

**ROYAL COMMISSION  
INTO  
TRADE UNION GOVERNANCE AND CORRUPTION**

**APPLICATION RE APPREHENDED BIAS**

**Application**

1. The CFMEU and the individuals named in the Schedule to this application apply to the Royal Commissioner to take immediate steps to resign the following commissions:
  - a. the appointment as a Commission of inquiry pursuant to the Letters Patent dated 13 March 2014 as amended by further Letters Patent on 30 October 2014 establishing A Royal Commission into Trade Union Governance and Corruption; and
  - b. each of the appointments contained in the following instruments issued in each of the States of the Commonwealth:
    - i. Letters Patent dated 24 March 2014, as amended on 18 December 2014, establishing a Royal Commission into Trade Union Governance and Corruption in the state of Queensland;
    - ii. Letters Patent dated On 9 April 2014, as amended on 14 January 2015 establishing a Royal Commission into Trade Union Governance and Corruption in the state of New South Wales;
    - iii. Letters Patent dated 4 June 2015, reconstituting a Royal Commission into Trade Union Governance and Corruption in the state of Victoria;
    - iv. Order dated 13 May 2014 and amended order dated 31 December 2015 establishing a Commission of Inquiry into Trade Union Governance and Corruption in the state of Tasmania, and formally appointed the Commissioner the Honourable John Dyson Heydon AC QC to conduct the Inquiry.
    - v. Letters Patent dated 22 May 2014, as amended on 30 October 2014, establishing a Royal Commission into Trade Union Governance and Corruption in the state of South Australia.
    - vi. Commission dated 8 July 2014, amended on 30 October 2014, establishing a Royal Commission into Trade Union Governance and Corruption in the state of Western Australia.

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2. The application is made on the ground that the appointments should be resigned because a question has arisen as to the independence or impartiality of the Commissioner. The facts establish that the test for apprehended bias has been satisfied.

## Principles

3. The principles applying to the test for apprehended bias are well established.<sup>1</sup> In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-355, the relevant principles were stated in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in the following terms (at 344-355):

"6. Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), **a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.** That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

7. The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of **possibility (real and not remote), not probability.** Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.

8. The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. **Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.** The bare assertion that a judge (or juror) has an "interest" in

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<sup>1</sup> *Livesey v NSW Bar Association* [1983] HCA 17; (1983) 151 CLR 288 at 293-294; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at 344-355; 348 and *The Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 at 548-549.

litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

(emphasis added)

4. In *Ibester v Knox City Council* (2005) 220 CLR 592 at paragraphs 21 and 22 Kiefel, Bell, Keane and Nettle JJ, with whom Gageler J agreed said:

[21] The principle governing cases of possible bias was said in *Ebner* to require two steps to be taken in its application. The first requires the identification of what it is said might lead a decision-maker to decide a case other than on its legal and factual merits. Where it is said that a decision-maker has an "interest" in litigation, the nature of that interest must be spelled out. The second requires the articulation of the logical connection between that interest and the feared deviation from the course of deciding the case on its merits. As Hayne J observed in *Jia Legeng*, essentially the fear that is expressed in an assertion of apprehended bias, whatever its source, is of a deviation from the true course of decision-making.

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

(emphasis added).

5. In *Ceccattini v ICM 2000 Pty Ltd* [2000] NSWCA 357 the NSW Court of Appeal applied the principles in the context of a referee required to inquire and report on the valuation of property under the Supreme Court Rules. The judgment of Heydon JA, with which the rest of the Court agreed, included the following:

*50 The submission that "the breaches were of a fundamental nature and did not merely consist of the wrongful admission of evidence" must be evaluated in the light of the following matters. The test is whether there is a "reasonable" apprehension of bias not a "fanciful or fantastic apprehension"; and the apprehension which is examined is that of a "fair-minded", i.e. "reasonable" observer: Gascar v Ellicott [1997] 1 VR 332 at 342; Dovade Pty Ltd v Westpac Banking Group [1999] NSWCA 113; (1999) 46 NSWLR 168 at 188. Further, it is "the court's view of the public's view, not the court's own view, which is determinative": Webb v R [1994] HCA 30; (1994) 181 CLR 41 at 52 per Mason CJ and McHugh J. In assessing whether a fair-minded member of the public would have the relevant apprehension, knowledge of all the material objective facts is to be imputed to that person: Webb v R [1994] HCA 30; (1994) 181 CLR 41 at 67. (emphasis added)*

6. The principles have been applied to Royal Commissions by the Federal

Court in *Ferguson v Cole* [2002] FCA 1411; (2002) 121 FCR 402; the Supreme Court of Victoria in *Firman v Lasry* [2000] VSC 204; the Tasmanian Supreme Court in *R v Carter; Ex Parte Gray* (1991) Tas R 174 and to a Commission of Inquiry under the *Commissions of Inquiry Act 1950 (Qld)* by the Supreme Court of Queensland in *Carruthers v Connolly; Criminal Justice Commission v Connolly* [1998] 1 Qd R 339.

