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ROYAL COMMISSION INTO TRADE UNION  
GOVERNANCE AND CORRUPTION

Level 19, 55 Market Street, Sydney, NSW, 2000

On Friday, 21 August 2015 at 10am

ACTU Application  
Decision

Before the Commissioner: The Hon. John Dyson Heydon AC QC

Counsel Assisting: Mr J Stoljar SC

Ms Sarah McNaughton SC

Mr Thomas Prince

Instructed by: Minter Ellison, Solicitors

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7

8

9 This is a test. Test test. Test test test test test

10test.

11

12MR BORENSTEIN: .

13

14MS LEVINE: Eugenia Levine Borenstein

15

16

17 ROYAL COMMISSION INTO TRADE UNION

18 GOVERNANCE AND CORRUPTION

19

20

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38

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40

41

42 .

43

44THE COMMISSIONER: Yes, Mr Stoljar?

45

46MR STOLJAR: Could I deal with some housekeeping matters.

47There are some appearances, Commissioner into yes.

1

2MR NEWLINDS: If you please, Commissioner, I appear with  
3Mr Actual Lyn for various entities identified in some  
4submissions we sent up yesterday. Can I seek leave for  
5us to appear on behalf of those parties for the purpose of  
6the application described in that document? Leave is  
7granted.

8

9MR BORENSTEIN: Commissioner, I seek leave to appear with  
10Ms Levine for The Australian Workers' Union.

11

12THE COMMISSIONER: Yes, that is granted.

13

14THE COMMISSIONER: Mr Agius of course appears for the  
15CFMEU and various other people. Thank you. Incidentally  
16Mr Agius I congratulate you on your speedy return to  
17health.

18

19MR AGIUS: I'm indebted to the care of medical  
20professionals at Royal North Shore Hospital.

21

22THE COMMISSIONER: They must be very able people.  
23Mr Stoljar?

24

25MR STOLJAR: Commissioner, can I just deal with a few  
26matters before the applicants come to the substance of  
27their applications. The first is there was an exchange of  
28correspondence between the solicitor for Mr Agius's client,  
29CFMEU, yesterday and the solicitors for the  
30Royal Commission. I tender on this application a letter  
31from Slater & Gordon of 20 August 2015 and the response  
32from the police terse of the Royal Commission of 20 August  
332015.

34

35THE COMMISSIONER: Yes.

36

37MR STOLJAR: It may be convenient for those to be marked  
38ACTU MFI-6.

39

40THE COMMISSIONER: I will mark them in that way. I think  
41it is convenient, as a matter of background, to retain  
42the exhibits from last Monday MFI- 2 is obviously centrally  
43important, but the others have some background utility.  
44Those two letters will be ACTU MFI-6. ^ ACTU MFI-6 two  
45letters.

46

47MR STOLJAR: The next matter is that the CFMEU submissions

1 came with a bundle of documents which as we apprehend it  
2 the CFMEU wishes to put into evidence on this application.  
3 I tender that bundle.

4

5 THE COMMISSIONER: Yes. That will be ACTU MFI-7. ^ ACTU  
6 MFI-7 ^ .

7

8 MR STOLJAR: Commissioner, the commission has received  
9 three sets of written submissions from respectively the  
10 ACTU and associated members of the ACTU, the CFMEU, and the  
11 AWU. I ask that those submissions be received by you.

12

13 THE COMMISSIONER: Yes, I receive those submissions.  
14 I should indicate that I have read them.

15

16 MR STOLJAR: Commissioner, this morning Counsel Assisting  
17 circulated a set of written submissions and I ask that they  
18 be received.

19

20 THE COMMISSIONER: Yes. They are received.

21

22 MR STOLJAR: I note in respect of those submissions that  
23 the usual practice in an application for disqualification  
24 is that it is treated as a matter between the parties  
25 seeking the disqualification and the judicial officer the  
26 subject of the application. That usual practice is that  
27 counsel for other parties who may be present take a neutral  
28 position on that application. That is the course which  
29 Counsel Assisting proposes to follow on these applications,  
30 subject to any matters arising or unless we can be of any  
31 assistance to you, Commissioner, we didn't propose to  
32 amplify what we've said orally on our written outline.

33

34 THE COMMISSIONER: That position seems to accord with what  
35 Mr Knew lands submitted in paragraph 114 of his written  
36 submissions.

37

38 MR STOLJAR: Yes, Commissioner. And then I've had some  
39 discussions with my friends about the order of address and  
40 the agreed position is, as I apprehend is, the ACTU will go  
41 first, followed by the CFMEU, followed by the AWU.

42

43 THE COMMISSIONER: Yes. Yes, Mr Knew lands.

44

45 MR NEWLINDS: Firstly in relation to the position of  
46 Counsel Assisting may we say we think the position adopted  
47 is entirely appropriate and these submissions as to legal

1 matters are a matter which we think that it is perfectly  
2 appropriate for counsel assisting to assist if they think  
3 they can in that regard. We thank our learned friend for  
4 that. .

5

6 As far as evidence is concerned, I have not been in  
7 the loop, if you like, as to the correspondence between  
8 other parties and the Commission. I have spoken to  
9 Mr /STO\*FPLT I'm operating on the basis that MFI-2 is  
10 complete and it seems to me what's happened in loading on  
11 the computer some things didn't get there. If at any point  
12 when I'm going through MFI-2 I come to a point when it  
13 seems not to be the case, I'm sure Mr Stoljar will point  
14 that out.

15

16 THE COMMISSIONER: I'm not entirely in the loop heater but  
17 I think what you have said is probably correct. I don't  
18 think there's any new material that is isn't in MFI-234  
19/\*FR 2 in some respect.

20

21 MR NEWLINDS: For my part, I haven't reviewed the material  
22 that was just tendered at the request of the CFMEU but for  
23 my part, the only material I want to rely on and that  
24 I consider relevant for my application is referred to in  
25 our written submissions and as you will have appreciated,  
26 that is either documents in MFI-2 or other documents which  
27 are in the public domain which I assume somewhere in the  
28 course of the Commission bear identification numbers, for  
29 example, the letters patent and the opening documents and  
30 the like.

31

32 THE COMMISSIONER: Yes.

33

34 MR NEWLINDS: Evidentiary wise, I confine myself and you  
35 can assume that the only relevant matters are what we have  
36 identified.

37

38 THE COMMISSIONER: Yes. Just on the CFMEU bundle, which  
39 I think is ACTU MFI-7, you may not have seen it but it  
40 supports your points in some respects.

41

42 MR NEWLINDS: That is good.

43

44 THE COMMISSIONER: Mr Borenstein do you have any  
45 additional evidence you want Mr Stoljar to tender.

46

47 MR BORENSTEIN: We don't. We have that in the

1 Commission's archives. We have a folder which collects  
2 them which may be convenient for you to look at.

3

4 THE COMMISSIONER: If you've gone to the trouble of  
5 putting them together, it probably is convenient if you can  
6 hand it up, but if any further step has to be taken, don't  
7 bother, I can check for myself.

8

9 MR BORENSTEIN: We got them in a convenient bundle and we  
10 can hand them up.

11

12 THE COMMISSIONER: All right. Not necessary for me to  
13 mark that I think but if you can hand it up whenever is  
14 convenient. Mr Agius, do you have any evidentiary material  
15 other than ACTU MFI-7?

16

17 MR AGIUS: Our additional material has now been tendered  
18 by Counsel Assisting. We have nothing in addition to that.

19

20 THE COMMISSIONER: Very well. I think we can proceed,  
21 Mr Knew lands.

22

23 MR NEWLINDS: Thank you, Commissioner. I understand  
24 you've read the written submissions and I certainly don't  
25 propose to read them out to you.

26

27 THE COMMISSIONER: Yes, I have, I've read them several  
28 times.

29

30 MR NEWLINDS: May I start with this point: there are some  
31 factual matters which no doubt will not be immediately  
32 embraced by you in relation to construction of certain  
33 circumstances that have occurred over the last year and a  
34 bit, but before I come to that can I make this submission,  
35 we think it is clear enough and would be readily a parent  
36 to the hypothetical reasonable observer that as of today,  
37 looking forward, your position is that you are prepared  
38 once this Commission concludes to speak at a Liberal Party  
39 fundraiser.

40

41 Our respectful submission is that is enough to pass  
42 what we've called the Edna test in our written submissions:  
43 in other words, the submission is ^ check ^ that the  
44 reasonable observer might apprehend that you might not be  
45 able to bring an impartial mind to the issues at hand.

46

47 I immediately appreciate that you are not going to

1embrace that submission because you made no secret of that  
2fact. So I start, I understand, from the proposition that  
3you have already formed your own view that that position is  
4appropriate and I accept that, but of course I have to make  
5the submission that your own subject view is irrelevant.  
6What one must do - and the reason I say that is not because  
7you are any relevant person, it is because if ever  
8there is someone who doesn't fit the description of the  
9reasonable and hypothetical lay observer it is you,  
10Commissioner.

11

12 The question becomes - and I would ask you and I know  
13you will to try and open your mind to this more wider  
14question which is objectively, is there sufficient problem  
15with the circumstance that I've just outlined so as to  
16create what the lawyers call apprehended bias.

17

18 Some of what I'm just about to say is obvious, but  
19just let me step through it. The connection between the  
20conduct and the asserted by me apprehended bias is as  
21follows: the Liberal Party of Australia and the Australian  
22Labor Party are natural adversaries, as we all know. Since  
23the Second World War they've either effectively been the  
24government or the opposition, certainly in the Federal  
25Parliament and in most State Parliaments throughout the  
26land, and in this great democracy in which we live  
27decisions as to what laws govern us and who becomes the  
28executive government are determined by the people who vote  
29one or other of those parties in and we have, as we all  
30know and love, a very robust contest between niece  
31adversaries which peaks at election time but continues  
32through out. That is the first point.

33

34 These these ^ the second point is the union movement  
35in Australia is not just inapplicantly but it's  
36organically connected to the Australian Labor Party. The  
37unions founded the Labor Party way back in the 1990s  
38I think after some shearing /STRAEUBGS, 1890s, and as we  
39know, because it is a presence yell debate within the Labor  
40Party, continues to by reference to the structure of that  
41party have significant influence on the policy position of  
42the party on various matters and also on the very important  
43matter of preselection and the like.

44

45 Indeed, I don't think this is something that would  
46require evidence during the period that Ms Gillard was  
47Prime, it was often said - and I certainly don't put this

1forward as being the fact - that she was a puppet or  
2someone who was under the control of the union movement and  
3that was put forward by the other side of politics, the  
4Liberal Party, as a criticism Ms Gillard, but the  
5underlying premise that the unions have the ability to  
6exert great control on the Labor Party ought to be taken as  
7a given.

8

9 Then you come to this Commission and in the portions  
10of our learned friend Mr Stoljar's remarks, which we set  
11out in our written submissions, the political context in  
12which this Royal Commission was formed and about which the  
13topics that the Commission is concerned was acknowledged  
14and we embrace those comments, but just to spell them out,  
15the Commission was created by the Abbott Government and it  
16has been said that it was created for purposes of hopefully  
17damaging the Labor Party in part. However, to put a  
18vanilla description on it, without getting into political  
19labelling, the topic, as I understand it, a fundamental  
20topic that runs right through the Terms of Reference and  
21right through the matters that you are inquiring into is  
22not the sexy things as to whether there are crooks or  
23non-crooks involved with the union movement, but it is the  
24very important question of whether the law should be  
25reformed so as to bring different responsibilities and  
26legal obligations upon those who control the unions.

27

28 A topic about which the two sides of politics in this  
29country disagree. ^ it seems to be, indeed, just this  
30week in the senate a bill failed to pass. It had been  
31promoted by the Government. It proposed some reforms, I'm  
32not over the detail, as to the governance of unions. It  
33was opposed by the Labor Party and it failed because of the  
34way the cross benchers fell.

35

36 There you have, without getting into the exciting part  
37of the Commission, a circumstance where you have a position  
38where the Union stated public position and the Labor  
39Party's public position is that they don't think that any  
40law reform is necessary, they think the way they are  
41structured is perfectly satisfactory. They don't think it  
42is appropriate that they should have brought to bear on  
43them - tan I say "they" I mean people in control of  
44unions - the same types of laws that apply to people in  
45control of companies and they think that the arrangements  
46for superannuation and the like under the control of Union  
47funds is perfectly satisfactory. On the other hand, it is

1 pretty clear that at a very general level, that is not the  
2 position of the Liberal Party.

