INDEPENDENT COMMISSION AGAINST CORRUPTION

Petroulias v Independent Commission Against Corruption

17 April 2019

Application by Nicholas Petroulias in respect of the Public Inquiry

Reasons for Decision

Structure of the Reasons

The reasons for the decision have been structured as follows:

Part A – Introduction

Part B – The application

Part C – The public inquiry

Part D – Actual and apprehended bias applications

Part E – The matters under investigation

Part F – The grounds in support of the application

Part G – Conclusion

Reasons for Decision

Part A: Introduction

1. On 14 March 2019 a written application was made by Mr Nick Petroulias ("the applicant") *"that the proceedings be discontinued on the grounds of bias and/or denial of procedural fairness"*. The arguments and contentions relied upon in support of the application are considered in Part F of these reasons. In this Part reference is made to the scope of the investigation being conducted by the Independent Commission Against Corruption ("the Commission") under the *Independent Commission Against Corruption Act 1988* (NSW) ("the ICAC Act").

2. The Commission is undertaking an investigation ("Operation Skyline") under s 20 of the ICAC Act, into a series of transactions purporting to deal with land owned by the Awabakal Local Aboriginal Land Council ("the ALALC") in the period from 2014 to 2016, and the role of a number of individuals and companies in connection with these transactions, or attempted transactions. The ALALC is an incorporated body under Part 5 of the *Aboriginal Land Rights Act* 1983 (NSW) ("the ALRA"). It is one of 120 Aboriginal land councils in New South Wales. Pursuant to the ALRA, land is vested in these land councils, who in turn are charged with the acquisition and management of land and other assets in the interests of their members and other Aboriginal persons living within the land council areas. The ALALC operates across Newcastle and the Lake Macquarie area. It owns and is the custodian of a range of assets including vacant blocks of land, undeveloped parcels of land, commercial properties and urban residential land.

3. On 27 March 2018 the Commission commenced a public inquiry authorised under s 31(6) of the ICAC Act. The scope allegations of the subject of the public inquiry announced in accordance with s 31(6) of the ICAC Act are in the following terms:

   a) Whether any public official, being a director of the Board of the Awabakal Local Aboriginal Land Council (the Land Council), acted dishonestly and/or in breach of his or her duty as a Board member in relation to a scheme involving proposals in the period of 2014-2016 for the sale and development of properties ("the Sale and Development Scheme") owned by the Land Council.

   b) Whether any director of the Board of the Land Council acted dishonestly and/or in breach of his or her duty as a Board member in agreeing to, or purporting to retain

or retaining Knightsbridge North Lawyers or anyone else to act for the Land Council in respect of the Sale and Development Scheme.

c) Whether any director of the Board of the Land Council:

i. acted dishonestly and/or in breach of his or her duty as a Board member by participating in or aiding or assisting any person in relation to the Sale and Development Scheme, including any dealings with:

• Sunshine Property Investment Group Pty Ltd

• Sunshine Warners Pty Ltd

• Solstice Property Corporation Pty Ltd

• Advantage Property Experts Syndications Pty Ltd and/or Advantage Property Syndications Ltd;

ii. received any financial or other benefits as a reward or payment for their involvement in or for assistance or services rendered in relation to the Sale and Development Scheme or any matter connected therewith.

d) Whether any person or persons:

i. encouraged or induced any director of the Board of the Land Council to dishonestly or partially exercise any of their official functions in respect of the Sale and Development Scheme and any other Land Council property; or

ii. otherwise engaged in conduct connected with corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988.

The scope and purpose of the inquiry is to gather evidence relevant to the matters being investigated for the purpose of determining the matters referred to in s. 13(2) of the ICAC Act.

4. Following its commencement on 27 March 2018, the public inquiry continued on the following dates: 28 to 29 March 2018, 8 days from 3 April to 13 April 2018, 14 to 16 May 2018, 16 July to 20 July 2018, 9 days from 6 August to 17 August 2018 and 18 September to 21 September 2018.