7. In *Carruthers* Thomas J observed at 344 that:

*Political controversy surrounded the commission to which the defendants were appointed both before and after its creation. In the circumstances which are about to be described, it was particularly important that those appointed to conduct this particular commission of inquiry could be seen to be impartial, and not as serving the interests of one side or the other of politics.*

8. The CFMEU and the individuals named in the Schedule submit that a proper application of the principles involves the following:
- a. Identification of the facts which indicate to a fair minded lay observer that the Royal Commissioner cannot bring an independent or impartial mind to the various legal and factual decisions required in the inquiry; and
  - b. An articulation of the logical connection between those facts and the feared deviation from the course of making those various legal and factual decisions on their merits.

### **Identification of the facts**

9. The following submissions deal with the facts. There are two areas dealt with. The first is the political nature of the Commission. The second is Commissioner's engagement with the Liberal Party during the course of the Commission. These submissions set out material in these areas in chronological order. The material demonstrated the first proposition is not comprehensive. The material going to the second issue deals with the material available.
10. On 10 February 2014 in a joint media release the Prime Minister, the Minister for Employment and the Attorney General announced that a recommendation would be made to the Governor General for the establishment of a Royal Commission to inquire into alleged financial irregularities associated with the affairs of trade unions<sup>2</sup>.
11. On the same day the Liberal Party of Australia issued a media release in the same terms. This demonstrates the interest of the Liberal Party in the inquiry into trade unions from its inception<sup>3</sup>.

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<sup>2</sup> See Tab 1 of the Exhibit Bundle lodged with this Application (Exhibit Bundle)

<sup>3</sup> Exhibit Bundle Tab 2

12. On 13 March 2014 the Royal Commission into Trade Union Governance and Corruption was established by Letters Patent issued by the Governor-General. Subsequently Letters Patent were issued by the Governor (or Administrator) of each of the States. The Letters Patent set the terms of reference for the Royal Commission and required a report by December 2014.

13. On 14 March 2014, in a joint Press Release the Minister for Employment and the Attorney General announced the Royal Commission into Trade Union Governance and Corruption. The release included the following indication of its political motivation:

The establishment of the Royal Commission delivers on the Government's pre-election commitment to establish a judicial inquiry into the Australian Workers' Union slush fund scandal.<sup>4</sup>

14. On 9 April 2014 the Royal Commission held its first public hearing.

15. On 10 April 2014 an oral approach was made by the organiser of the Garfield Barwick Address to the Commissioner to deliver the 2015 Address. He indicated to the person who made the approach that he would deliver the Barwick address in August 2015 if the Commission had completed its work<sup>5</sup>. That statement demonstrates that the Commissioner was at an early time conscious that it would be inappropriate to give the address whilst conducting the work of the Commission.

16. On 10 April 2014 at 8.32 pm the Royal Commissioner received a written request in an email from the organiser of the Garfield Barwick Address. The subject line in the email was "2015 Barwick Address". The email was an invitation from the organiser to speak at a dinner in August 2015 to deliver the Address<sup>6</sup>. The email provides information setting out;

- a. detail of the Lawyer Branches of the Liberal Party NSW Division,
- b. the nature of the Garfield Barwick Address,
- c. the previous four speakers at the dinner, two of whom were at one time Liberal Party politicians and Attorneys General of the Commonwealth, one was a former Liberal Party Prime Minister and the other was the current Liberal Party Attorney General,
- d. that the speaker for August 2014 would be a former Chief Justice of the High Court;
- e. that another former Justice of the High Court had agreed to speak in the future,
- f. the usual running sheet at the dinner, and
- g. the request that the Commissioner confirm his ability to undertake the role of speaker at the 2015 event.

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<sup>4</sup> Exhibit Bundle Tab 3

<sup>5</sup> T11, lines 29-34.