3

4 That's a matter I don't want to take it any further,  
5 that is a subject of the inquiry.

6

7 The next point is this, our submission is that in  
8 agreeing to do the speech, even on the condition originally  
9 imposed in 2014, as as we apprehend is the position today,  
10 at a time when the Commission has ended, is such as to  
11 associate yourself with the Liberal Party and if I can put  
12 it bluntly, people don't speak at fun raisers of a  
13 political party unless they believe in the cause of that  
14 party and they certainly don't speak as fundraisers of a  
15 political party if they support the other side of politics.

16

17 I don't want to get into which side of politics you do  
18 or don't support because if this application was simply  
19 based on someone doing a search and working out that you'd  
20 been to /HREUB rat party functions or were a member of the  
21 Liberal Party indeed, this would be a very different  
22 application which I don't think I would be prepared to  
23 make. The distinguishing factor that we say changes the  
24 position from that bland state of affairs, because if  
25 people who supported a particular party in this country  
26 were disqualified from being judges or being Commissioners  
27 of inquiry ^ Liberal Party ^ then we went be left with  
28 many people to choose from. There are swinging voters and  
29 there people who keep it top secret, but mostly it is  
30 generally known that. Is not our application, it is not  
31 based on that, it is not based on any suggestion that you  
32 might be a Liberal Party supporter or not. It is based on  
33 the agreement to do the address which we say elevates the  
34 situation to being prepared to associate yourself with the  
35 party, that is lend your name to a party function for the  
36 purpose of raising money for the party in part, but even if  
37 it wasn't for raising money for the party, for the purpose  
38 of the party.

39

40 I don't know how political parties operate but  
41 I assume that in organising functions and getting people to  
42 come along to them, not only do they want to raise money  
43 but they want to try and convert people, if you like, to  
44 the cause and certainly they probably like to get people  
45 who might be ^ ed they'd ^ interested in the cause to take  
46 up membership or if they're already members to get more  
47 involved in the affairs of the parties.

1

2 To use the words of one of the cases, those  
3 circumstances are sufficient, in our respectful submission,  
4 to gender in our friend the hypothetical lay observer a  
5 disquiet that you might be partisan against the Labor Party  
6 ^ engender ^ and I'm quoting from justice Ashley said in  
7 the case of Lex lass re QC now justice lassry I think which  
8 we set out in paragraph 5 of our written submission, which  
9 his Honour said I agree on the other hand with the  
10 observations of justice Thomas that the hypothetical  
11 observer would be likely to be concerned if in a commission  
12 raising matters /THREURP highly politically charged  
13 reflecting a divide between the main political parties a  
14 Commissioner was thought to harbour political prejudice.

15

16 May I emphasise at this point what I call the double  
17 might test in Edna. We would respectfully suggest that the  
18 use of the two might not only is it rather ugly grammar,  
19 it does emphasise this is actually quite a low bar that is  
20 imposed by the High Court in relation to the test, because  
21 I don't have to dissuade thought hypothetical observer  
22 would think that you harbour a political prejudice. I only  
23 have to persuade you that the hypothetical observer,  
24 firstly, might think and secondly, what he might think is  
25 that you might harbour a political prejudice.

26

27 I think that is an important point to emphasise. The  
28 test could be cast with the use of many other words but if  
29 it is obviously deliberately been cast in that sense which  
30 creates a low threshold. That is our first submission and  
31 we put it forward as a basis by itself that would justify  
32 the making of the orders we seek.

33

34 May I say at it this point may I refer to some of the  
35 English cases that my learned friend has brought to  
36 Commissioner's attention. Firstly, a word of warning: it  
37 is quite clear from a review even a cursory review the  
38 authorities in each country that ^ even ^ that the  
39 English test, the legal test, is substantially than the  
40 test in Australia.

41

42 THE COMMISSIONER: That was explained in Johnson &  
43 Johnson.

44

45 MR NEWLINDS: It was explained in Johnson & Johnson and in  
46 Edna kits the /KA /KORBT said the decision in the Lord  
47 Hoffman case because I think what the court said was we if

1 we were looking at those facts we would approach in a  
2 completely different way. We would apply a different test.  
3 They wouldn't say they would have come to the same result  
4 but in England there's a concept as I read of automatic  
5 disqualification or something.

6

7 That is just a word of warning. Secondly, the case  
8 about the Palestinian litigant and the lady judge who was a  
9 member of a Jewish organisation, I can't quite remember its  
10 name.

11

12 THE COMMISSIONER: I know what you're referring to.

13

14 MR NEWLINDS: Hello, I'm.

15

16 THE COMMISSIONER: Hello and home Secretary ^ .

17

18 MR NEWLINDS: Thank you very much. I'm sorry. All I want  
19 to say about that is beware applying different legal test  
20 but secondly, very distinguishable on the facts because her  
21 Honour, whilst a member of an organisation, had not adopted  
22 a public stance of support of that organisation in the way  
23 that we say you have done for the reasons I have explained.  
24 We say applying a different test and in any event facts  
25 very different.

26

27 Could I then say something about the document of  
28 necessity which my learned friend has brought to your  
29 attention. (Doctrine ^ and it is important obviously.  
30 Our answer to it is this, it is at a number of levels.  
31 Firstly as a matter of law no doctrine of necessity ^  
32 did I interrupt you.

33

34 THE COMMISSIONER: I was about to say I hadn't quite heard  
35 what you were talking about the doctrine of necessity, yes,  
36 which we of course one only gets to.

37

38 MR NEWLINDS: I thought I would deal with it.

39

40 THE COMMISSIONER: As you wish.

41

42 MR NEWLINDS: At this point what I am trying to do is to  
43 deal with this discreet submission I've just made as a  
44 stand alone case, if you like. I'll deal with the doctrine  
45 of necessity now if that is convenient to you. I won't  
46 come back to it /STPHRAO certainly.

47

1MR NEWLINDS: There are three points we want to  
2/PHAEUFPBLGT firstly, we say as a matter of law in this  
3done /TREUT doctrine of necessity has no part to play in  
4relation to the application of the bias rule as a  
5concomitant of procedural fairness. It is certainly has a  
6place to play in relation to other aspects of the  
7requirement of procedural fairness and as the cases  
8explain, there is, especially in relation to the  
9prejudgment rule, a lot of flexibility allowed in the  
10jurisprudence for the application of that rule to take into  
11account the very different ways that, for example, a court  
12would operate in an adversarial case to the way a  
13commission of inquiry like this obviously acts.

14

15 That is the first point. I'll tell you the first  
16three points and I'll come back and develop it. The second  
17point we would say as a matter of fact it is just not made  
18out, necessity is necessary, it is not some subjective  
19balancing of financial consequences and the like. I'll  
20give you an example if I may. For example, this case went  
21to the High Court of course the High Court would hear ^ if  
22^ the application even though all their Honours know you  
23very well and the reason for that is obvious - if they all  
24recused themselves there would be no High Court and  
25Commissioner and the other litigant would be deprived the  
26opportunity to go to that court. So there's a classic  
27example of the doctrine of necessity. The third point we  
28would make is if the doctrine is applicable and if you find  
29some facts are made out, there is ultimately a question of  
30discretion involved. There must be because there must be a  
31balancing exercise between the asserted or found necessity  
32and what is considered a fundamental requirement of our  
33entire legal system that anyone who adverse findings might  
34be made against is entitled to a fair hearing, which  
35includes a hearing not just by an unbiased person but that  
36is perceived to be heard by an unbiased person.

37

38 Maybe that third point is another way of putting the  
39second point because if it is truly necessary to proceed  
40with the proceedings notwithstanding that the perceived or  
41indeed perhaps even actual bias you can't have any  
42discretionary consideration involved. But if necessary is  
43a matter of judgment, for example, how much money has this  
44Commission cost to date, would it be appropriate to throw  
45all that money, time work away f that be the consequence,  
46against ^ indeed ^ the requirement for procedural  
47fairness, then we would say that as a matter of discretion

1 the particular circumstances of this inquiry would actually  
2 dictate that you accede to our application for reasons I'll  
3 develop.

4

5     Going back to the first point, as I understand it and  
6 my submission is, just starting at first principles, why is  
7 there an obligation of procedural fairness on this  
8 Commission? Our submission is it seems to be well settled  
9 that it is because the operation of this Commission, what  
10 its powers are, and the like, are governed by the  
11 Royal Commission act of 1902. Nowhere in that Act does it  
12 say that a Royal Commission is required to afford  
13 procedural fairness to anybody.

14

15     However - -.

16

17 THE COMMISSIONER: It's scarcely controversial that  
18 Royal Commissions are bound by procedural fairness into.

19

20 MR NEWLINDS: I want to develop why the doctrine of  
21 necessity can't come in and can I just develop the  
22 submission.

23

24 THE COMMISSIONER: Yes. My.

25

26 MR NEWLINDS: I know it is not controversial, the over  
27 arching proposition. First principles, you've got to find  
28 it in the Act. The orthodox way that that would be dealt  
29 with it is an implied provision of the Act.

30

31 THE COMMISSIONER: If you could find it in the the in the  
32 act well and good. It is a general principle of /PHRAOELT  
33 /TKPWALT the /HA\*BGT has to be very clear before it takes  
34 away such --.

35

36 MR NEWLINDS: Correct. The fact that parliament hasn't  
37 taken it away leads to an implication either in the Act  
38 that it is positively there or simply legality to the  
39 result that the general obligation remains in place. ^  
40 check ^ . That is because it is one of those principles of  
41 law that whilst it is open to the parliament to derogate  
42 from, the courts have always taken the position that it  
43 would be such an important step for a parliament to take  
44 that the courts in order to find that the parliament has  
45 taken that step required the parliament to spell it out in  
46 simple terms.

47

1 Where does that leave us? That leaves us with the  
2 position that procedural fairness is something that a  
3 commission is required to provide. That lead to the second  
4 question, what is procedural fairness? It is an easy thing  
5 to say, sometimes a slippery Con /#1E79 to comes to grips  
6 with. It is generally accepted its that two limbs. One is  
7 that a person is entitled to a fair hearing which boils  
8 down to (concept ^ a proper opportunity to be heard and to  
9 be heard by an unbiased adjudicator. That's one limb. The  
10 other limb is that the adjudicator can't prejudge the  
11 litigation or the adjudicator can't pre-judge the  
12 litigation.

13

14 There you have a whole series of cases that explain in  
15 relation to that second limb that it is not set in  
16 concrete, that no-one can write out what is required by the  
17 particular officer in your case, a Commissioner, but in  
18 other cases a judge of the court, and what the cases say  
19 you've got to be flexible because you look at the  
20 Royal Commission act, it is an inquiry, the Commissioner is  
21 involved in the inquiry, it is not adversarial, it is  
22 inquisitorial. Of course she or she is going to form views  
23 along the way. They might be very strong views (he or she  
24 ^ that all can be dealt with by being flexible as to  
25 what's applied.

26

27 We haven't found any cases that say anything similar  
28 in relation to the bias rule. In other words, in doing all  
29 of those things, the requirements to bring an impartial and  
30 unprejudiced mind to the resolution is not diluted and  
31 get those words from the case of /KUR /RUGTers and  
32 Connolly which is in our submissions, it is Queensland case  
33 1998, 1 Queensland reports, starts at page 339, the  
34 decision of justice Thomas. I won't, could I just draw  
35 your a edges to the part of the passage, I'm not going to  
36 spend very much time taking you to the cases, but at 371,  
37 starting at about line 16, firstly starting at line 5 there  
38 is a paragraph that talks about the relevant test for bias  
39 and it picks up the EBNER test objectively.

40

41 At about line 9 says this objective is applicable not  
42 /OEUPLD in the proceeding of court but dots administrate  
43 tribunals and commission of inquiries N applying the  
44 principles different expectations of conduct will /SKPEUS  
45 according to the function being performed bit person or  
46 entight who exercises the relevant public /PO\*UFRPLT for  
47 example, a degree of intervention that is unacceptable by a

1judge may be acceptable in a Commissioner. The  
2Commissioner an inquisitor cal...(reads)...but the  
3expectation of the person exercising the power will bring  
4item partial and unprejudiced mind to the resolution of the  
5question entrusted to that person is not to be diluted.  
6Contempt nation of a biased tribunal is an unacceptable  
7abuse just as exoneration after I biased tribunal may be  
8considered worth less.

9

10The non-dilution of that requirement as explained by  
11his Honour - of course it could be diluted by parliament -  
12in our respectful submission means that the doctrine of  
13necessity has no part to play as a matter of law. If there  
14is a biased tribunal and I know you understand it but for  
15the benefit of every one else, I at no point in these  
16submissions are suggesting that you actually biased, but  
17when I say bias it is shorthand for the apprehension as  
18described in the cases.

