer would inevitably lead to the following conclusions:
- a. the Commissioner was prepared to speak at a Liberal Party event, first only when his role as Commissioner had ended, but then later for reasons unknown to the fair-minded observer, the Commissioner had changed his mind and was now prepared to speak at a Liberal Party event during the period in which the Commission was continuing;
 - b. the Commissioner was prepared during his time as Commissioner to speak at a Liberal Party event that was seeking donations to the Liberal Party for the purpose of State Election campaigning; and
 - c. although the Commissioner has now withdrawn from the current 2015 event, the Commissioner remains prepared to speak in the future (once the Commission is at an end) at an event that is properly described as a Liberal Party fundraiser in that it seeks donations for the purpose of State Election campaigning.
84. In addition, the fair-minded lay observer would be entitled to be puzzled about the following matters:
- a. why the Commissioner was prepared to give the address in August 2015 when his initial acceptance in April 2014 seemed to be contingent upon the Commission having completed its work and that work was ongoing in August 2015; and

- b. when the Commissioner wrote, through his staff on 13 August 2015, that “if there was **any possibility** that the event could be described as a Liberal Party event” how he could have possibly thought or assumed anything else particularly in circumstances where:
- i. Mr Burton’s email of 10 April 2014 made express reference to the fact that the event was being hosted by the Lawyers’ Branches of the Liberal Party NSW Division;
 - ii. Mr Burton’s emails of 25 March 2015 and 4 April 2015 made express reference to the setting of the date so as to enable parliamentarians the opportunity to turn up on non-sitting days of parliament;
 - iii. Mr Burton’s email of 12 June 2015 was entitled “Liberal Party of Australia (NSW Division)...” and attached an invitation with the Liberal Party logo along with the RSVP form allowing for donations;
 - iv. Mr Burton’s email of 12 August 2015 referred to the NSW Attorney giving a brief vote of thanks;
 - v. Mr Burton’s email of 12 August 2015 made specific reference to the event being under the auspices of the Liberal Party lawyers’ professional branches – and made the statement that “this is not a fundraiser”.

Contextual background

85. On 17 August 2015 an application was made by the ACTU to obtain documents. The documents were produced. There were a number of exchanges between the Commissioner, Counsel Assisting and Counsel then appearing for the ACTU.
86. In short, having produced the documents that day, the Commissioner then apparently expected to have Counsel appearing for the ACTU read and absorb the documents, provide advice to his client, take instructions and make any application for disqualification there and then. A fair-minded observer might

well have thought that the Commissioner was attempting to force Counsel on, in circumstances where the fair-minded observer might think that Counsel could not have possibly been adequately prepared.

87. After Counsel in the first instance refused to make such an application, the Commissioner then adjourned the hearing but a short time later reconvened the hearing because he said that he “*wanted to give some contextual background to the material which has been marked ACTU MFI-2*”¹⁴.
88. The fair-minded observer might think that it is not at all clear whether, if Counsel had taken up the Commissioner’s initial urgings to make the application, whether that contextual background would have ever been disclosed or, how, if at all, the Commissioner may have disclosed the contextual background during the course of that application or otherwise. The fair-minded observer might wonder whether that could possibly have been fair.
89. The four primary points which appear to be put forward by the Commissioner as relevant contextual background are as follows¹⁵:
 - a. in March 2015, the Commissioner “overlooked” the connection between the person or persons organising the event and the Liberal Party which had been stated in the email of 10 April 2014;
 - b. in March 2015, the Commissioner “overlooked” the fact that his agreement to speak had been in April 2014 conditional on the work of the Commission being completed before that time;
 - c. on around 12 June 2015, when the Commissioner was sent the email, he glanced through the email but did not read the attachments to the email;
and
 - d. at all times the Commissioner’s understanding was that the dinner was not to be a fundraiser.
90. Two matters of fundamental importance ought immediately be noted.

¹⁴ 17.8.2015, tsp p 11, line 18.

¹⁵ 17.8.2015, tsp p 13-14.

91. First, the Commissioner did not say that he “overlooked” the fact that, at least in 2014, he had known that it was a Liberal Party event. Rather, the emphasis was that for reasons described as “overlooking” he did not understand the event to be fundraising.
92. Second, the Commissioner’s position has always been and remains that he is prepared to speak at a function (which has as at least part of its aim raising funds for the Liberal Party State election campaign) at a time when the Commission ends.
93. So, the fair-minded lay observer might view the contextual background as confirming that the Commissioner is willing (at some point in the future) to lend his name and standing to the Liberal Party cause by assisting that party to raise funds and might therefore be partisan to the Liberal Party and might harbor political prejudice toward the Labor Party and therefore might not bring an impartial mind to bear upon the work of the Commission.
94. This last matter ought be enough to compel the conclusion that procedural fairness cannot be afforded by the Commission to any union or any person or entity with a connection to the union movement or the Australian Labor Party.
95. Leaving aside those matters, the question then arises as to what proper use can be made of the corrective statement.
96. In cases where an application for apprehended bias proceeds on a basis that the judge has said something in open court which conveys a wrong impression of prejudgment about a witness or the evidence, a “*correcting statement*” may be sufficient to remove an apprehension of bias. Whether a correcting statement is sufficient will depend on the circumstances of the particular case: see for example *Johnson v Johnson* (2000) 201 CLR 448 at 494.
97. In *Locabail UK Ltd v Bayfield Properties Ltd* [2000] QB 471, the Court of Appeal (Lord Bingham, Lord Woolf and Lord Scott) said at 477F-G:

While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any

relevant time, the court is not necessarily bound to accept such a statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of the statement; occasionally, if rarely, it may doubt the reliability of the statement, sometimes, although inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the particular case. There can, however, be no question of cross-examination or seeking disclosure from the judge.