<sup>6</sup> ACTU MFI2 Tab 1

17. On 11 April 2014 at 8.01 am the Commissioner replied to the organiser confirming that he could deliver the Address<sup>7</sup>. The subject line of the email was "RE: 2015 Barwick Address".
18. In April 2014 the Royal Commission commenced private hearings, public hearings began in May 2014 and continued to October 2014 and beyond.
19. The highly political context of the Royal Commission is demonstrated by the fact that the 2014 public hearings involved consideration of events involving Ms Gillard a former ALP Prime Minister. Ms Gillard gave evidence on 9 September 2014.
20. Ms Gillard's evidence was the subject of extensive media attention and party political comment<sup>8</sup>.
21. The Royal Commission held public hearings into the CFMEU as follows:
  - a. 7 July to 9 July 2014 in Melbourne;
  - b. 15 July 2015 in Sydney;
  - c. 4 August to 7 August 2014 in Brisbane;
  - d. 1 September to 4 September 2014 in Sydney;
  - e. 16 September to 18 September 2014 in Melbourne;
  - f. 22 to 25 September 2014 in Sydney;
  - g. 2 October to 3 October 2014 in Sydney;
  - h. 17 October 2014 in Sydney;
  - i. 23 to 24 October 2014 in Sydney; and
  - j. 28 October 2014 in Sydney.
22. The September Melbourne hearings occurred shortly before the State election in November 2014. Those hearings concentrated on allegations of impropriety against senior union officials. Those allegations were widely reported in the media in Victoria and were relied upon by Liberal Party politicians during the election campaign. This is another example of the political controversy that surrounded the work being done in the Commission<sup>9</sup>.
23. On 30 October 2014 the Letters Patent were amended to extend the deadline for the report to 31 December 2015<sup>10</sup>.
24. On 15 December 2014 the Royal Commission submitted an Interim Report to the Governor-General and the Governors of the States. The Royal Commission also submitted a Confidential Report with a recommendation that it not be made public. The report goes so far as to say that the confidential volume reveals grave threats to the power and

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<sup>7</sup> ACTU MF12 Tab 2

<sup>8</sup> Exhibit Bundle Tab 4

<sup>9</sup> Exhibit Bundle Tab 5

<sup>10</sup> Interim Report Vol 1page 2 [2]

- authority of the Australian state<sup>11</sup>.
25. The Interim Report was publicly released on 19 December 2014. The press release announcing the report was issued by the Minister for Employment. In another example of the political controversy around the work of the Commission the press release lists the findings made about union officers and highlights the comments in the report about grave threats to the Australian State. The release uses the report in a political way. The media release argues that the Report supports the passing of controversial bills that were before parliament<sup>12</sup>.
  26. On 2 March 2015 at 1.16 pm the organiser of the Sir Garfield Barwick Address sent an email to the Commissioner seeking to confirm the date for the event. The subject line of the email was "RE: 2015 Barwick Address to confirm an exact date". Three dates in August 2015 were suggested. The email also suggested a topic for the Address. That email included the email chain from April 2014 which contained information about the Liberal Party being the organisers, the previous speakers at the event and the nature of the event<sup>13</sup>.
  27. On 25 March 2015 at 4.19 pm the Commissioner responded that he had no preference as between the three dates suggested in August 2015 and nominated a topic for the address<sup>14</sup>. The subject line of the email was "RE: 2015 Barwick Address".
  28. This exchange confirms the Commissioner's intention to attend the event and deliver the Address.
  29. On 25 March 2015 at 8.23 pm the organiser replied. The subject line of the email was "RE; 2015 Barwick Address". The email confirms the topic chosen by the Commissioner and makes reference to "something John Howard said once". The email goes on to say that the organiser will "try to aim for a non-parliamentary sitting week to give the politician-lawyers less excuse not to turn up"<sup>15</sup>.
  30. On 4 April 2015 at 3.52 pm the organiser sent an email to the Commissioner with the subject "RE: 2015 Barwick Address". The email informed the Commissioner that the event would be on 26 August 2015 "a non-sitting week for Federal and NSW Parliaments." It also set out the running sheet for the event and the lengths of previous presenters' addresses. It also foreshadowed that a "save the date email" would be sent out<sup>16</sup>.
  31. The Commissioner replied on 7 April 2015 at 12.12pm in an email with

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<sup>11</sup> Interim Report Vol 1 page 29 [99]

<sup>12</sup> Exhibit Bundle Tab 6

<sup>13</sup> ACTU MFI2 Tab 4

<sup>14</sup> ACTU MFI2 Tab 5

<sup>15</sup> ACTU MFI2 Tab 6

<sup>16</sup> ACTU MFI2 Tab 7

the subject "RE: 2015 Barwick Address" that he had entered the event into his diary for 26 August 2015<sup>17</sup>.