5. The inquiry was re-listed to resume on Monday, 19 November 2018. However by reason of matters raised concerning the applicant's health the proceedings were stood over and re-listed for directions on 8 February 2019.

6. When the public inquiry proceedings were re-listed for directions on 8 February 2019 additional dates were set down to complete the evidence. In the course of the directions

hearing I made the following observation, which is of relevance to the present application:

> *I have decided that by way of a provisional ruling, and I emphasise provisional, on Mr Petroulias's application* [to cross-examine] *so far as I can judge at the moment, that I'd be minded to permit him to cross-examine the following witnesses, but on conditions. They would be Mr Andrew Kavanagh, Mr Richard Green, Ms Debbie Dates and Ms Bakis.*
>
> *I emphasise however that provisional ruling is subject to conditions that I'll now identify.*
>
> *Firstly that the particular* ***factual matters he wishes to cross-examine any one of those witnesses is identified in the way I've indicated, because without him*** *doing so it is impossible for me to finally conclude by way of ruling that he should be allowed to cross-examine any one of those witnesses I've mentioned. Mr Petroulias has raised in his application the question of the need to provide the Commission with his affirmative case, if he has an affirmative case. I emphasise again that standard conditions of the Commission, standard direction 13 makes provision whereby in applications to cross-examine witnesses the person making the application should, amongst other things, state whether a contrary affirmative case is to be made, so it will be necessary for any factual matters relied upon which he seeks to cross-examine are judged in light of what is the affirmative case he wishes to present to the Commission.*
>
> *Apart from identifying those factual matters, the second condition is that it will be necessary for Mr Petroulias to first give his account in respect in particular to the transactions the subject of this inquiry that have been referred to in evidence, namely the Sunshine, Solstice, the Advantage transactions, before I can grant the application to cross-examine those witnesses I've mentioned. Accordingly I will hear evidence from Mr Petroulias in the week commencing 18 March next in order to obtain and provide Mr Petroulias the opportunity of giving his version of events in relation to those transactions and any other relevant matters. Following the conclusion of his evidence, which will be adduced by Counsel Assisting, Mr Lonergan – who appears for Mr Green – will be entitled to follow with any cross-examination. I note that Mr Lonergan has made application for cross-examination and provided the basis for doing so.*

7. The public inquiry was stood over to recommence on 18 March 2019 and thereafter to proceed over that and the following weeks.

8. No issue was raised or foreshadowed by the applicant on 8 February 2019 (or had been previously raised) concerning the conduct of the proceedings in terms of bias or denial

of procedural fairness and no application had been made for the Commission to correct or remedy any perceived procedural disadvantage.

Part B: The application

9. The grounds in support of the application traverse a number of disparate matters concerning the conduct of the Commission and that of Counsel Assisting. Each of the matters will be addressed in Part F of these reasons. In various paragraphs of the application the applicant has raised matters in support of contentions of actual bias and apprehended bias. The basis for the contention of actual bias was pre-judgement bias as opposed to, for example, personal interest bias. It will therefore be necessary to give consideration to the relevant test for determining actual bias on the basis of pre-judgement. In Minister for *Immigration and Multi-cultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 Gleeson CJ and Gummow J, with whom Hayne J agreed, said at [72]:

> *"The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented."*

10. In relation to apprehended bias the test was stated by the High Court in *Livesey v New South Wales Bar Association* (1983) 157 CLR 288 at 293 as being whether:

> *". . . the parties or the public might entertain a reasonable apprehension that* [the decision-maker] *might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."*

11. In *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 100 Gaudron and McHugh JJ said:

> *"A reasonable bystander does not entertain a reasonable fear that a decision-maker will bring an unfair or prejudiced mind to an inquiry merely because he has formed a conclusion about an issue involving the inquiry. When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her."* (Citations omitted).