19

20 If you are bypassed, procedural fairness cannot and  
21forwarded in a way that cannot be answered by questions of  
22necessity. Biased ^ that is the first point. The second  
23point is as a matter of fact necessity hasn't been proved.  
24All that has been pointed out by my learned friend there's  
25been a mammoth amount of work done undoubtedly at a large  
26amount of costs to Government and other people. We would  
27respectfully say okay, that's a result but it doesn't  
28compel that the only way to deal with a finding of bias  
29would be to continue on notwithstanding such a bypass. The  
30third point is if there is discretion involved, in my  
31respectful submission it, would actually compound the  
32matter, compound the problem, if you were to come to the  
33unlikely, I accept this would be an unlikely result, but  
34this the one contemplated by our learned friend, to  
35actually find that you are, to actually find that there is  
36shown to be a reasonable apprehension of bias in the  
37hypothetical bystander, on the one hand, but on the other  
38hand find, as a matter of fact, that it is necessary,  
39notwithstanding that, for you continue, I may explain why  
40that would actually be a month truss exercise of  
41discretion.

42

43 I know this is obvious will you, but the end result of  
44this inquiry is not going to be a judgment that is binding  
45on people. It is going to be a report. A very important  
46report every one says and we would accept that and it is  
47going to be deployed then within the body politic of

1 Australia by various interest groups to determine what, if  
2 anything, should be done about unions. Maybe the result of  
3 this inquiry will be all the rumour and innuendo that is  
4 floated around for decades in this country that unions are  
5 corrupt and the like is not true and you give them a clean  
6 bill of health. That's possible and if that happens the  
7 unions will be very happy, but it will have no credibility  
8 to anyone if it comes forward in the context that there's a  
9 finding that it was a biased hearing. The other side of  
10 the coin you will find bad things about various people in  
11 unions perhaps, but most importantly, you might recommend  
12 law reform. Law reform will happen if the Parliament under  
13 whichever side of politics has the numbers at any given  
14 time, is persuaded that it is a good thing. If the report  
15 is to be used for that beneficial purpose, to assist people  
16 to persuade our democracy to come to a new position on law,  
17 it has to have credibility, it has to be unimpeachable and  
18 it can't be allowed to happen that people can just walk  
19 around after reform and say don't worry about that report,  
20 that was old Mr Heydon and he was biased. He told us he  
21 was bypassed. We say the doctrine of necessary just should  
22 be put to one side and the answer to this case is yes or  
23 no. I either make out the position ^ after the report ^  
24 in which case whatever relief is appropriate has to follow  
25 and I have to say we haven't properly analysed relief, but  
26 if I get to that stage I'm sure it can be sorted out.

27

28 Can I then go to the longer part of the case, if  
29 I may. It doesn't going back to MFI-2 and walking through  
30 the documents. I know that you've read them recently and  
31 you'll have them in your mind. Can I just take a little  
32 time doing that. At MFI-2, starting, mine didn't have tabs  
33 in it so can I use the numbers in the bottom right-hand  
34 corner, so /TPART starting at page 1 we have the email from  
35 Mr Burton to you of 10 April 2014. Obviously, Mr Burton's  
36 been to a riveting and brilliant Acton lecture and you and  
37 he have had a conversation and it is quite clear from the  
38 second paragraph that the conversation included probably a  
39 reasonably vague chat about the Sir Garfield Barwick  
40 address and that you had given some sort of indication that  
41 you might be prepared to do that once the Commission was  
42 completed and he's setting out the detail. And then in the  
43 next paragraph he sets out or he tells you that he's a  
44 chair of one of lawyers branches of Liberal Party New South  
45 Wales, the one that has a focus on policy, the other on  
46 professional engagement, and so on.

47

1 The next paragraph although we have formally a Branch  
2the party our aim is to be a liberal mind the bridge to the  
3profession than overtly political party (although we trust  
4we show the party in a favourable light!)." And then the  
5next paragraph is about the flagship event, being the Sir  
6Garfield Barwick address. He tells you where it is and the  
7like. Then we in the next paragraph are told about some  
8former speakers and as you can see, it includes various  
9certainly all the people who are not currently serving  
10legendary Liberals, Mr Ellicott, Mr Hughes and Mr Howard,  
11who have spoken, it would be consistent, you would expect,  
12with a Liberal Party event and also, though, I should point  
13out, in the third last paragraph the Honourable Murray  
14Gleeson has spoken. I don't think anyone who dare suggest  
15what way his political leanings bend. I would imagine he  
16would keep them very close to his chest.

17

18 But still, he was a person who they were anticipating  
19getting and they've sound you had out Mr Callinan and  
20Mr Barry downs. Just going back to the second paragraph,  
21what Mr Burton took away from the discussion was that you  
22had indicated that you would be amenable to delivering the  
23address, but - and this is very important, I know -  
24conditional on the Commission being completed.

25

26 There we have, going back to my first submission, the  
27position being that you, Commissioner, see no problem with  
28agreeing to do the address but only when the Commission is  
29completed and I have made my submissions about that.

30

31 Could I then go through to page 3 where you write back  
32punctually. I'll deliver the Barwick address in August  
332015. Just in the chronology, we know that at that time  
34your commission expired or the letters patent expired  
35I think on the last day of December 2014 and so obviously  
36the foreshadowed date is after that time. Page 5,  
37Mr Burton writes back even more punctually with an  
38explanation mark, many thanks, that happens on 12 April.  
39Then on page 8, if we move forward to 2015, the chronology  
40has paused ^ we move ^ in April 2014 and the arrangement  
41is that you'll do it some time in August and it's known to  
42both you and Mr Purr on that that is after the Commission  
43has been completed and it's obviously understood by the two  
44of you that that was a condition. ^ Burton ^ .

45

46 Chronologically, I think we're right in saying that in  
47October 2014 the Governor General amended the letters

1 patent or issued new ones extending the time for reporting  
2 until the end of 2015. By the time we get to page 8 of  
3 MFI-2, we are in March 2015 and the Commission no longer is  
4 scheduled to be completed by the end of 2014. That is  
5 obvious enough because we're now into March 2015 and you  
6 are still the Commissioner and Mr Burton would have known  
7 that.

8

9 He writes to you. At this point, it has to be  
10 accepted, on the facts, that it that Mr Burton has  
11 forgotten that there was a condition understood by the two  
12 of you as to the giving of the address, because he writes  
13 and he says:

14

15 I'm proposing to save the date.

16

17 That's a thing you can send through the email that attaches  
18 the calendar, I think. You don't actually get an email of  
19 That's a thing you can send through the email that attaches  
20 the calendar, I think. You don't actually get an email of  
21 the save of the date although no doubt Commissioner you are  
22 more savvy with these things than I am. For the 2015  
23 Barwick address which you have kindly accepted should go  
24 out in March. Do you have a preference between Wednesday  
25 and there's some dates are set out, with arrangements as in  
26 the first email in the chain below. That is important  
27 because Mr Burton is referring you to something that is  
28 below in what is commonly known as chains of emails. You  
29 may already have in mind a perceptive on a topic of  
30 interest, but if you don't, having dived into your work on  
31 bills of rights and human rights, I wonder if Barwick on  
32 human rights conventions and related matters might be a  
33 diving point. I think as you pointed out later that would  
34 be a very short speech. But importantly, if we move down  
35 to the chain of emails, we come at page 9 immediately to  
36 the email of 10 April 2014 where Mr Burton had spelt out in  
37 very clear terms that this was an event organised by  
38 Liberals and could reasonably be described as a Liberal  
39 Party event.

40

41 At page 11 you write back on 25 March. You've  
42 obviously read the email and rather pithily point out that  
43 a gap in your knowledge was any understanding of any views  
44 of sir Garfield on human rights conventions and subject to  
45 that, you had considered you were putting forward a topic  
46 for a speech and you weren't fussed as to dates, to the  
47 dates that had been suggested, and at page 12 Mr Burton

1 writes back on 25 March, he thinks your suggested topic is  
2 terrific. Then gives an explanation for the human rights  
3 thing. Then importantly, we think, the last paragraph  
4 says:

5

6 If you have no preference on dates I'll try  
7 to aim for a non-parliamentary sitting week  
8 to give the politician lawyers less excuse  
9 not to turn up.

10

11 We would have thought when you read that email you would  
12 have understood that the politician lawyers were likely to  
13 be liberal politicians who were also lawyers who might be  
14 interested in coming to the address, but even if that  
15 wasn't the case, you would immediately know that the event  
16 had some sort of political connection and that is what the  
17 fairminded observer, we would respectfully submit, would  
18 think that you thought.

19

20 Then if we go to page 13, if I may, we're now into 4  
21 April this year. Mr Burton has now fixed on a date and he  
22 notes that that's a non-sitting week for Federal and New  
23 South Wales Parliaments. The next paragraph is simply  
24 about how long the speech may be. And then at page 15 on 7  
25 April you write back to Mr Burton and tell him that you  
26 entered the event into your diary of 26 August. It is  
27 clear whether the save to date email was ever sent, but if  
28 it was, it seems that you've manually entered the event  
29 into your diary. When it seems you've manually done it, as  
30 opposed to it having automatically by the save the day  
31 process.

32

33 We then come to June. There's a gap in the chronology  
34 from the start of April through to 12 June when Mr Burton  
35 sends you the email of 12 June and there's a number of  
36 things to notice about this document which we think the  
37 reasonable bystander would assume you would have read and  
38 understood. Firstly, the subject line of the email is  
39 Liberal Party of Australia New South Wales division,  
40 lawyers Branch and legal policy Branch and the attachments  
41 are described as, "Barwick invitation, August 2015" then it  
42 says 1 DOC date donation compliance do the dock. I think  
43 that means there were two attachments it may be there was  
44 one and that was a description of them. Is doesn't matter.  
45 It is clear enough to the reasonable bystander that you  
46 would have understood from reading this email that this was  
47 a function of the Liberal Party and there was going to be

1some form of fundraiser because there was donation

2compliance forms involved.

3

4 What he says to you is:

5

6 I thought you would like a copy of the

7 formal invitation following the save the

8 date that was circulated some months ago.

9 You are of course our guest. Please let me

10 know if you would like to bring a guest.

11

12Pausing at this point, the transcript of Monday's

13appearance at I think it is towards the bottom of page 13

14you said that you did not read the attachments to this

15email, that you noted the date and place but nothing more.

16

17 We then go down to the bottom of the email and what

18Mr Burton I think what he's done he's forwarded on to you a

19general email that presumably has been sent out to people

20who are identified as likely suspects to come along to this

21talk. Once again it it's got the same heading on it.

22Liberal Party of Australia New South Wales division lawyers

23Branch a be legal policy Branch. The next paragraph talks

24about the lawyers' Branch and the legal policy Branch,

25obviously enough in the context of the title of the Liberal

26Party of Australia, inviting you and then the details of

27the time and place are in that third paragraph ^ invites

28^ , of attached to it the invitation mine's not colour but

29I'm prepared to bet quite a lot on the fact that it is

30probably blue in large parts, it's got the Liberal Party

31bow gone and brand and obviously enough anyone looking at

32that invitation would immediately know it was a Liberal

33Party event and then if you go over to the RSVP part of it,

34at page 19, which obviously enough want a relevant document

35to you because you weren't going to be paying to come along

36to give your own speech, and Mr Burton had made that clear,

37but the document, if noticed by you, makes it entirely

38clear that, firstly, if people don't want to come, only

39because I assume they'd be out of the jurisdiction, they're

40able to make a donation and secondly, that it is \$80 a

41person to come along, that is on the left-hand side. On

42the top of the right-hand side, the cheque is to be made to

43the Liberal Party of Australia New South Wales division.

44The bottom of that column, a receipt will be issued all

45proceeds for this event will be applied to State Election

46campaigning. In context, that is obviously State Election

47campaigning for the Liberal Party. Then there is the

1 disclosure warning which is at the bottom of that page and  
2 then what seems to be from the title of the email, perhaps  
3 a separate document, at page 20, a state donation  
4 compliance explanation document. I haven't looked at this.  
5 I should have because in another place I was involved with  
6 a lot of facts of donations in New South Wales, but  
7 obviously enough, I think you can take notice that there is  
8 a \$1,000 cap on at least individuals can donate to any  
9 political party. You of course can donate more than that  
10 but if you do you have to disclose your name, that is the  
11 first point you get from the warning, and I guess the  
12 other advantage, if you like ^ I guess ^ if a person  
13 understands that what they are paying by way of their  
14 ticket price is a donation to a political party, they get a  
15 tax deduction for it.