32. On 14 April 2015 the NSW Bar Association included in its daily email message to barristers "In Brief: The NSW Bar Association's news and current awareness bulletin" an item which publicised the dinner. The item was in the following terms:

*For the diary: Sir Garfield Barwick Address*

*The 6th Annual Sir Garfield Barwick Address will be delivered by the Hon Dyson Heydon AC QC at a dinner to be held at the Castlereagh Boutique Hotel, 169 Castlereagh Street, Sydney on Wednesday, 26 August 2015, at 6.00pm for 6.30pm.*

The item included a link to further information on the Bar Association website but the link has since been removed from the Bar Association website<sup>18</sup>.

33. Public Hearings in the Royal Commission recommenced on 23 April 2015.
34. On 12 June 2015 at 6.31 pm the organiser sent an email to the Commissioner with the following subject line: "FW: **Liberal Party of Australia (NSW Division)** – Lawyers Branch and Legal Policy Branch". Immediately beneath the subject line was an Attachment line which read " Barwick Invitation – August 2015(1).docx; **State Donation Compliance.docx**" (emphasis added). By the email the organiser forwarded to the Commissioner a copy of another email which contained a copy of the "formal invitation" and informed the Commissioner that he was a guest and asked if would like to bring a guest<sup>19</sup>.
35. The forwarded email was in the following terms:

**From:** Mary Field <[REDACTED]>

**Date:** Friday, 12 June 2015 5.57 PM

**Subject:** Liberal Party of Australia (NSW Division)-Lawyers' Branch and Legal Policy Branch (emphasis added)

*The Lawyers' Branch and the Legal Policy Branch invite you to **The Sixth Annual Sir Garfield Barwick Address**, in honour of the Rt. Hon. Sir Garfield Barwick AK GCMC QC, Attorney General of Australia (1958-64), Minister for External Affairs (1961-64) and longest serving Chief Justice of the High Court of Australia (1964-81).*

*The Address will be delivered by **The Hon Dyson Heydon AC QC**, Justice of the High Court of Australia (2003-2013) Justice of the Supreme Court of New South Wales Court of Appeal (2000-2003), at*

<sup>17</sup> ACTU MF12 Tab 8

<sup>18</sup> Exhibit Bundle Tab 7

<sup>19</sup> ACTU MF12 Tab 9



a dinner to be held at the Castlereagh Boutique Hotel, 169 Castlereagh Street Sydney, on **Wednesday 26 August 2015 at 6.00 pm for 6.30 pm. Cost \$80.00 incl GST.**

Your invitation is attached. Please RSVP to Robert Carey by 21 August 2015 [REDACTED]  
Tel. [REDACTED]

We look forward to seeing you on this special occasion.

Kind regards  
Gregory, Susannah, Robert and Mary.  
(Emphasis in original)

36. Two documents were attached to the email. The first page of the first document was an invitation which relevantly:
- was a coloured document with all information in large font;
  - prominently displayed the logo of the Liberal Party of NSW;
  - included an invitation from the "Lawyers Branch and the Legal Policy Branch" to attend the event; and
  - displayed a photo of the Commissioner below a photo of Sir Garfield Barwick.
37. The second page of the first document was a form headed "RSVP – 6<sup>th</sup> Annual Sir Garfield Barwick Address, Wednesday 26 August 2015" it:
- asked recipients to choose between reserving tickets for the event or making a donation;
  - asked recipients to provide their name on the electoral roll and electoral address;
  - asked recipients to make "Cheques payable to: Liberal Party of Australia (NSW Division)"
  - indicated that "All proceeds from this event will be applied to State election campaigning"
  - included a warning in the following terms:

**IMPORTANT-- Disclosure Warning**

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

[www.aec.gov.au/Parties\\_and\\_Representatives/financial\\_disclosure/guides/donors.htm](http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/donors.htm).