12. In the **Introduction** (p 2) to the application for discontinuance, the applicant addresses 11 'arguments' in the following terms:

a) *The process of the investigation has commenced by the basis of a fixed view that shuts out the opportunity to receive both sides of the evidence or be capable of evaluating them objectively;*

b) *The paradigm adopted as the premise of the investigation is based on the version of events adopted by Zong that is inconsistent with previous versions of events sworn by him and which failed in the Supreme Court both on the basis of fact and law. Yet the premise of the investigation has not accommodating these errors;*

c) *That CA assisting, as the effective exclusive channel of evidence, has failed the most elemental threshold evaluation of the law and fact to formulate a competent allegation that has impact to damage me publicly;*

d) *That CA assisting, contrary to his duties of a prosecutor, has selectively tendered documents and omit to distort the evidence which can be the subject of submission and fact finding;*

e) *That CA assisting and CC have taken a differential treatment to classes of witnesses and thereby distorting the evidence that can be produced. This includes failing to test the evidence elicited by him from witnesses that is contrary to the evidence before him;*

f) *That the CC shuts any effective testing of the evidence by myself or Ms Nolan;*

g) *That key witnesses are excluded from giving evidence which is favourable or collaborative of my interests;*

h) *The CC and CA fails in its duties to me as an unrepresented litigant to assist me presenting my case and testing the evidence of others;*

i) *The CC and CA have perverted the natural order and flow of XXN that unfairly prejudices the evidence that can be elicited from the key remaining un-XXNed witnesses*

j) *The CC and CA have failed to provide procedural fairness in circumstances of my mental health impairment period exacerbated by the sensitive impact of public humiliation;*

k) *That CC continuation of my examination and without adjustments it suggested to and accepted by its psychiatrist such as private hearings or written question and answer interrogatories, is foreseeably causing me permanent damage, and,*

l) *Whether individually or together represent bias and/or a denial of procedural fairness and in excess of the jurisdiction of the Commission.*

13. The legal principles by which the grounds should be considered and determined are set out in Part D. They, in particular, are relevant to a consideration of the procedures

adopted and followed in the public inquiry for the purposes of the investigation in Operation Skyline.

Part C: The public inquiry

14. The investigation in Operation Skyline had, of course, progressed through a number of stages before the decision to hold the public inquiry was made. That is manifest from the considerable material constituting the brief which was placed upon the Commission's website before the public inquiry commenced.

15. There are, with respect, a number of apparent misconceptions held by the applicant as to the nature of public inquiry proceedings under the ICAC Act. In his application the applicant has proceeded upon the basis that the public inquiry has similarities to judicial or quasi-judicial proceedings. In his grounds to his application there are references to the following matters:

- *'Allegations'* said to have been made against him: paragraphs 2.4, 2.5, 3.3, 3.38, and that the Commission has *a "case to present in the public inquiry" – "The Key plank of the CA's case is that the Gow's Agreement . . .";*
- That Counsel Assisting has *'the duties of a prosecutor'*: paragraphs 3.1, 3.21, 3.38;
- That the Commission has a positive duty to assist him as *'an unrepresented litigant'*: paragraph 3.38, and in particular that *"as 'an inquisition' one would expect that every assistance would be given to helping me frame questions that may not meet formalistic standards that have been applied to me . . .":* paragraph 3.38.

16. These references suggest an understanding in the applicant that the public inquiry is to be conducted, at least in part, upon principles and procedures that apply to the conduct of judicial proceedings, in particular, criminal and/or civil proceedings.

17. The position, of course, is that a public inquiry, being investigative in nature, is quite unlike curial proceedings. A public inquiry of the ICAC does not proceed by way of formulated allegations or issues defined by pleadings. Commission proceedings are essentially exploratory and to an extent expository by nature. They are also necessarily flexible and do not proceed by rigid rules. The Commission in a public inquiry may examine and test information held and evidence that may have been obtained in compulsory examinations or evidence that has been given in the course of the public inquiry.