16

17 So pausing, without having heard what you said on  
18 Monday at transcript page T13, the hypothetical reasonable  
19 observer would really be in no doubt that you understood  
20 that this was a Liberal Party function and that you  
21 understood it was a fundraiser of some type and that is  
22 because the hypothetical observer would naturally assume  
23 that you would read the email and even if scanning it, you  
24 would pick up those facts. Not necessarily from going to  
25 the attachments but from the very body of the email itself  
26 and the titles.

27

28 Can I pause here and address another question of law  
29 that our learned friend has just drawn attention to? We  
30 know that you're the Honourable Dyson Heydon. When I say,  
31 we, I mean the lawyers in this room and we know that you  
32 have particular skills as a lawyer and as a judge and for  
33 that matter as an academic.

34

35 We know that you're a man with a reputation for having  
36 a razor sharp mind, to use another cliché, a mind like a  
37 steel trap. I think my learned friend is correct in saying  
38 that the hypothetical bystander that this matter must be  
39 judged by he or she doesn't know that. But what he or she  
40 does know is if you like your resume. They do know that  
41 you were appointed to the High Court, that you were ain't  
42 /POed to the Court of Appeal of New South Wales, then to  
43 the High Court of Australia ^ appointed ^ and served for  
44 the best part of a decade, I think, and that the executive  
45 Branch of government has seen you as a person appropriate  
46 to carry out this very important, difficult and fact  
47 intensive inquiry.

1

2 I would submit that you would accept that those facts  
3 are imputed to the bystander. Then /THRES's a question of  
4 what would the bystander make of all that. In our  
5 respectful submission, it is not a very large step say that  
6 they would assume that the very things that you are  
7 actually renowned for are the position. People don't get  
8 appointed to the High Court of Australia unless they are  
9 considered truly brilliant lawyers and what the truly  
10 brilliant lawyers have over and above truly ordinary  
11 lawyers, they have that special ability to absorb  
12 incredibly quickly and distil facts and an ability to  
13 retain facts so absorbed and distilled, so as to fit them  
14 into the wider picture of the particular legal problem at  
15 hand.

16

17 That is what a great lawyer is expected to be able to  
18 do and that is what the person would infer the executive  
19 thought about your abilities when they originally appointed  
20 you to this Commission and extended it.

21

22 The reason the hypothetical bystander is going to  
23 think you've read this email. He or she may think you've  
24 read it quickly but they're going to think that you are a  
25 very good - not a very good reader, but a person who is a  
26 very quick reader, because that is another skill that most  
27 successful lawyers have, and that even when reading  
28 quickly, you pick up the salient points.

29

30 Could I then go forward to page 21, just to remind you  
31 that was June. We now move forward to 12 August and in the  
32 usual way of emails, Mr Burton, using the chain, sends you  
33 the email at the top of the page, forgetting to ask if your  
34 wife was coming, but in enclosing the chain, what's  
35 happened is he's changed the title but if you look at the  
36 next email down the page on page 21, that is got the same  
37 title but this is the one which we don't have an original  
38 of. That's right, the way this seems to work, I'm sorry,  
39 Commissioners, I've got myself confused, Mr Burton has sent  
40 two emails two minutes apart and it would seem that your  
41 assistant has printed them off at one and that is why we  
42 don't have a stand alone copy of the one at the bottom of  
43 the page.

44

45 I'm told that there is now the stand alone email. It  
46 doesn't matter. They were obviously both given to you, it  
47 would seem, inferentially, that you received them in this

1 way.

2

3 Let's look at the two emails. The one at 11.12, the  
4 first one, says that he's enclosing the information for  
5 your reference, but nowhere on the document does it suggest  
6 that there was an enclosure and we can infer by reference  
7 that no inclosure was produced by the Commission that  
8 Mr Burton forgot to do the thing that he said he was doing  
9 /STPH-FPLTS enclosure ^ and the invitation wasn't  
10 enclosed. Mr Stoljar will tell me if I've got that wrong.  
11 I will proceed.

12

13 Thank you. All right apparently what has been  
14 produced today does have produced with this email the  
15 invitation which I have to say surprise /PHAOES because  
16 usually you can tell on emails whether there is something  
17 attached to it, but there you have it. It would seem that  
18 we can proceed on the basis that Mr Burton in fact did  
19 manage to attach it.

20

21 You've got the invitation again but importantly, what  
22 the email says is he's giving you a running sheet and then  
23 the second paragraph, the New South Wales attorney and this  
24 is in August of this year and so if you read on has kindly  
25 agreed to give you a brief note if she - now, there's only  
26 been one New South Wales attorney who is a lady and we know  
27 she's a liberal, but anyway, the Liberal Party is in power  
28 in New South Wales, so we we know that the usual attorney  
29 was a liberal and then we can skip a paragraph. Bar news  
30 seems to have missed out as a result of this process but  
31 I'm store Mr Stoljar. As you know normal Lyn the auspices  
32 of New South Wales lawyers professional Branch this is not  
33 a fundraiser. The cost charged is purely to cover dinner  
34 including our guests and a small Con continuing /TKPWEPBGcy  
35 for fixed cost in face of a numbers collapse which doesn't  
36 look like happening at present although people will  
37 disclose if they go over the state donation limit. It is  
38 not open to the media. I shall compere questions and there  
39 won't be any on the Royal Commission.

40

41 Pausing there ^ contingency ^ we tried to identify  
42 why the hypothetical observer or indeed anyone reading this  
43 letter would be a little bit confused by reading that  
44 paragraph, because on the one hand, the first thing  
45 Mr Burton does he reminds you it is under the auspices  
46 Liberal Party lawyers professional Branch. The second  
47 thing he says is it is not a fundraiser. The third thing

1he says is that people paying money to come along will  
2disclose if they go over the State donation limit. That is  
3the State donation limit, obviously enough, for political  
4donations.

5

6 So there is a contradiction apparent on the face of  
7the document between the proposition that this is not a  
8fundraiser but that people who come along will have to  
9disclose what they paid if they're over the limit.

10

11 It seems inferentially and perhaps this is what the  
12bystander might think, that Mr Burton is now a little bit  
13concerned as to whether it is appropriate for you to be  
14attending in circumstances where the Commission is  
15continuing, but he couches it in a very unusual way. In  
16other words, he doesn't say what I just said. Perhaps that  
17is the consequence of the position you hold and the way  
18people deal with you, but in a round about way - let me say  
19what he says. He says:

20

21 In the absence of hearing from you, we  
22 proceed on the basis you are happy to go  
23 ahead even though the Commission is still  
24 in hearing (not expected when originally  
25 arranged) and thought.

26

27That is the "we":

28

29 And thought it presumptuous to do other  
30 than leave that up to you. If however a  
31 problem emerges at the last moment then  
32 people will I am sure understand.

33

34He might have said, hey Dyson, remember originally you  
35weren't going to do this if the Commission was still going  
36or he might have said, have you thought about whether there  
37would be a problem coming along to this event, even though  
38he has just told you it is not a fundraiser, but he doesn't  
39do that, he couches it in that rather odd way.

40

41 And then if you move forward, I think, to 13 August,  
42which is at page 24, you respond. It is the next day at  
439.23 - I'm so sorry, I said you responded, it is Barbara  
44which I think is Ms Price. Did Mr Burton I'm replying to  
45your email dated 4 August on Mr Heydon's behalf dots he  
46does not wish to answer any questions after this address.

47

1 Pausing there, obviously you're coming, subject to what  
2 follows, you're coming without anyone coming with you, and  
3 you don't want to answer any questions. Or he just going  
4 to give the address:

5

6 If there is any possibility.

7

8 And those words are in bold:

9

10 That the event could be described as a

11 Liberal Party event he will be unable to

12 gift address at least whilst in the

13 position of Royal Commission member.

14

15 I think we've used the words bewildered in relation to the

16 reasonable bystander's state of mind at this point of the

17 chronology because obviously the event could be described

18 as a Liberal Party event. When I say "obviously", it is

19 obvious from the email that this responds to which we've

20 just looked at. It is at page 24, but that is the same

21 email that we just went through at page 21 and it spells

22 out absolutely clearly that whatever else this is, it is a

23 Liberal Party event and then it's got but it is not a

24 fundraiser but if people pay money they might have to give

25 donations. We pose for consideration the fact that the

26 hypothetical observer would be saying to him or herself at

27 this moment, "Well, what's going on? Why does Ms Price on

28 behalf plaintiff Heydon ask Mr Burton that there's

29 possibility that the event could be described as a Liberal

30 Party event in circumstances where the day before he has

31 been told it's a Liberal Party event and anyway, from 2014

32 through, from April 2014 through to 13 August, he has been

33 told over and over again that it is a Liberal Party event

34 and he has been told that it is a fundraiser because he has

35 been given the invitation."

36

37 Then we move forward to page 28. We are now at 11.22

38 on 13 August. What we don't have is any evidence that

39 casts any light as to what, if anything, happened between

40 9.23am on 13 August and 11.22 on 13 August. One could

41 speculate but it would be nothing more than speculation

42 and, therefore, in our submission, the proper way to

43 approach it is the hypothetical observer would not know and

44 would be mystified because all he or she could do would be

45 to speculate. You really can't draw any inferences from

46 any of the surrounding circumstances.

47

1 What happens is the media department of the Commission  
2 issues a press release, what used to be called press  
3 releases, I think they're called something else now, media  
4 releases, which says the Commissioner Dyson Heydon will not  
5 be delivering the Sir Garfield Barwick address. An  
6 interesting thing for the general public to know. One  
7 would have thought the general public had no idea you were  
8 giving the Sir Garfield Barwick address and would perhaps  
9 wonder why they were being told that. And then the public  
10 is told through the media:

11

12 As early as 9.23 this morning and prior to  
13 any media inquiry being received.

14

15 I'm sorry, I should pause there, from those words in  
16 parentheses one can infer that between 9.23 and 11.23  
17 there was a media inquiry received by the commission. He,  
18 that is you, advised the organisers that if there is any  
19 possibility that the event could be described as a Liberal  
20 Party event, he will be unable to give address at least  
21 while he is in the position.

22

23 We have made the position that the hypothetical  
24 observer might think that that statement might be  
25 misleading because literally, of course, it's true at 9.23  
26 that morning you had advised the organisers of those words,  
27 but read in context, it could be said or thought to be  
28 misleading because, in fact, when you look at the 9.23  
29 email at page 24, the only sensible reason was you were  
30 coming and you were asking Mr Burton to tell you if there  
31 was any possibility of the event being described as a  
32 Liberal Party event, you wouldn't be able to come.

33

34 The hypothetical observer would think, well, what's  
35 going on? That is not what he said at 9.23 other than  
36 literally. In fact, at 9.23 he made it quite clear to  
37 Mr Burton that subject to that matter he was coming and  
38 they might also think he told Mr Burton or does Mr Burton  
39 find out via the media? And certainly we know that  
40 Mr Burton wasn't told by any email or documentary  
41 communication.

42

43 The hypothetical observer is confused, perhaps even  
44 confounded.

45

46 At 3.11pm on that same day a second media release  
47 emerges from the Commission which sets out the first one

1 and then says:

2

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

8

9 So the hypothetical observer looks at those two emails  
10 which he or she of course has already seen in this strange  
11 hypothetical world we have to try to get our heads around  
12 and immediately his or her concern that the earlier media  
13 release might have been misleading in the way I've  
14 described is allayed because every one through the media is  
15 being shown the full context of the 9.23 email.

16

17 Having had his or her concerns allayed at that point,  
18 immediately he or she notices other problem because he  
19 might think - and in our submission he would be entitled to  
20 think - the release of those two emails puts the earlier  
21 media release in a context but if the suggestion was that  
22 these two emails put that media release in its full  
23 context, that would be misleading, you might think.

24

25 The reason I say that is that all one looks at is  
26 those two emails and the media releases, one might be  
27 forgiven for thinking that the first time you had any  
28 inkling that this might be a Liberal Party event was some  
29 time around August 2015, which is just not true. You've  
30 always known the hypothetical observer would think he's always  
31 known it was a Liberal Party event. He's known that from  
32 April 2014. Hypothetical ^ . Mr Burton, subject to thinks  
33 problems with grammar, has actually gone out of his way to  
34 make it clear over and over again that it was a Liberal  
35 Party event and he's given him the invitation which makes  
36 it clear that it is a Liberal Party fundraiser although  
37 Mr Burton apparently asserts it is not, but anyway, the  
38 Commissioner knows the people coming along who pay money  
39 will be obliged under the law of New South Wales to declare  
40 that money, and so if the hypothetical observer was  
41 speaking out loud, he or she would be very concerned. What  
42 is going on? Why is the Commission not putting the reason  
43 that Mr Heydon is not giving this address in its full and  
44 proper context.