38. The second document attached to the email was a document headed "State Donation Compliance". The document provided information on the following topics:
- The requirement for individual donors to be on the electoral roll or non individuals to provide ACN or ABN to make a political

- donation;
- b. The donation cap of \$5,000 for political donations;
  - c. The prohibition on property developers, tobacco industry or liquor or gambling business or their close associates making political donations;
  - d. A disclosure warning when making political donations of \$1,000 or more.
39. Public hearings in the Royal Commission continued through June, July and August 2015. The political nature of the hearings continued and involved consideration of events involving Mr Shorten a Minister in the former ALP Government and the current Leader of the Opposition in the Commonwealth Parliament. Mr Shorten gave evidence on 8 July 2015.
40. Mr Shorten's evidence was the subject of extensive media attention and public political comment<sup>20</sup>.
41. On 12 August 2015 at 11.14 am the organiser of the event sent an email to the Commissioner in the following terms<sup>21</sup>:

*From: Gregory Burton  
Sent: Wednesday, 12 August 2015 11:12 AM  
To: The Hon Dyson Heydon  
Subject: final arrangements Barwick dinner address 26 August 2015*

*Dear Dyson,  
I thought I should enclose the invitation for your reference and repeat the running sheet so you have it to hand: 6 for 6.30pm sit down, entree and main course by 7.25pm, introduction and address 7.25pm to 8.30/8.40pm (length is up to you), questions to about 8.55pm while dessert is served (service may start towards end of address), close 9pm.*

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

*If you are able to email me after the event a corrected final manuscript I shall as usual arrange for placement in Bar News unless you wish to try for another place of publication; I've had no indication Bar News won't be happy to publish. There is no Party attribution on the publication.*

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

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<sup>20</sup> Exhibit Bundle Tab 8

<sup>21</sup> ACTU MF12 Tab 10

*In the absence of hearing from you we have proceeded on the basis you are happy to go ahead even though the Commission is still in hearing (not expected when originally arranged) and thought it presumptuous to do other than leave that up to you. If however a problem emerges at the last moment then people will I'm sure understand.*

*Best wishes, Gregory*

42. The email includes another email sent out 14 minutes earlier (at 10.58pm) by another of the event organisers to "Members and Friends" with the subject line "FW: Liberal Party of Australia (NSW Division) – Lawyers' Branch and Legal Policy Branch". That further email serves as a "gentle reminder" that the event was occurring on 26 August 2015 and says that it attaches a formal invitation and RSVP form. The formal invitation and RSVP form said to be attached do not appear in the material marked ACTU MFI2 Tab10. Nor is there an attachment line listing the names of the electronic files attached to the email in the email from the organiser to the Commissioner of 12 August 2015 at 11.14 am which is part of ACTU MFI2 Tab 10.
43. The email also includes the forwarded email of 12 June 2015 from Ms Field which was the original invitation email that had been forwarded to the Commissioner at that time. It had the subject line "Liberal Party of Australia (NSW Division) – Lawyers' Branch and Legal Policy Branch" and attached the invitation and disclosure documents referred to above.
44. In the email of 12 August 2015 at 11.12 am it can be seen that the organiser:
  - a. seeks to enclose the invitation for the Commissioner's reference;
  - b. repeats the running sheet for the event;
  - c. indicates that the NSW Attorney General will be attending;
  - d. seeks an edited manuscript of the address for publication;
  - e. indicates that there would be no "Party attribution" on publication of the address;
  - f. states "*As you know, although nominally under the auspices of the Liberal Party lawyers' professional branches*" and indicates, contrary to the invitation sent to prospective attendees in June, that it is not a fundraiser;
  - g. indicates there will be no media presence;
  - h. undertakes to ensure there will be no questions on the Royal Commission; and
  - i. seeks confirmation that the Commissioner is happy to proceed "*even though the Commission is still in hearing*".
45. A further email was sent by the organiser at 11.14 am asking if the Commissioner would be accompanied to the event.
46. On 13 August at 9.23 am the Commissioner's personal assistant

responded to the organiser in the following terms (omitting formalities)<sup>22</sup>

*I am replying to your email dated 12 August on Mr Heydon's behalf.*

*He will not be accompanied to the dinner.*

*He does not wish to answer any questions after his address.*

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

*(Emphasis in original)*

47. Public hearings in the Royal Commission commenced at 9.30 am on Thursday 13 August 2015.

48. A five minute adjournment was called by the Commissioner at 10.10 am when the Commissioner announced:

*I need to adjourn for an important problem that has just arisen. The hearing will resume in five minutes. (TS p417 line 9)*

49. During the morning of 13 August 2015 the Sydney Morning Herald published on its website a story revealing the Commissioner's attendance at the dinner<sup>23</sup>.