18. Additionally, counsel assisting, of course, is not a prosecutor. Counsel assisting does not, as the applicant contends, have the duties of a prosecutor. As I discussed in paragraph 106 below, counsel assisting is subject to the *Legal Profession Uniform Conduct (Barrister) Rules 2015*, which expressly provide that the prosecutor's duties prescribed therein do not apply to council assisting an investigative tribunal.

19. Further, proceedings by way of a public inquiry held under and in accordance with the provisions of the ICAC Act are not required to conform with any prescribed or accepted practice or convention in terms of the taking of evidence. In particular there exists no rule, practice or convention as to the order in which persons giving evidence must be called.

20. The application claims a failure by the Commission to follow the 'natural order' in which persons are called to give evidence. It is well-accepted that the Commission in a public inquiry is permitted, indeed entitled, to determine the order of witnesses as it considers will best serve the interests of the investigation in question. Strategic and tactical considerations will often determine how evidence is obtained and utilised. In *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 19 FCR 494 at 514, Wilcox J observed:

> *In the case of broad-ranging inquiries it is often necessary to divide an investigation into discrete areas or segments. In relation to each an appropriate investigation plan may be developed on the basis of research, intelligence and other operational input. Strategic considerations influence the approach to be taken with respect to investigations, including the use of private and public hearings and whether evidence is called in a structured way with written statements or whether witnesses are to be examined for the first time in the witness box. Strategic or tactical considerations will often determine how evidence is obtained and utilised. In* Bond v Australian Broadcasting Tribunal (No 2) *(1988) 19 FCR 494 at 514, Wilcox J stated:*
>
> > *Subject to any statutory provision or agreement to the contrary, it is for the person conducting the inquiry to determine both the time when that witness will be heard and the order in which the various counsel may question the witness. Either of these matters may affect the value of a witness' evidence. The order in which witnesses are called may influence the assistance obtainable from other witnesses. The effect of the conduct of inquiry is not to be hamstrung by a claim of property made by an associate of the witness.*

See also ICAC Standard Direction 8.

21. Flexibility rather than rigidity in procedure accordingly is an inherent part of the investigative process.

22. The procedures adopted by Royal Commissions and other investigative commissions will, of course, vary according to the nature of the inquiry and the subject matter of an investigation. It has been observed that:

> *Procedural fairness does not impose rigid rules upon investigative tribunals with regard to the acceptance of oral or written submissions, rules of evidence and examination and cross-examination. The courts consistently recognise that such tribunals proceed in a manner very different from courts and should be permitted a flexibility to follow the evidence where it leads.*
>
> *This entails that counsel assisting the tribunal determines the order of witnesses . . .*[1]

23. In broad terms, cross-examination may be regulated and controlled by:

- Procedural directions and/or guidelines formulated and prescribed or otherwise announced by the commission of inquiry. These may be subject to general or specific variations;

- Rulings of the Commissioner on applications to cross-examine and on particular questions put by a cross-examiner to a witness.

24. Insofar as the applicant complains or objects to the order or sequence in which his evidence is proposed to be taken there is, with respect, no proper foundation for the complaint or objection and no case law authority or other basis has been identified to support such a proposition. As noted above, relevant case law is very much against the applicant's contentions in this respect.

Standard Directions

25. The Commission has prescribed for its public inquiries standard directions. Such directions are supported in terms of validity, by the Commission's powers provided for in s 19 of the ICAC Act as well as by its implied statutory powers. Procedural guidelines for the conduct of public hearings by investigative commissions have not infrequently

[1] *Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals,* Professor M Allars SC. (1996) 24 Federal Law Review 235, 279.

been adopted as a means for ensuring the effective discharge of inquiry functions. See, for example, Royal Commission into the Construction Industry discussed in *Kingham v Cole* [2002] FCA 45. As stated in that case procedural guidelines may, in particular, be utilised to prescribe conditions of leave to appear and for the procedural control of cross-examination of witnesses. They are directed to the efficient performance of the obligations of a Commissioner: *Kingham v Cole*, supra, at [12]. The practice note in that case set out at [12] was said to operate:

a) As a means of ascertaining whether or not an applicant to cross-examine has a sufficient interest in challenging the evidence of a particular witness;

b) As a means for alerting the Commissioner and all others concerned as to the true extent of factual dispute and thus promote the efficient resolution of those disputes.