98. Whilst it is not clear from the authorities, it would seem that the better view is that a public statement by the relevant judicial officer becomes another fact known to the fair-minded observer which the fair-minded observer is taken to know but not bound to uncritically accept: see for example, *Wentworth v Rogers* [2000] NSWCA 368; see also *CUR24 v DPP* (2012) 83 NSWLR 385 at [14]-[22].
99. It will thus fall to the fair-minded lay observer to seek to reconcile the contextual background against all the objective facts. Ultimately there must be a question for the fair-minded lay observer as to what weight is given to the statement and whether it is accepted, especially when the statement conflicts with objectively known facts or is improbable or implausible.
100. The objective facts include the fact that the Commissioner is not only a former High Court judge, but also a person considered by the Executive to be appropriate to be appointed Commissioner. The objective facts also include the very many references to the nature of the event in the emails that passed between April 2014 and August 2015. The fair-minded lay observer might at least pause long and hard before accepting the notion that the Commissioner would not be scrupulous in reading his emails.

101. The fair-minded lay observer might also consider other possible inferences open to him or her based on all the facts and the contextual background. An available inference is that by 2015 when the topic of the address arose again, the Commissioner in fact had no difficulty with lending his name to a Liberal Party function, notwithstanding the fact that the Commission had continued. It was only when some unknown event occurred on the morning of 13 August 2015 that the Commissioner reconsidered his position and decided that an association with the Liberal Party at the present time was unwise.
102. At the very least, the fair-minded lay observer might naturally find him or herself giving primacy to the objective written material over the unspoken subjective considerations of the Commissioner, particularly in circumstances where the passage of time and the process of memory can be affected by the fallibility of memory as well as ordinary human experience: see in a different context, *Watson v Foxman* (1995) 49 NSWLR 315 per McClelland CJ in Eq at 318-319.

Conclusion as to reasonable apprehension

103. The above material amply demonstrates that the fair-minded lay observer might reasonably apprehend that the Commissioner might not bring an impartial mind to the resolution of the issues before the Commission.
104. Had the work of the Commission not been so politically charged then perhaps an agreement to speak at a party political event during the course of a Royal Commission would create no real problem or difficulty, or no real problem or difficulty of any moment.
105. But that is not the present case.
106. It is not possible for the fair-minded lay observer to divorce from his or her consideration of the Commissioner's position the highly charged political nature of this commission.
107. Nor is it possible for the fair-minded lay observer to rule out a sense that the Commissioner by reason of the emails set out above and taking into account the

contextual background that the Commissioner might have a persuasion towards the Liberal Party and thereby might harbor a prejudice to the Labor Party which the commission has acknowledged has deep historical ties to the union movement: see Issues Paper of 19 May 2015 at [77].

108. These matters are seriously compounded by the statement on 13 August 2015 that the Commissioner was not prepared to give the address “*at least whilst he is in the position of Royal Commissioner*”.
109. By the time of this statement there could be no doubt that the nature of the event, including the political fundraising nature of the event, was known to the Commissioner. It follows that the fair-minded observer must be taken to know that the Commissioner is prepared to speak at a function to raise funds for the Liberal Party in the future.
110. The fair-minded lay observer would conclude from this fact that one does not state such a position or agree to speaking at such an event in the future without having a persuasion or alignment toward the Liberal Party.
111. When all of the known facts have emerged, the sense of disquiet felt by a fair-minded lay observer is sufficient to satisfy the test in *Ebner*.

The role of Counsel Assisting

112. On 17 August 2015, Counsel Assisting made submissions to the effect that the ACTU’s position “*smacks of grandstanding*”¹⁶ and that “*this is degenerating into a shambles*”¹⁷. Counsel Assisting then later in the day agreed a consent position to ensure that a timetable was set for this application to be brought.
113. Counsel Assisting’s role in the Royal Commission is to assist in the elucidation of facts, to present material to the Commission in an orderly fashion and to examine witnesses independently without the Commissioner having to descend into the arena: see *Firman* at [25] citing Hallet, *Royal Commissions and Boards of Inquiry* at 210-211.

¹⁶ Tsp 17.8.2015 at p 16, line 30.

¹⁷ Tsp 17.8.2015 at p 15, line 13.

114. Counsel Assisting does not act for the Commissioner. It follows that Counsel Assisting does not have a role to perform in making submissions in respect of this application.

Relief

115. The relief sought is that the Commissioner recuse himself, and determine that he should not continue with any part of the inquiry that concerns the conduct of any union and, if he thinks it appropriate, resign his commission forthwith.

116. No lesser or qualified form of relief is appropriate given the subject matter of the Commission, the continual reference in the Commission to the political context, and the future desire of the Commission to make recommendations for reform.

20 August 2015

Robert Newlinds

David Sulan