50. There was a further adjournment at around 10.50 am after the Commissioner said:

*Ms McNaughton, another problem has arisen that I must attend to. If it is convenient, we might take the morning tea adjournment now. The hearing will resume at 10 past 11. (TS p437 line 32)*

51. At 11.22 am what appears to be a media release was sent from the Royal Commission's Director, Media and Communications by email. The subject line read "Statement on Sir Garfield Barwick address". The email does not show the recipients. The email was in the following terms<sup>24</sup>:

**UNCLASSIFIED**

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

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

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<sup>22</sup> ACTU MF12 Tab 11

<sup>23</sup> Exhibit Bundle Tab 9

<sup>24</sup> ACTU MF12 Tab 13

52. There is no communication to the organiser that the Commissioner would not be giving the address. The email to the organiser at 9.23 am indicated that the Commissioner would be attending unaccompanied and suggested that he would not give the address "if there was any possibility that the event could be described as a Liberal Party event". There had been no response to that email when the release was made.
53. There was extensive media coverage about the Commissioner's involvement in the event on 13 August 2015<sup>25</sup>.
54. During the day on 13 August 2015 the State Director of the NSW Liberal Party issued a press release in the following terms:

*13 August 2015*

***Media Statement  
Tony Nutt  
State Director  
Sir Garfield Barwick Address***

*Several years ago the coordinator of the Sir Garfield Barwick Address, which is sponsored by members of the legal profession, who also happen to be Party members (via the relevant professional branch), approached the Hon. Dyson Heydon AC QC to deliver this year's memorial lecture.*

*The lecture, named in memory of a great Australian lawyer, provides the venue for a distinguished speaker to address a topic of academic interest to the legal profession.*

*Previous lecturers for instance have discussed Barwick's technique as a barrister and aspects of his judicial reasoning, as well as his wider contribution to Australian law.*

*The invitation was widely distributed within the legal profession and previous lectures have been published.*

*Earlier this morning I was advised that the Hon. Dyson Heydon would not be able to attend and deliver the Address.*

*This decision followed contact by the coordinator with the Hon. Dyson Heydon yesterday.*

*The lecture was to have taken place at a Sydney city hotel and the \$80 per head was to have covered the cost of a three course meal and associated expenses in organising the event. The usual attendance is around 80-90 people.*

*In order to meet the obligations of electoral disclosure laws the invitation included the usual information.*

*The suggestion that this memorial lecture was a significant fundraising event is ridiculous.*

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<sup>25</sup> Exhibit Bundle Tab 10

55. At 3.11 pm the Director, Media and Communications sent a further email repeating the media statement from the morning and attaching "an email exchange of 12 and 13 August 2015" between the organiser and the Commissioner.
56. The Royal Commission continued its public hearing on 14 August 2015.
57. The media coverage continued on 14 August and over the weekend of 15 and 16 August.
58. On 17 August 2015 the ACTU wrote to the Commission foreshadowing an application for documents to enable it to consider whether an application should be made that the Commissioner disqualify himself from further presiding over the Royal Commission<sup>27</sup>.
59. The Commission continued its public hearing on 17 August 2015. The hearing was interrupted at 11.30 am to allow the ACTU to be heard. The Commission released documents in response to the ACTU letter. The documents were marked ACTU MFI2. The matter was adjourned. On resumption Commissioner made a statement providing contextual background to the documents in ACTU MFI2.
60. In that statement:
  - a. The Commissioner had one or more informal discussions several years ago with the coordinator of the Sir Garfield Barwick Address concerning the possibility of delivering the address at some future time.<sup>28</sup>
  - b. On 10 April 2014 a further approach was made orally to the Commissioner in the Banco Court after he had delivered a lecture. He indicated to the person who made the approach that he would be amenable delivering the Barwick address in August 2015 if the Commission had completed its work.<sup>29</sup>
  - c. An email to the Commissioner (10 April 2014) from the chair of one of the lawyer branches of the Liberal Party confirmed the Commissioner's agreement to attend and present the Barwick address (ACTU MFI-2).<sup>30</sup>
  - d. At the time of the meeting and the email of 10 April, the Letters Patent required delivery of the final report to the Governor-

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<sup>26</sup> Exhibit Bundle Tab 11

<sup>27</sup> ACTU MFI1

<sup>28</sup> Transcript of ACTU application on 17 August 2015; T11, lines 22-25.

<sup>29</sup> T11, lines 29-34.

<sup>30</sup> T11, line 38 to T12, line 31.