26. Section 34 of the ICAC Act makes it clear that there is no unrestricted right in a person granted leave to appear in a public inquiry to cross-examine witnesses. The terms of s 34(1) of the ICAC Act confer a discretion on a Commissioner though it is accepted, not one that is unfettered. In that respect, s 34 provides:

34 Examination and cross-examination

(1) An Australian legal practitioner appointed by the Commission to assist it, or a person or a person's Australian legal practitioner authorised to appear at a compulsory examination or public inquiry, may, with the leave of the Commission, examine or cross-examine any witness on any matter that the Commission considers relevant.

(2) Any witness so examined or cross-examined has the same protection and is subject to the same liabilities as if examined by a Commissioner or an Assistant Commissioner.

27. There are two matters arising in respect of the provisions of s 34(1). First, examination and cross-examination of a witness is not at large. The leave of the Commission to cross-examine is required. Second, examination/cross-examination of a witness is restricted to "*. . . any matter that the Commission considers relevant*". In a public inquiry it is for the presiding Commissioner to determine what matters are relevant to it. In some circumstances relevancy will be readily determined. However, in other matters the position may be less clear and only become clearer as the inquiry proceeds. A Commissioner will no doubt in determining issues of relevancy have regard to the scope and purpose of the

public inquiry and to the extent to which a person's interest may be affected by the evidence given by a witness, but again limited to matters relevant to a particular investigation.

Part D: Actual and apprehended bias applications

28. An allegation of bias may be an allegation of actual or of apprehended bias or both. Actual bias as noted above is commonly alleged in the form of pre-judgement bias as opposed to personal interest bias. That is the position in the present application. In accordance with long-standing convention, an application for *disqualification* (as distinct from the present application which is for *'discontinuance'* of the proceedings) on the basis of bias is first made to the tribunal (or in this case the Commission) and the application is to be considered and determined in accordance with accepted principle by the Tribunal or Commission as the case may be as discussed below.

Application of the rule against bias to investigative commissions

29. Before considering the specific grounds for the application (dealt with in Part F), it is necessary to identify the relevant principles by which the issues arising on the application are to be determined.

General Principles

30. Specific principles, as to the content of the rules of procedural fairness as they apply to the ICAC have been established by the relevant case law (see below). The general principles are reflected in the following observations.

31. An investigative body is required to exercise its functions, in particular those conferred upon it by a statute, in an efficient and efficacious way. The content of rules of procedural fairness as applied to it, accordingly, will often need to be modified for that purpose. In relation to the ICAC it has been held that the procedures that it adopts should be structured, consistently with the relevant provisions of the ICAC Act, so as to enable it to discharge its investigative function with the greatest efficiency: *McCloy v Latham* [2015] NSWSC 1879 at [259]. It has also been observed:

> *. . . One important weapon that it (the ICAC) has is the ability to examine witnesses without them being given some opportunity, based on knowledge of the matters to be covered or the documents to be deployed,*

to concoct a story.[2]

32. As also observed in that case the requirements of natural justice, within the confines of the ICAC Act, are met sufficiently if a witness is given adequate opportunity to put forward his or her story, to cross-examine (where appropriate) witnesses who implicate him or her in corrupt conduct, and to put submissions on the whole of the evidence and that ". . . *Nothing more is required*".[3]

33. In *McCloy v Latham* [2015] NSWSC 1879 a submission was made on behalf of a person affected by ICAC proceedings, that, by reason of the conduct of the Commissioner and Counsel Assisting during public hearings a fair-minded observer might reasonably infer the Commissioner had formed certain opinions and that the Commission's and Counsel Assisting's obligation of fairness towards witnesses and persons of interest failed to exhibit the qualities or standards akin to those that apply in judicial proceedings, despite the gravity of potential consequences of the Commission's exercise of power and in spite of the applicability of the Barristers Rules as then in force.