45

46 Why is Mr Heydon not telling every one else, because  
47 of course this hypothetical observer, he or she knows all

1 these otherwise private facts, he or she knows of the  
2 emails or the communications that have gone backwards and  
3 forwards, the people reading the media release in the  
4 media, they don't know anything about that, all they know  
5 is there have been two media releases and they've been  
6 shown two emails.

7

8 The hypothetical observer would be saying to him or  
9 herself, "What is going on? Why aren't the public being  
10 told the full picture? Why is it being suggested that  
11 Mr Heydon has only just found out that it's possible this  
12 could be a Liberal Party event when he has always known it  
13 was a Liberal Party event?" .

14

15 That conclude what is we call in our submissions the  
16 objective evidence. Can I just use that as a tag because  
17 in this unusual application we then have, which we do  
18 accept is relevant evidence, what you said from the bench  
19 on Monday of this week which is set out from about line 17  
20 you on page 11 of the transcript of that day through to  
21 precisely line 25 on page 14.

22

23 We tried to work out whether there's any clear law on  
24 what is the status of what you said and what the cases tell  
25 us and what I'm going to say is the answer is not clear,  
26 what the case does say there is a thing well known to the  
27 area of these type of applications called a correcting  
28 statement. It is membered by the High Court I think in the  
29 Johnson & Johnson case which we have given you a reference  
30 to at page 96 (it is mentioned ^ ).

31

32 The High Court doesn't put this qualification on it,  
33 but every case we have been able to find where the  
34 correcting statement has been given and taken into account  
35 in the decision has been those classic cases where it is  
36 alleged against the judicial officer that he or she has  
37 prejudged because they've gone overboard in what is usually  
38 described in the judgments as robust debate, often with  
39 counsel, where it is suggested that they have so  
40 emphatically stated a position of fact in issue where they  
41 got to the stage where they prejudged, and then there are  
42 those statements, which I think we're all very familiar  
43 with, to the effect that well, of course, every one  
44 understands that was just me engaging in sock teal  
45 dialogue, it is the way I resolve cases and of course these  
46 are all just preliminary views, I have have nod made any  
47 final judgment at all even though it might have sounded

1like I had. We all understand that. But this is not one  
2of those cases. This is a case where we rely on the events  
3that I've just been through and the inferences that can be  
4drawn from those events to found our application.

5

6 We can't find a case where a correcting statement or,  
7as you called it, a contextual statement from the judicial  
8officer has been referred to, but there's nothing in John  
9on Johnson say it /-RPBT /KA be and may I therefore make  
10this submission in response to its proper status in the  
11conspectus of facts before you. Firstly, it is admissible  
12as evidence but not evidence of the fact. That is, it  
13doesn't become evidence that you can take into account that  
14what you say actually occurred or what you did or didn't do  
15you did or didn't do, but it becomes evidence that it was  
16said in open court and, therefore, becomes another fact  
17that the reasonable hypothetical bystander knows and takes  
18into account when coming to his or her ultimate conclusion.

19

20 It is not determinative. There is nowhere and nor  
21could it be right as a matter of principle, that any  
22application of this kind is simply trumped by a statement  
23from the bench as to what in fact happened. It must be  
24that the hypothetical observer is then taken to consider  
25that explanation and factor it into all the facts. Of  
26course, what we've done on going through the chronology is  
27et issing out in each point of time where we think the  
28hypothetical observer would be up to in terms of what they  
29think is going on, it would be to go down a path towards  
30error to continue to take that too far, because ultimately,  
31like all decision makers, the hypothetical observer, having  
32got in all the facts, then sits back and reflects on  
33everything he knows.

34

35 We would suggest including his various states of mind  
36as things have unfolded, so including the fact at various  
37times he's perplexed and bemused about what's going on,  
38that he's noticed all these inconsistencies in documents  
39and the like.

40

41 But he doesn't accept this uncritically. He of course  
42those it is not on oath and he of course knows it is not  
43the subject of being test in the cauldron of  
44cross-examination, but he also knows that it comes from  
45you, so he's going to give it some weight and we would  
46expect him to.

47

1 He is going to assess it against the objective facts  
2that he does know happened, the probabilities and come to a  
3conclusion as to how plausible it is and equally, he's  
4going to be very careful - I've slipped into calling him,  
5nothing in the cases suggest this person is a man - he's  
6going to be very alert once a judicial officer has made an  
7explanation as to what hasn't been said.

8

9 May I go then to deal with this at paragraph 89. We  
10have sought to pull the Is out of what he said and we think  
11it comes down to three points. ^ eyes ^ ?

12A. You overlooked the connection between the person and  
13persons organising the convenient and the Liberal Party  
14which had been stated in the email of 10 April 2014. ^  
15event ^ . Without being rude, may I respectfully suggest  
16that overlooked means forgot. That is certainly as we read  
17it. It tends to suggest that in March 2015 you forgot that  
18you'd been told it was a Liberal Party event in April 2014.

19

20 It doesn't say that at all the points that I've just  
21identified between April 2014 and March 2015, when you'd  
22been told that it was a Liberal Party event over and over  
23again, that you overlooked or forgot any of those  
24statements.

25

26 The second thing you said was that you forgot, if  
27I may be so bold, the fact that you had an a /TPWHRAOEPLT,  
28whether it be a tacit agreement to speak in April 2014  
29conditional on the work of the Commission being completed  
30before that time (^ agreement ^ . So much may be  
31accepted. It is obvious from the emails and it is equally  
32obvious that Mr Burton forgot. But it really doesn't come  
33to grips with the fundamental problem which is so what if  
34he forgot about that agreement or condition that had been  
35struck in April 2014, you've had so many opportunities to  
36impose the condition again, which is, indeed, what happened  
37when you pulled out of the address. You reimposed the  
38condition. It doesn't say why in all the period during  
39that year, when you knew it was a Liberal Party event, you  
40didn't re impose the condition.

41

42 Then you talk about the 12 June email which we've  
43looked at. It is at page 17 and you say that you glanced  
44at that, you only noticed the time, date and place, by  
45implication you're saying that you missed the title to both  
46emails, you missed the title to the 12 June, Liberal Party  
47lawyers Branch and legal policy Branch and you missed the

1 title to the other email, Barwick invitation, state DOC  
2 donation compliance document but you don't say that you  
3 missed the fact that you had been told it was a Liberal  
4 Party functionary peatly in all the other correspondence  
5 we've looked at. And so the natural inference that the  
6 hypothetical bystander would draw, that is you read and  
7 understand your emails, is actually confirmed by what you  
8 didn't say in the relevant context. The next thing we  
9 think is telling you say that at all times you didn't  
10 understand at all times the Commission's understanding was  
11 the dinner was to the to be a fundraiser. So what. It  
12 just confirms at all times you knew it was a Liberal Party  
13 event and secondly, it is completely out of kilter with all  
14 of the documents we've looked at, including all of the  
15 documents we've looked at.

16

17 Where does that leave us, if I may conclude? We've  
18 set this out at page 22 of our written documents.  
19 Reminding you, if I may be so bold, of the double might  
20 test, low threshold. Might the fairminded observer think  
21 you might not bring an impartial mind to the resolution of  
22 the issues of the Commission in circumstances where he  
23 knows that you were at all times prepared to speak at what  
24 you knew was a Liberal Party event. He is confused as to  
25 why it is that you say you never understood it was a  
26 fundraiser because it is out of kilter with what he would  
27 expect of a person with your reputation, that is, it is  
28 blindingly obvious from the emails you were sent, he's  
29 confused about that. He's not necessarily going to reject  
30 what you said but he just finds that perplexing, unusual.  
31 In lawyer-speak, improbable or implausible.

32

33 He also knows - and this is important when you look at  
34 for guidance any other cases and I would suggest that that  
35 is changes because these are /KWEUPBT essentially cases  
36 that turn on their own facts - the extraordinary highly  
37 charged public and political nature of this Commission. He  
38 knows that this is red hot in political terms and yet, he  
39 knows that you, for a year, were quite happy to lend your  
40 name to an event of the Liberal Party, albeit for a large  
41 part of that time at a time after the Commission concluded  
42 and that for a significant period this year you indeed were  
43 prepared to speak when the Commission was continuing in  
44 circumstances where you most definitely knew it was a  
45 Liberal Party function.

46

47 He also knows, to go back to my first point that,

1 remains your stated position even though without a shadow  
2 of a doubt you now know it is a Liberal Party function that  
3 was a fundraiser.

4

5 In our respectful submission, he would be left in a  
6 state of doubt sufficient to think that you might not be  
7 able to bring an impartial mind to these highly sensitive  
8 matters and I don't even need to go to that far. I've made  
9 the submission leaving out the first might of the test.  
10 I only need to go as far as to persuade you that he might  
11 find himself in a position of apprehending reasonably that  
12 you might not bring an impartial mind to the resolution of  
13 the question.

14

15 We could debate, if you're in debating frame of mind,  
16 whether I've persuaded you of some higher level of  
17 subjective state of mind in this hypothetical perp, but it  
18 is irrelevant. It is the test that I just stated and in my  
19 respectful submission, an understanding of the full gravity  
20 of the consequences that follow from such a finding which  
21 for reasons I've explained as a matter of law you are  
22 wholly irrelevant, you're really compelled to make that  
23 finding which compels the result. I will just conclude by  
24 saying this: we haven't and I take full responsibility for  
25 this, spent enough time thinking about appropriate relief.  
26 Also, I haven't addressed you on the ACTU's standing --  
27

28 THE COMMISSIONER: I wouldn't bother about that.

29

30 MR NEWLINDS: I was about to make a concession.

31

32 THE COMMISSIONER: There are plenty of other people.

33

34 MR NEWLINDS: There are. Leaving ACTU aside, I act for a  
35 number of unions, their application is that you not proceed  
36 in the inquiry insofar as it affects them, but that is all  
37 they can seek.

38

39 THE COMMISSIONER: That simply would mean that your relief  
40 is framed in 115 as a little too wide.

41

42 MR NEWLINDS: It does.

43

44 THE COMMISSIONER: It would be quite wide because of the 7  
45 or so unions that --.

46

47 MR NEWLINDS: Yes, but what I was about to say though is

1 whether there is a question whether you can unscramble the  
2 scrambled egg. If - and I don't know and I don't pretend  
3 to know about the way the inquiry, the way it is structure  
4 and even what in particular you're investigating into, if  
5 it is possible to proceed with other parts of the inquiry  
6 well then I can't on behalf of my clients make any  
7 submissions that you should not do so, but ultimately, of  
8 course, if I've made good my submission, which is not to do  
9 and is not based on the individual Unions that I appear  
10 for, it is based on the union movement generally, if I've  
11 made good that submission, and that is the only submission  
12 I've made, then it would really seem to follow that you  
13 can't proceed. Those are my respectful submissions and  
14 thank you for dealing with it with so much courtesy.

15

16 THE COMMISSIONER: Thank you. Mr Agius?

17

18 MR AGIUS: Commissioner, with the exception of the very  
19 last submission my learned friend made carving out parts of  
20 the jurisdiction, in effect, afforded by the letters  
21 patent, with the exception of that submission we embrace  
22 and support my learned friend's submissions and I say that  
23 with great respect to him. The reason why we do not adopt  
24 that part of his submissions is that in our respectful  
25 submission the fairminded lay observer's observations in  
26 this matter would be such that there would be no part of  
27 the inquiry that would be untouched by a finding of a  
28 reasonable apprehension of bias and that once you reached  
29 that position, Mr Commissioner, that there is a reasonable  
30 apprehension of bias that from would be no part of the  
31 inquiry that could continue, which would not be infected by  
32 such a finding.

33

34 Otherwise, we embrace my learned friend's submissions,  
35 indeed we're indebted to them. They replicate in other  
36 words much of what we put in our own and I do not propose  
37 to repeat what we have in our written submissions. We rely  
38 upon the written submissions.

39

40 Mr Commissioner, you will have seen a bundle which was  
41 tendered this morning of material. Its purpose is merely  
42 to establish a nexus between the prejudice that arises  
43 because the function in this case was a Liberal Party  
44 function and the work of the Commission. I don't want to  
45 spend any time on this but in our respectful submission one  
46 needs to look at the context of the Commission, one needs  
47 to look at the context of the inquiry, like it or not, this

1 Commission is dealing with matters which are politically  
2 sensitive on both sides of Parliament, the conservative  
3 side and the labour side, and the work of this commission  
4 has been embraced by the Liberal Party ^ Labor ^ in  
5 government. It is proud and is said to be proud of the  
6 fact that that ^ been embraced ^ it has established this  
7 Royal Commission and there is a clear inference available,  
8 in our respectful submission, on the material that  
9 Mr Commissioner you have lent your support to the Liberal  
10 Party and that would indicate, in our respectful  
11 submission, a clear link between the bias which that, is  
12 the apprehended bias that we allege is available and the  
13 work of this Commission.