General on or by 31 December 2014.<sup>31</sup>

- e. The email of 10 April 2014 did not state, and the Commissioner did not understand from it, that the Barwick Address was in any sense a fundraiser for the Liberal Party.<sup>32</sup>
- f. The Commissioner did not give any attention to the topic of the Barwick Address for the remainder of 2014.<sup>33</sup>
- g. In approximately March 2015 the Commissioner was contacted again by the coordinator of the Barwick Address, by email.<sup>34</sup> At that point the Commissioner overlooked the connection between the person or persons organising the event and the Liberal Party which had been stated in the email of 10 April 2014.<sup>35</sup>
- h. The Commissioner also overlooked the fact that his agreement (on 10 April 2014) to speak in August 2015 had been conditional on the work of the Commission being completed before that time.<sup>36</sup>
- i. The reporting date for the Commission was extended in October 2014 to 31 December 2015.<sup>37</sup>
- j. In March 2015 or shortly thereafter, the date of the Barwick address was fixed for 26 August 2015.<sup>38</sup>
- k. On 12 June 2015 the Commissioner received an email (a one page document) from the organiser of the event to which was attached a copy of the invitation (a three-page document). The Commissioner's personal assistant printed out a copy of the email and the attachments and provided them to him. The Commissioner glanced through the email but did not read the attachments.<sup>39</sup>
- l. Following 12 June 2015, the Commissioner did not give any consideration to the Barwick Address, although he did prepare some rough notes.<sup>40</sup>
- m. On Wednesday 12 August 2015 the coordinator of the Barwick Address sent the Commissioner an email. The Commissioner was engaged either in hearings or in other duties until the

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<sup>31</sup> T12, line 33-35.

<sup>32</sup> T12, line 35-38.

<sup>33</sup> T12, line 45-46.

<sup>34</sup> T12, line 46.

<sup>35</sup> T13, lines 7-9.

<sup>36</sup> T13, lines 11-13.

<sup>37</sup> T13, lines 14-15.

<sup>38</sup> T13, lines 17-19.

<sup>39</sup> T13, lines 30-37.

<sup>40</sup> T13, lines 41-44.

following morning, 13 August. On 13 August he caused his personal assistant to send an email which included the words:

*If there is any possibility that the event could be described as a Liberal Party event, he will be unable to give the address at least whilst he is in the position of Royal Commissioner.*<sup>41</sup>

- n. Shortly after the dispatch of that email it was made plain that the Commissioner would not be giving the address.<sup>42</sup>
- o. The Commissioner's understanding at all times has been that the dinner was not to be a fundraiser.<sup>43</sup>

61. An objective view of the material is that:

- a. In March 2014 the Commissioner was appointed by Letters Patent to preside over a politically charged Royal Commission. It was to inquire and report by the end of 2014.
- b. In April 2014 the Commissioner agreed to speak at the Sir Garfield Barwick Address, which was a Liberal Party Function, in 2015 and knowing that it was a Liberal Party Function recognised it was inappropriate for him to give the Address if the Royal Commission was still on foot.
- c. Hearings in the Royal Commission commenced in April 2014;
- d. The Royal Commission's hearings in 2014 included the examination of a former Prime Minister in an ALP government and attracted much public attention and political comment and controversy.
- e. In October 2014 the Royal Commission was extended by amendment to Letters Patent and required to report by the end of 2015.
- f. In April 2015 the Commissioner confirmed attendance at the Liberal Party event for August 2015.
- g. The Royal Commission's 2015 public hearings recommenced in April 2015. They included examination of the Leader of the Opposition on July 8 2015.
- h. In June 2015 the Commissioner was sent an email and was provided with a copy of the promotional material for the event. That material made it clear that the event was not just a party event but also a party political fund raising event.
- i. Whilst the Commissioner has denied reading the promotional material attached to the email, the June 2015 email itself indicated on its face that the event was a Liberal Party Function and that it was a Liberal Party Fundraiser.
- j. Respectfully, the denial by the Commissioner that he read the supporting material or that he was not aware after receipt of the June 2015 emails that the event was a Liberal Party event, or

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<sup>41</sup> T14, lines 1-15.

<sup>42</sup> T14, lines 17-18.

<sup>43</sup> T14, lines 20-21.



that he was not aware that the event was a Liberal Party Fundraiser does not sit comfortably with the content of the emails of 12 June 2015. The emails included reference to the Liberal Party in the subject lines. They included attachment lines in the header referring to "State Donation Compliance" and the invitation itself prominently displayed a Liberal Party logo. The other two pages were an RSVP which solicited political donations and an information sheet on the rules associated with political donations. An objective assessment, despite the denials, would be that the material was received and read. There is, with the greatest respect, a strong inference that the Commissioner's claimed lack of recollection and lack of knowledge is unreliable.