34. The aggrieved person in those proceedings sought relief in the nature of prohibition against the Commission. He alleged that there were reasonable grounds for apprehending the Commissioner might not bring an open mind to the resolution of any findings made concerning him. The Court (McDougall J) observed:

> *Turning to the inferences set out at [5], it is correct to say that the obligations of fairness are not identical with those observed (or which ought to be observed) "in judicial processes". However, the disparity between the two is a necessary consequence of the legislative scheme. The ICAC Act prescribes certain measures of procedural fairness (see, for example, ss 30(4) and 31(5), (6)). It is apparent that the legislature made an informed judgment that some greater standard of procedural fairness (or more detailed right to know what material the Commission had amassed) might be inconsistent with the proper and effective conduct of the Commission's activities.*

[2] Grove J in *Aristodemou v Temby*, 14 December 1989, (unreported at BC 8901329 at 11); and see also Hunt CJ at CL in *Donaldson v Wood, 12 September 1995,* (unreported at BC 9507330 at 12-13, 16-17).
[3] *McCloy v Latham* at [260].

Specific Principles

26. The specific principles to which reference has been made above include the following.

27. It is at least a custom and, aside from exceptional circumstances, possibly also a rule of law, that in the first instance an application for disqualification based upon apprehended bias should be made to the person whom the applicant alleges is biased or is apparently biased. If that is not done, a court in which an application for an order or a declaration may be sought could reject the application as premature.

28. In determining allegations of bias, actual or apprehended, a court will have due regard to the nature of the commission of inquiry and its subject matter: see *Re The Finance Sector Union; Ex parte Illaton Pty Ltd* (1992) 66 ALJR 583, per Deane, Toohey and Gaudron JJ. The fundamental nature of a commission of inquiry will influence the role a commissioner is to play and the way in which he or she discharges the commission's functions.

29. The proceedings of a commission of inquiry concerned with the investigation of factual matters associated with suspected corrupt or other illegal conduct are very different from judicial proceedings in which the parties to the litigation determine the evidence to be called. Accordingly, decision-makers who are performing statutory functions may be entitled to be involved in an investigation and to make final decisions where they are authorised by statute to act in both capacities: see *R v Howard* [1902] 2 KB 363 at 377 per Collins MR (CA).

30. In determining whether or not a claim for apprehended bias is made out, two questions posed by the High Court in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 must be considered. Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner* said at [6]-[8]:

> *[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 …, 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 that should be recognised. Deciding whether a public 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 the 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 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 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.*** (Emphasis added).

31. In *Isbester v Knock City Council* [2015] HCA 20; (2015) 255 CLR 135, in the joint reasons of Kiefel, Bell, Keane and Nettle JJ, it was stated at [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.*

32. In *Isbester v Knock City Council*, Gageler J agreed with the plurality. His Honour observed (at [59]) that in its application the apprehension of bias principle involves three steps:

> *Whether or not it might be useful to state the test in that alternative form, the test for the appearance of disqualifying bias in an administrative context is to be understood to mirror the test for apprehended bias in the curial context in two important respects. The first is that it is an "objective test of possibility, as distinct from probability". The second is that its application necessarily involves three analytical steps. Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as the result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.*

33. An allegation of bias against a commissioner conducting a commission of inquiry may be an allegation of actual or of apprehended bias or both. In *Minister for Immigration and Multicultural Affairs v Jia Lebeng* (2001) 205 CLR 507, Gleeson CJ and Gummow J, with whom Hayne J agreed, said at 532: "the state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or argument may be presented." The test with respect to apprehended bias stated by the High Court in *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293–294 was expressed as being whether "the parties or the public might entertain a reasonable apprehension that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question involved in it".

34. In *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 100, Gaudron and McHugh JJ stated:

> *A reasonable bystander does not entertain a reasonable fear that a decision-maker will bring an unfair or unprejudiced mind to an inquiry merely because he has formed a conclusion about an issue involved in the inquiry … When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her.*

See also *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1992) 173 CLR 78 at 85.