14

15 What I do want to spend some time on and hopefully not  
16 very much time is on what we regard as a very significant  
17 matter that has occurred since our written submissions were  
18 completed and which has arisen following our written  
19 request to the Royal Commission yesterday for material and  
20 the provision of that material by the Royal Commission  
21 yesterday.

22

23 Here I am speaking of ACTU MFI-6, a request from  
24 Slater & Gordon on behalf of the CFMEU for clarification  
25 and for the provision of documents and the reply by the  
26 Royal Commission providing additional material which had  
27 not before been provided. Mr Commissioner, I commence with  
28 the statement that was made by the Commissioner in this  
29 hearing room earlier this week. At line 29 at page 13  
30 Mr Commissioner you said:

31

32 On 12 June 2015 I received an email from  
33 the organiser to which was attached a copy  
34 of the invitation to address, that being a  
35 three page document, as I say, attached to  
36 the email, a one page document. In the  
37 usual course my personal assistant printed  
38 out a copy of the email and the a. At  
39 that and provided them to me. I glanced  
40 through the email noting the date, time and  
41 place of the dinner. I did not read the  
42 attachments. Having noted in the one page  
43 email of 12 June that I was to be the guest  
44 of the organisers.

45

46 Following 12 June, I was deeply engaged in Commission  
47 business. I did not give any consideration to the Sir

1 Garfield Barwick address. I did not prepare a written  
2 paper. I did prepare rough notes which I have produced  
3 pursuant to the questions of the applicant in its letter of  
4 today's date which is ACT you MFI-1.

5

6 Then you go on Mr Commissioner to say:

7

8 On 12 August 2015 the co-ordinator of the  
9 Sir Garfield Barwick address sent me an  
10 email which has previously been released by  
11 the Commission. I was engaged either in  
12 hearings or in other duties until the  
13 following morning. At that time I cause my  
14 /PERPBT assistant to send an email which  
15 end collude the following words: "If there  
16 is any possibility, those two words  
17 emphasised, that the event could be  
18 described as a Liberal Party event, he will  
19 be unable to give the address at least  
20 while he in the position of  
21 Royal Commission ner.

22

23 For completeness, you go on to say:

24

25 Shortly after the dispatch of that email it  
26 was made plain that I would not be giving  
27 the address.

28

29 In that part of the statement you refer to an email which  
30 has previously been released by the Commission. We take  
31 that email to be behind tab 14 of ACTU MFI-2. At page 29  
32 of the bundle there is an email from Adrian Kerr which was  
33 sent on Thursday, the 13th, at 3.11pm. It has attachments,  
34 12 and 13 August, email, as PDF copies and it reads:

35

36 The Commission's media statement this  
37 morning was issued in the following terms.  
38 The commission anywhere Dyson Heydon will  
39 not be delivering the Sir Garfield Barwick  
40 address. As early as 9.23 this morning and  
41 prior to any media inquiry being received,  
42 he advised the organisers that if there was  
43 any possibility.

44

45 Again in bold:

46

47 That eat vent could be described as a

1 Liberal Party event he will be unable to  
2 give the address, at least whilst he is in  
3 the position of Royal Commission member-N  
4 answer to media inquiries and to put the  
5 words quoted above in context, the  
6 Commissioner is releasing an email exchange  
7 of 12 and 13 August 2015 regarding the Sir  
8 Garfield Barwick address. Email addresses  
9 have been redacted.

10

11 Then as attachments to that email, there are two emails,  
12 one is the email that we're very familiar with from Barbara  
13 Price in which she replies to an email dated 12 August on  
14 your behalf, Mr Commissioner, indicating "he will not be  
15 accompanied to the dinner. He does not wish to answer any  
16 questions after his address" and then the statement which  
17 we've heard /STWAOEUS now in this reading, if there is any  
18 possibility that the event could be described, et cetera,  
19 he will be unable to give the address.

20

21 The second email that was released was the one from  
22 Mr Burton of 12 August 2015 at 11.12am and the subject is  
23 included:

24

25 Final arrangements Barwick dinner address  
26 26 August.

27

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

37

38 Attachments: Barwick invitation August  
39 2015 one DOC X; state donation compliance  
40 DOC.

41

42 And then we see the rest of the email. There is no  
43 explanation as to how it might be that an exact copy of  
44 that email, absent the reference to Barwick invitation  
45 August 2015 and state donation compliance" has an annexure  
46 or an attachment can be found in the ACTU MFI-2 and why it  
47 is that this email appears in a different form absent that

1line of information in the MFI-2. Beyond that, the  
2document produced yesterday in response to the CFMEU's  
3request through Messrs Slater & Gordon including the email  
4from Robert Carey of 12 August 2015 at 10.58am which  
5includes as its subject forward Liberal Party of Australia  
6New South Wales division lawyers' Branch and legal policy  
7Branch which again makes plain that the event was a Liberal  
8Party function.

9

10 The first of these emails in the material produced  
11yesterday makes clear that connected with the invitation to  
12the Barwick lecture was a state donation compliance  
13requirement which clearly identifies the function as one  
14which might be called a fundraiser.

15

16 The fairminded observer, in our respectful submission,  
17would very likely conclude that if the Commissioner was  
18able to, in his glancing or reading of the email, see that  
19it was from the organiser, that it was addressed to him,  
20that it referred to the final arrangements for the Barwick  
21dinner address on 26 August, that is also referred to the  
22state donation compliance.

23

24 The fairminded observer would, in our respectful  
25submission, have serious concern as to why it was that this  
26email, which was produced yesterday and the form in which  
27it was produced, didn't find its way into ACTU MFI-2 and  
28that the copy of it which did find its way into that bundle  
29deleted the reference to attachments and the information  
30that follows the word "attachments", and the email which  
31followed that, that is, the email from Robert Carey of 12  
32August 2015, 10.58am, was also not attached to the 12  
33August 2015 email that forms part of the MFI-.

34

35 In our respectful submission, ^ MFI , the omission of  
36the email that was provided yesterday and the form in which  
37it was provided has great significance on the question of  
38the opinion of the fairminded observer. We submit - and  
39I think it is beyond any doubt - that the fairminded lay  
40observer would apply commonsense that she would be entitled  
41to draw inferences from facts disclosed but not just from  
42facts disclosed, but also from the fact of non-disclosure  
43or incomplete disclosure or disclosure which was of itself  
44misleading.

45

46 As an objective fact, it is apparent that the  
47disclosure was in fact misleading. In the statement made

1 on 17 August, which I've just read, the Commission speaks  
2 of putting matters in context ^ spoke ^ . At page 11,  
3 Mr Commissioner you said:

4

5 I wanted to give just some contextual  
6 background to the material which has been  
7 marked ACTU MFI-2.

8

9 And then you, Mr Commissioner, went on to give the address  
10 that we read in the transcript at pages 11 and following,  
11 in the course of which you indicated that you'd overlooked  
12 the connection between the persons organising the event and  
13 the Liberal Party and that you also overlooked that your  
14 agreement to speak at that time had been conditional on the  
15 work of the Commission being completed at that time.

16

17 You go on to speak of the emails of 12 June 2015 and  
18 at the bottom of the page, you refer to "an email" from the  
19 co-ordinator which you say has previously been released by  
20 the Commission. In respect of that email, you say that you  
21 caused your personal assistant to send an email which  
22 included the following words, "If there is any possibility  
23 that the event could be described as a Liberal Party  
24 event."

25

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

34

35 Concern that the information that was released was at  
36 best a partial disclosure, if not a disclosure of a  
37 doctored document which had been edited to remove the  
38 reference to State donation and also would be concerned  
39 about the incomplete disclosure, the independent fairminded  
40 observer, would, in our respectful submission, have great  
41 concern as to the claim that you, Mr Commissioner, had not  
42 recalled the earlier caution that you had expressed in  
43 April of 2014 and would be concerned that this email of 12  
44 August at 11.12 really makes unacceptable the context that  
45 is put forward for the email that is referred to at the top  
46 of page 14 in which your assistant, Mr Commissioner, was  
47 asked to send an email if there is any possibility that the

1 event could be described as a Liberal Party event.

2

3 The fairminded observer would, in our respectful  
4 submission, not just might but in our respectful submission  
5 would on the balance of probabilities conclude that it was  
6 disingenuous for the writer of that email to include at  
7 this late hour, that is, 24 hours after the receipt of the  
8 email on 12 August, would at that late hour suggest there  
9 there was any doubt about the possibility the event could  
10 be described as a Liberal Party event.

11

12 There is some authority which we pray in aid on this  
13 point. I apologise for none of this being in our written  
14 submissions but it only emerged when we received the  
15 material from the Royal Commission yesterday. It is the  
16 decision of the Full Court of the Federal Court of gays  
17 Ford and Hunt and another, GAISFORD, which is reported at  
18 1996, 71 FCR page 187. I have a copy for my friend.  
19 I have another five copies which we will pass around.

20

21 This was a matter which involved facts in a fairly  
22 limited spread. Mr Hunt had been appointed to conduct an  
23 inquiry. He decided that the inquiry might benefit from  
24 some press publicity. He had an off the record interview  
25 with a journalist which led to the publication of an  
26 article on 28 August containing numerous references to the  
27 views of the inquiry.

28

29 He was asked to make a public comment about the  
30 article on the next day and he did so and he said that he'd  
31 reached no conclusions whatsoever on any aspects of the  
32 Terms of Reference but he did not reveal that the article  
33 had at its source the off the record interview with him.

34

35 At first instance, the primary judge upheld the  
36 submission of Mr Hunt that he'd not expressed any  
37 conclusive view in his off the record comments and that,  
38 therefore, the claim of apprehended bias or ostensible bias  
39 as it's referred to in this case could not be upheld.

40

41 The matter went to the Full Court before justices  
42 Beaumont, o'clock land and la Hayne. Their Honours form a  
43 different view about whether or not the off the record  
44 comments expressed a concluded view or satisfied the  
45 apprehended bias test in relation to whether or not the  
46 inquirer had a concluded view. Then their Honours said at  
47 the bottom of page 202:

1

2 But the matter does not end with the tenor  
3 of the article. As we have said, the whole  
4 of the circumstances should be taken into  
5 account. They include, first, the fact  
6 that an off the record briefing to a  
7 journalist was provided by a person in  
8 Mr Hunt's position.

9

10 That is not relevant for present purposes, Mr Commissioner.

11 The next portion is:

12

13 And secondly, the failure by Mr Hunt to  
14 make immediately a full and true disclosure  
15 when challenged about the article about his  
16 conversation with the journalist and its  
17 circumstances. In our view, these  
18 considerations must exacerbate any  
19 reasonably held apprehension of bias  
20 arising from the comments made in the  
21 Canberra Times.

22

23 They were the comments that reflected the off the record  
24 conversation. The words we point to are, their Honours  
25 said, the failure by Mr Hunt to make immediately a full and  
26 true disclosure when challenged about the article.

27

28 In our respectful submission, to the extent to which  
29 what was said on 17 August might satisfy the description of  
30 a disclosure, it is with great regret that I'm compelled to  
31 make the submission that it was neither full nor complete.  
32 Indeed, as I've already said, in our respectful submission,  
33 the fairminded lay observer would be entitled to draw  
34 adverse inferences on the question of the state of  
35 knowledge of the Commissioner from the facts which were not  
36 disclosed either on 17 August or in the release that was  
37 made and which can be found at tab 14 of the bundle, ACTU  
38 MFI-2.

39

40 Mr Commissioner, as I said, I won't read our written  
41 submissions, nor will I refer to them in any length, but in  
42 our respectful submission, that is a very significant  
43 matter to be put into the balance for the attention of the  
44 fairminded observer. It can be added to the matters we  
45 have listed in paragraph 62 of our written submissions.