- k. The email of 12 August 2015 contained an email which was a "gentle reminder" and provided a further copy of the invitation and RSVP.
- l. On 13 August 2015 the Commissioner confirmed his attendance at the event albeit that he also informed the organiser that he would not be able to make the Address if there was any possibility that the event could be described as a Liberal Party event. Again with the greatest respect, this does not sit well with the earlier emails which had, since the very first email in April 2014, made it clear that it was a Liberal Party event. An objective assessment would conclude that the Commissioner was aware that the event was a Liberal Party event well before this condition was put on the giving of the Address.
- m. The media statement released by the Royal Commission at 11.22 am, shortly after news of the event broke, on 13 August 2015 did not disclose that the Commissioner had received the emails which included the invitations, RSVP and political donation information referred to above or their content. It did not refer to the fact that when first invited to give the Address the Commissioner had indicated that he would not do so if the Royal Commission was still on foot. It did not refer to the content of the email from the organiser to the Commissioner on 12 August at 11.12 am to which the Commissioner's assistant's email of 13 August 2015 at 9.23 am was a reply or that the email of 12 August 2015 at 11.12 am had indicated again that the event was a Liberal Party event and included reference to the documents from the June 2015 email which clearly stated that the event was a fundraiser.
- n. The proceedings in the Royal Commission were adjourned when news broke of the event and the Commissioner described those events as a problem.
- o. There has been extensive media reporting and political comment on the Commissioner's acceptance of the invitation to attend the Liberal Party event and its impact on the role of the Commissioner.

62. A fair minded observer might reasonably apprehend that the Commissioner:
- a. was made aware that the event was a Liberal Party event when he was first invited to give the Address and that it was not likely that he would have forgotten that fact; and/or
  - b. was aware of the conflict between speaking at a party political function and presiding over the Commission when he first responded to the invitation in April 2014 indicating that he could do so once the Commission had completed<sup>44</sup>; and/or
  - c. could not fail to recall or overlook that the event was a Liberal Party event, at least from the time of his receipt of the email from the organiser in April 2014 or from 12 June 2015 when he received the email referred to above; and/or
  - d. was willing to speak at the Liberal Party function and was prepared to allow himself to be portrayed as a supporter of the Liberal Party; and/or
  - e. did, contrary to his denials, in fact become aware that the event was a fund raising event for the Liberal Party following the receipt by him of the email of 12 June 2015 and was willing to attend and give the address.
63. These conclusions demonstrate that the Commissioner has an affinity with, and partiality in favour of, the Liberal Party. They jointly or severally support a conclusion such that a fair minded lay observer might reasonably apprehend that the Commissioner might not bring an independent mind to the tasks he is required to perform, viz. to make the findings of fact in a politically controversial inquiry.
64. The CFMEU and the individuals named in the Schedule submit that these facts clearly support and indeed require a conclusion that "[the Commissioner] *is disqualified* [because] *a fair-minded lay observer might reasonably apprehend that the* [the Commissioner] *might not bring an impartial mind to the resolution of the question* [the Commissioner] *is required to decide*"<sup>45</sup>.

Dated: 20 August 2015

John Agius SC  
16 Wardell Chambers

Anthony Slevin  
HB Higgins Chambers

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<sup>44</sup> ACTU MF12 at page 1.

<sup>45</sup> See the judgment in *Ebner*, op cit at paragraph 6 reproduced in paragraph 3 above.

## SCHEDULE

Gerard Benstead  
Sakib Bergic  
Zoran Bogunovic  
Greg Churchman  
Peter Close  
Ralph Edwards  
Darren Greenfield  
Dean Hall  
Shayne Hall  
Maurice Hill  
Garry Hamilton  
Mick Huddy  
Jason Jennings  
Rob Kera  
Johnny Lomax  
Rita Mallia  
Gregory McLaren  
Kerryn McWhinney  
Kenneth Miller  
Mark O'Brien  
Bill Oliver  
Jason O'Mara  
Michael Ravbar  
Shaun Reardon  
Mick Robinson  
John Setka  
Zachary Smith  
Doug Spinks  
Anton Sucic  
Andrew Sutherland  
Scott Vink  
Anthony Vitler  
Tommy Watson  
Kylie Wray