46

47 Not only might a fairminded observer reasonably

1 apprehend that the Commissioner was made aware that the  
2 event was a Liberal Party event when he was first invited  
3 to give the address, but also that it was not likely that  
4 he would have forgotten that fact. I can expand that  
5 paragraph as follows: it would be apparent to the  
6 fairminded observer that one of the first thoughts that  
7 came into the Commissioner's mind when he was asked in  
8 person, that is orally, in April of 2014 if he would  
9 consider giving the address was to recognise a conflict of  
10 interest. That was one of the first things that must have  
11 come into the Commissioner's mind because as the  
12 Commissioner says in his statement, you indicated that you  
13 would not do that whilst the Commission was still sitting.  
14

15 As an exquisitely experienced lawyer and judge, it is  
16 not unnatural that that would have entered the  
17 Commissioner's mind at that time, but that same exquisitely  
18 experienced mind, the fairminded observer might think,  
19 could not thereafter overlook that very important fact and  
20 yet, fundamental to the explanation or statement given on  
21 17 August was that that was overlooked.

22

23 The fairminded observer might think "well, that is  
24 fair enough if that conversation occurred in isolation, the  
25 man was, after all, very, very busy", however, shortly  
26 after that conversation, if not the fact day, an email is  
27 received which makes it plain that the event is a Liberal  
28 Party event and then there are four or five emails over the  
29 next 18 months which also make it very plain that the event  
30 was a Liberal Party event and some of those also make it  
31 plain that the event attracts the issue of donations and  
32 that, therefore, it was likely to be a fundraiser.

33

34 It just, in our respectful submission may beggar the  
35 belief of the fairminded observer that the commissioner's  
36 recollection that something had been overlooked is not  
37 reliable and that it is unlikely that such a matter would  
38 have been overlooked in circumstances where it immediately  
39 came to mind the invitation was first raised.

40

41 We also submit that the fairminded observer might  
42 reasonably apprehend that the Commissioner was aware of the  
43 conflict when speaking at a party political function and  
44 presiding over the Commission when he first responded to  
45 the invitation in April 2014, indicating that he could do  
46 so once the Commission had been completed, that the  
47 Commissioner could not fail to recall or overlook the event

1 was a Liberal Party event at least from the time of the  
2 receipt of the email from the organiser in April 2014, or  
3 if not then, in June of 2015; that the Commissioner was  
4 willing to speak at a Liberal Party function and all that  
5 that carried with it. We summarise that by saying that the  
6 Commissioner would be prepared to allow himself to be  
7 portrayed as a supporter of the Liberal Party and agreeing  
8 to give the address concerning Sir Garfield Barwick at a  
9 Liberal Party event could only be seen as in some way  
10 supporting the Liberal Party, particularly if that party  
11 had the capacity to attract donations to the party.

12

13 It should go without saying that the presence of a  
14 retired High Court judge of such standing at a Liberal  
15 Party function, speaking to lawyers, some of whom may not  
16 be members of the Liberal Party, would be great political  
17 advantage to the Liberal Party and may of itself (would be  
18 of great ^ ) convince or assist in persuading non-members  
19 of the party to join that party or to make a donation. In  
20 our respectful submission, the fairminded observer is very  
21 likely to find that if you, Mr Commissioner, were willing  
22 to speak at the Liberal Party function, that you were also  
23 aware of the consequences of publicly portraying your  
24 position as such.

25

26 Further, we have submitted that that fairminded  
27 observer might reasonably apprehend that you,  
28 Mr Commissioner, contrary to denials, in fact became aware  
29 of the event as a fundraising event following the receipt  
30 of the email of 12 June 2015 and we would add to that as at  
31 the receipt of the email which is not redacted or altered  
32 of 12 August 2015 at 11.12. We would pray in aid what fell  
33 from the full bench of the Federal Court that a relevant  
34 matter to be taken into account in these assessments is the  
35 fact that when first released - actually, on two occasions  
36 when the email of 12 August at 11.12am was released, on two  
37 occasions it did not include any reference to an attachment  
38 which clearly identified donations as being relevant to the  
39 talk.

40

41 Those two occasions are the public release of the  
42 email which is the substance of tab 14 of ACTU MFI-2 and  
43 then secondly, the release of that same email which the  
44 fairminded observer would be entitled to conclude had been  
45 edited to exclude the reference to attachments by this  
46 Commission which is at tab 10 of that MFI-2.

47

1 There is now on the record no explanation as to the  
2 apparent editing of the email of 12 August at 11.12am.  
3 There is no record of any explanation as to what effect, if  
4 any, the reference to the in the attachment to donation  
5 note had upon the Commissioner and and there is perhaps an  
6 available inference that the absence of any explanation in  
7 relation to that is because there in fact is no explanation  
8 for it consistent with a denial of knowledge of the true  
9 nature of the event.

10

11 In our respectful submission, the test to be applied  
12 here is no higher than the test enunciated about I my  
13 friend Mr Newlinds. It is the test if a fairminded lay  
14 observer might reasonably apprehend that the Commissioner  
15 might not bring an impartial mind to the resolution of the  
16 question, the Commissioner is required to decide, in this  
17 case the Commissioner is dealing not so much with one  
18 question but with a series of questions and with a report  
19 which includes recommendations about significant members of  
20 the trade union movement in this country. It is a might,  
21 might test, much as been written and said about that test,  
22 but we do not bear the onus of proving that a fairminded  
23 lay observer would reasonably apprehend that a judge or in  
24 this case the Commissioner would not bring an impartial  
25 mind to the resolution of the question. It is a much lower  
26 standard than that and matters we've outlined in our  
27 respectful submission are all matters within the purview of  
28 the mind of the fairminded lay observer.

29

30 Just one more matter that we wish to add above our  
31 beyond our written submissions and that is in response to  
32 my learned friend's Mr Stoljar's submission on the issue of  
33 necessity at paragraph 27 and paragraph 28, my learned  
34 friend deals with this point and he deals with it in  
35 another context at paragraph 14. At paragraph 14 he points  
36 to the significant differences between a Royal Commission  
37 and a judicial proceeding. The finding of a  
38 Royal Commission have no effect on legal rights and  
39 obligations. The report which is produced is in the nature  
40 of advice to the executive which may or may not be  
41 published and may or may not be acted upon. A  
42 Royal Commission is not bound by the rules of evidence by  
43 by procedural rules applied in courts. The  
44 Royal Commission has a inquisitorial role that /SKWRAEUPBLG  
45 does not V from these matters it follows that a Royal  
46 Commissioner is permitted to take a more executive  
47 interventionry and bow bust role in ascertaining facts and

1 a less constrained role in reaching conclusions than  
2 applies in court proceedings.

3

4 There's nothing about any of that that we would  
5 contest. However, we would add in that a Royal Commission  
6 nerhas power to compel the answer to questions and to deny  
7 a right to silence, that the Royal Commission nermakes  
8 findings of fact only on the balance of probabilities, and  
9 that those findings of fact can be hurtful if not utterly  
10 detrimental to the lives and livelihood of many persons, be  
11 they Union members or not, that those findings of fact  
12 could go to the very heart of the way in which industrial  
13 relations is managed in this country. It is a question of  
14 looking at the full context of this Royal Commission and  
15 part of that context includes the politically charged  
16 nature of the material that this Commission is examining.

17

18 In our respectful submission, the fact that this is a  
19 Royal Commission is a very significant matter to be taken  
20 into account in favour of the application. The submissions  
21 we have made today are made with the greatest of respect  
22 and one solid foundation for that respect is the very role  
23 of Royal Commissions in a society such as ours. A  
24 Royal Commission can be a resort that governments go to  
25 when they are dealing with difficult problems, they can be  
26 the subject of calls by members of the public. They have  
27 enormous power, they have the most powerful investigative  
28 tool in the country (they are ^ ) and they have a  
29 significant role in our society. If there was an  
30 apprehension of bias in relation to a Royal Commission then  
31 that infects not just any possibility findings of that  
32 Royal Commission, whether they be favourable or against any  
33 particular party, it infects the whole role of  
34 Royal Commissions in our society and so what you are  
35 confronted with, with the greatest of respect,  
36 Mr Commissioner, is a question which is much greater than  
37 the significance or the reputation of any one person. It  
38 is a significant matter in relation to the conduct of  
39 Royal Commissions generally and the extent to which the  
40 State should be permitted to use extraordinary powers of  
41 investigation in circumstances where there may be an  
42 apprehension about the bias of the Royal Commissioner.

43

44 At the end of the judgment in *gays Ford and hunt* the  
45 full bench said at page 203, in the last paragraph, the  
46 following:

47

1 The other observation is that we are, of  
2 course, aware that the orders which we  
3 shall make will have the result that an  
4 inquiry which has already proceeded some  
5 distance will be brought to a premature end  
6 so that considerable time and resources  
7 will have been wasted. It is perhaps to  
8 state the obvious, however, to say that a  
9 finding of reasonable apprehension of bias  
10 can lead to no other result.

11

12 We raise that in response to something that fell from you,  
13 Mr Commissioner, when this issue arose in the hearing room  
14 and that was a concern about others, not Union members or  
15 the unions, who have given evidence before the Commission  
16 and we infer that, Commissioner, you're referring to others  
17 who might rightfully look for a judgment on those matters  
18 from this Royal Commission. In our respectful submission,  
19 if there is a reasonable apprehension of bias then that  
20 judgment would have no weight and that is the principle  
21 that stands behind that statement of the Full Federal Court  
22 and as regrettable as it would be that there are matters  
23 under investigation where that investigation is not  
24 complete and when there is further evidence to be called  
25 from a number of persons, would not be able to be advanced  
26 by you Mr Commissioner, that is just the natural  
27 consequence of up holding very significant matter of  
28 principle concerning the reasonable apprehension of bias.

29

30 They are our submissions.

31

32 THE COMMISSIONER: Yes. Mr Borenstein?

33

34 MR BORENSTEIN: Thank you, Commissioner. We too have  
35 filed written submissions and like our learned friends we  
36 seek to rely on those submissions. We're indebted to the  
37 written and oral submissions that have been presented by  
38 Mr Newlands and Mr Agius this morning and we would support  
39 those submissions subject to what I'm about to say.

40

41 In relation to the matters that Mr Agius was dealing  
42 with at the end of his oral submissions and in particular,  
43 the reference to paragraph 14 of Mr Stoljar's written  
44 submission, where there is a discussion of the difference  
45 between Royal Commissions and other judicial proceedings  
46 and the reference to the fact that the findings of a  
47 Royal Commission have no effect on legal rights and

1 obligations, what is overlooked there is the recognition  
2 which the High Court has given both in the Ainsworth case  
3 and in add dits and McCann to the interest in one's  
4 reputation and the availability of protection against  
5 reputational damage.

6

7 One has seen in the proceedings of this Commission  
8 over the last 18 months or thereabouts that that is a very  
9 significant consideration that would apply in the  
10 circumstances. Perhaps to summarise what Mr Agius was  
11 putting, the greater the power that is exercised by a  
12 tribunal, the greater the need to protect those persons who  
13 are brought before the tribunal and as Mr Agius said and we  
14 agree, the process of a Royal Commission is one of the most  
15 powerful investigative and inquisitorial exercises that can  
16 be undertaken under our law.

17

18 So far as the position of others who have come before  
19 this tribunal with complaints about various forms of  
20 behaviour is concerned, there is no judgment that can be  
21 provided by this Commission for them. The Commission isn't  
22 charged with adjudicating on particular disputes and that  
23 perhaps is the most significant difference between the  
24 Commission and an ordinary judicial proceeding. Those  
25 people have their remedies in other places and if this  
26 Commission finds that because of the apprehension of bypass  
27 that it cannot continue, then those people must be left to  
28 those other remedies. ^ bias ^ .

29

30 The other matter that we wish to address that was  
31 raised by Mr Agius and with which we also agree is the  
32 ultimate outcome of this application if the commissioner  
33 accepts that it is an appropriate case of apprehended bias.  
34 Like Mr Agius, we see great difficulties in seeking to  
35 isolate various parties before the Commission or even  
36 various topics that have been ventilated by the Commission  
37 once there is may finding of apprehended bias of the kind  
38 which has been advanced by the applicants before you this  
39 morning. It is bias which goes to an aspect of the  
40 Commission which, as Mr Agius says, infects all of its  
41 inquiries into all matters and that can perhaps be seen  
42 from the fact that the Commission is charged with, among  
43 other things, making recommendations to government about  
44 the future structure of industrial laws in the country.

45

46 Other than those comments, Commissioner, we seek to  
47 make some brief comments about the allegations arising from

1 the acceptance of the address of the Liberal Party  
2 function. There has been much said in the materials and in  
3 the submissions about whether the Commission was or wasn't  
4 aware that this was a fundraising function. There has been  
5 much said in the documents and orally about when the  
6 function was to take place and whether the Commissioner was  
7 aware or remembered that the particular date that was  
8 nominated was during the continuation of the Commission or  
9 not.

10

11 We would submit that once the Commissioner accepted  
12 the invitation to speak at a Liberal Party function in  
13 April of 2014 or thereabouts, that the damage was done then  
14 and there and that nothing changed thereafter. It doesn't  
15 matter, once it's accepted, if it is accepted, that the  
16 acceptance of the invitation to speak at the Liberal Party  
17 function creates in the mind of the relevant lay observer  
18 that there is an association between the Commissioner and  
19 the Liberal Party. It doesn't matter when that association  
20 is acted out in public. Invitation ^ .

21

22 If, for example, the commission anywhere gave the  
23 speech at the Liberal Party function a week after  
24 presenting the report in this Commission and if that was  
25 the first occasion when the public were aware that the  
26 Commissioner had accepted to present that speech 18 months  
27 or more earlier, it would be open to the same sort of  
28 objection which is being made today. The vice is in the  
29 Commissioner being associated with a political party in  
30 circumstances where the Commissioner has been asked and  
31 appointed to carry out an inquiry which has a very  
32 substantial political aspect to it.

33

34 In a sense, the discussion about whether in early 2015  
35 the Commissioner remembered about the date on which the  
36 talk was to be given or remembered that there had been a  
37 proviso that it wouldn't be given until the commission was  
38 concluded is not central to the inquiry. What is central  
39 is whether there is evidence which shows that the  
40 Commissioner has associated with the Liberal Party and then  
41 the Commissioner has been charged to carry out a  
42 Royal Commission which has a very substantial political  
43 aspect to it.

44

45 On top of that, even in the email of 13 August, the  
46 Commissioner doesn't say that he will no longer give the  
47 that you can to the Liberal Party. All that is said is

1 that it will have to be deferred until after the Commission  
2 is completed and so we make the point, again, that it  
3 doesn't matter whether it is a fundraiser, it doesn't  
4 matter what date it's given on, once the Commissioner has  
5 been seen to associate with the Liberal Party, that taints  
6 the work that the Commissioner does in relation to this  
7 Commission.

8

9 With regard to the submissions that Mr Agius made  
10 about the emails that were produced yesterday at the  
11 request of Slater & Gordon, we submit that the matters  
12 which Mr Agius raised need to be carefully assessed against  
13 the statements that were made by the Full Court in *Gays*  
14 *Ford*. In relation to the matter of necessity, we rely also  
15 on the passage which Mr Agius cited from the Full Court in  
16 *Gays Ford*. We also direct Commissioner's attention to a  
17 part of Mr Stoljar's written submission which appears on  
18 page 10 and which is a footnote, footnote 43, which refers  
19 to the High Court's judgment in *Laws*. In *Laws* and the  
20 Australian broadcasting tribunal Mr Stoljar has referred to  
21 a passage in the judgment of the Chief Justice and Brennan  
22 J and a passage in the judgment of Deane J. There is a  
23 further passage to which we would direct Commissioner's  
24 attention which is at page 102 in the joint judgment of  
25 justices Gaudron and McHugh and this is in the final  
26 paragraph of the judgment and in that paragraph their  
27 Honours say:

28

29 Our conclusion that no reasonable bystander  
30 would reasonably fear that the members of  
31 the tribunal would bring unfair or  
32 prejudiced mines to the inquiry makes it  
33 necessary for us to determine whether the  
34 doctrine of necessity applies to the case  
35 of a person who is reasonably suspected of  
36 prejudging an issue which a he has ruled on  
37 decision by him or her.

38

39 I interpolate, Commissioner, that the other judges  
40 took the view they didn't really need to conclusively deal  
41 with this matter because the matter fell on the primary  
42 argument. Their Honours go on:

43

44 Whatever the precise scope of the doctrine  
45 of necessity...(reads)...it seems contrary  
46 to all principles of fairness that on the  
47 ground of necessity...(reads)...who is

1 already prejudged the an issue. Likewise  
2 there seems to be much to be said for the  
3 view in the absence of a contrary statutory  
4 intention the ground of necessity should  
5 not require a person to submit to a  
6 decision made or to be made by a person who  
7 is reasonably believed to have pre-judged  
8 the issue.

9  
10 That comment has direct applicability in the present  
11 circumstances.

12  
13 The other matter that perhaps ought be borne in mind  
14 when dealing with this rule of necessity is that in most  
15 circumstances it has arisen where the parties to the  
16 litigation have rights that they wish to vindicate one way  
17 or the other and they have an entitlement to have those  
18 rights determined. As I said earlier, nobody has any  
19 flights in proceeding to have anything determined on a  
20 personal level. It is an inquiry and if it comes to an  
21 end, it comes to an end. If it is to be replace bid  
22 another inquiry that may occur, but there is no-one who can  
23 complain that they have a right which they are asking this  
24 Commission as of right to determine. That must bear upon  
25 the judgment that the Commission makes in relation to the  
26 application or otherwise of the rule of necessity.

27  
28 Commissioner, they are the only additional submissions  
29 that I seek to make. Thank you.

30  
31 THE COMMISSIONER: Thank you, Mr bore stein? Mr Cheshire

32  
33 MR CHESHIRE: Thank you, I join in the application but  
34 I don't wish to say anything further.

35  
36 THE COMMISSIONER: Mr Agius?

37  
38 MR AGIUS: There is one matter that has been brought to my  
39 attention by my learned friend Ms Mac that you on which  
40 I feel in fairness to you Mr Commissioner I should address.  
41 Ms McNaughton ^ . It is a correction based upon some facts  
42 that Ms McNaughton has told me which I accept from her. It  
43 deals with the material that was produced yesterday.

44  
45 THE COMMISSIONER: If you wish to proceed, by all means do  
46 so.

47

1MR AGIUS: Mr Commissioner, I am informed that the reason  
2why the email which one sees on page 21, dated 12 August  
32015 at 11.12am does not disclose the attachment line and  
4the information after the word "attachment" that we see in  
5the email that was disclosed yesterday, was because as  
6presented in this folder at tab 10, this email or this  
7version of the email is part of a chain and Ms McNaughton  
8tells me that the way in which the system apparently works  
9is that it drops off any attachments when an email forms  
10part of a chain. That is not anything that was explained  
11to us yesterday when for the first time we received a copy  
12of the email with the attachment line present and, indeed,  
13with the attachments that now form part of ACTU MFI-6.

14

15 That additional information, if we accept it for the  
16sake of argument, does not, however, impact upon our  
17submission which was in essence that on 12 August 2015 at  
1811.12am, the email which was received contained an  
19attachment line and attachments which attachments can now  
20be found in MFI-6.

21

22 It doesn't in any way detract from our submission that  
23that information was available to the commissioner on 12  
24August at 11.12am and that its availability to the  
25Commissioner was not disclosed either in the email of  
26Adrian Kerr, of ^ at 3.11pm which is at page 29 and  
27following of MFI-2 and was not disclosed at tab 10 of  
28MFI-2, page 21, and was not disclosed until specific  
29inquiry was made yesterday and it does not detract from our  
30submission that there has been no explanation, much less a  
31full explanation, as to why it was that the attachment line  
32did not come to attention prior to the email which was sent  
33out at 9.23am the following morning. Thank you.

34

35THE COMMISSIONER: Thank you.

36

37MR NEWLINDS: May I with your leave address two matters?

38

39THE COMMISSIONER: You are replying to your allies. By  
40all means address them knew the first one is this, the  
41first one I'm not replying. On the question of relief can  
42I simply withdraw what I said before and rest on what we  
43say in paragraphs 115 and 116 ^ .

44

45MR NEWLINDS: ^ the second matter is important. I want  
46to make it clear that I do not adopt any submission to the  
47effect that any documents have been doctored or that there

1has been any and that there could be on the state of the  
2information any basis for making such a submission. I just  
3want to make that entirely clear, but I do want to say one  
4thing about the document and I know Monday wasn't the most  
5comfortable day or either you and I in a court but --

6

7THE COMMISSIONER: It is not a court.

8

9MR NEWLINDS: In a room that likes like a courtroom, you  
10did try and force me on on Monday in circumstances where  
11you emphatically total me that I had all the documents. It  
12now turns out I didn't (told me ^). That is the first  
13point. The hypothetical observer would be most perturbed  
14by that. Now, it doesn't matter if there's anything in the  
15new document or not. It doesn't matter at all. I haven't  
16had time to consider that document, and this is the next  
17point, the Commission at no time has given us this new  
18document, but we were never provided with, if this was  
19litigation, the supplementary discovery.

20

21 There is no explanation for how that would be and the  
22hypothetical observer would be horrified. That's all  
23I want to say, that really, part of the problem with  
24forcing cases on when people say they're not ready is this  
25sort of thing happens all the time, but boy, you've got to  
26be confident when you tell someone that they've got all the  
27documents and you were wrong when you told me that and  
28there's no explanation for how that could have happened.  
29That is my submission.

30

31THE COMMISSIONER: I will adjourn for a short time to  
32consider the future progress in relation to these  
33applications.

34

35SHORT ADJOURNMENT.

36

37THE COMMISSIONER: I have reached a view as to what should  
38happen. Mr Stoljar. Do you have anything to say?

39

40MR STOLJAR: Yes, Commissioner. Can I just make the  
41following observations: at 11.40am yesterday the  
42solicitors for the CFMEU were given at their request an  
43electronic copy of all emails the subject of Mr Agius's  
44address this morning. I tender that electronic copy.

45

46THE COMMISSIONER: That will be ACTU MFI-8. ^ ACTU  
47MFI-8.

1

2MR STOLJAR: That electronic copy should have been  
3produced to the solicitors for the ACTU and the AWU. By  
4oversight of Commission staff it was not, that was an  
5error. However, while not excusing the error, firstly, it  
6is clear from the face of the email that the invitation was  
7enclosed or attached and secondly, copies of the email and  
8the invitation were in evidence on Monday, all that was  
9missing was the stand alone version of the email. The  
10electronic native format of the email at tab 11 of  
11membership 2 is identical to the hard copy version produced  
12by the Commission on Monday, 17 August. This is obvious on  
13a cursory examination of the electronic record. There is  
14no basis whatsoever for the serious allegation that the  
15version of tab 11 produced by Commission was altered or  
16doctored in any way. That is all I wish to say,  
17Commissioner.

18

19MR NEWLINDS: I need to make a submission.

20

21THE COMMISSIONER: By all means Mr Knew land. There's no  
22need to get excited.

23

24MR NEWLINDS: I know, I'm so sorry. What I didn't know  
25until that document - what I have never understood until  
26this document was explained to me and the reason for that  
27is I never saw it until it was tendered this morning you  
28got the invitation twice. That is what the evidence shows,  
29I think. Now the reason I say I think is the way this has  
30unfolded, but I make that submission.

31

32THE COMMISSIONER: Thank you.

33

34MR NEWLINDS: It is very important.

35

36THE COMMISSIONER: Yes. Yes, I've noted what you say.  
37Mr Agius?

38

39MR AGIUS: Mr Commissioner, two things arising from what  
40my learned friend has said - I did not make the submission  
41that the copy was doctored or altered. I said that a  
42fairminded observer might form that conclusion, which is a  
43different matter. The documents that were in evidence  
44prior to the receipt by us of the hard copy of the email  
45yesterday did not disclose that that email had an  
46attachment to it. They did not disclose the word  
47"attachment" or the words that follow the word

1 "attachment" in the email, in the forms in which it

2 appeared in ACTU MFI-2.

3

4 We did not know until yesterday that that email in its

5 native form, when it would have been received at 11.12am on

6 12 August contained the attachments, nor do we have the

7 attachments, nor were those facts revealed in ACTU MFI-2.

8

9 Thank you. I have not suggested that you,

10 Mr Commissioner, have altered that email. What I have

11 suggested is that given that the emails that were in MFI-2

12 were said to be the record of email exchanges, that

13 representation was not accurate. MFI-2 cannot be a

14 complete record of the emails because it did not include

15 the email in its native form which we received for the

16 first time yesterday, nor did we receive any explanation as

17 to why it differed in the very critical respect in which it

18 does from the emails in MFI-2. In our respectful

19 submission, the fairminded observer would be entitled to

20 draw such conclusions as were available from that which

21 includes that for some reason there was or there may have

22 been some deliberation in that process.

23

24 THE COMMISSIONER: What I'm going to do is to commence

25 work on a consideration of this interesting and in some

26 respects complex matter. I hope to complete that by

27 Tuesday. If that date changes those affects, indeed every

28 one, will be informed of that fact. The hearing now

29 adjourns. AT 1.10PM THE COMMISSION ADJOURNED ACCORDINGLY