35. In some cases, the effect of a statement that could indicate pre-judgment can be removed by a later statement which withdraws or qualifies it. As has been observed, some statements, or some behaviour, may produce an ineradicable apprehension of pre-judgment: *Johnson v Johnson* (2000) 201 CLR 488 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at 494. However, that said the Court added that "*the hypothetical observer is no more entitled to make snap judgments than the person under observation*".

36. In determining a question of apprehended bias, it is appropriate for the Court called upon to review the proceedings to have regard to any reasons provided by the commissioner in refusing to disqualify himself or herself both on the issue of actual bias and on the issue of apprehended bias but that they are considered as part of the total circumstances of the case: *Ferguson v Cole* (2002) 121 FCR 402 at 418 per Branson J. The challenged findings of a commissioner, on close examination, may or may not establish that he or she has formed conclusions that are incapable of being altered whatever material may be presented. It is, of course, necessary to consider whether or any challenged findings in fact directly involve the person who seeks relief: *Ferguson v Cole* at 422.

37. With respect to apprehended bias in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 Mason J (at 352) observed:

> *. . . It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But that does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way.*

38. In *Webb v The Queen* (1994) 181 CLR 41 at 68, Deane J stated that the test for apprehended bias "is an objective one and the standard to be observed in its application is that of a hypothetical, fair-minded and informed lay observer. That being so, it is convenient to frame the test itself in terms of reasonable apprehension on the part of that particular inhabitant of the common law". In *Firman v Lasry QC* (unreported, Victorian Supreme Court, 5022 of 2000, 9 June 2000) Ashley J (at p 7) pointed out that only one inquiry is

necessary and that should be framed by reference to the hypothetical observer and that an inquiry from the perspective of a party could yield no different result.

39. The principles in relation to "apprehended bias" are well established and are of singular importance in the administration of justice. They also apply to the proceedings of an inquisitorial body. However, in their application it is necessary to take into account the nature of inquisitorial proceedings including the statutory framework under which a commission of inquiry is established and in accordance with which its activities are regulated: *McCloy v Latham* [2015] NSWSC 1879 at [20].

40. In relation to the test for apprehended bias, discussed above, a Royal Commissioner is permitted to take a more interventionist role in conducting hearings: *R v Carter; Ex parte Gray* (1991) 14 Tas R 247 (FC) at 260-263, [29]-[34]; *Carruthers v Connolly* [1998] 1 QR 339 at 3458; *Keating v Morris* [2005] QSC 243 at [46].

41. In *Isbester v Knox City Council*, supra, the High Court, supra, observed:

> *How the principle respecting apprehension of bias is applied may be said generally to be dependent upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer of assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision.*

In *Keating v Morris*, supra, the Court considered an issue of apprehended bias concerning an inquiry conducted under the *Commissions of Inquiry Act 1950* (Qld) (referred to as the "Bundaberg Hospital Inquiry"). The issue was one of claimed apprehended bias. In the course of his judgment in that case, Moynihan J stated (at [45] – [57]):

> *The application of the rule to the proceedings of an inquiry takes into account the nature of the inquiry, and the circumstances in which the hearings take place and which give rise to the consideration.*
>
> *Recognition of the Inquiry's inquisitorial and reporting function and its powers allowed the Commissioner to take a more active, interventionary and robust role in ascertaining the facts and a less constrained role in reaching*

> *conclusions than applies in litigation. It does not however, dilute or diminish the expectation that an impartial and unprejudiced mind will be applied to the resolution of any question.*
>
> *Apprehended bias is a serious allegation to be made in respect of an inquirer and the considerations canvassed by the High Court in* Briginshaw v Briginshaw *are relevant. The application of that principle means that the gravity of the issue necessarily is reflected in the weight of the proof required to establish the facts founding the conclusion. See also* R v Lusink*;* Ex parte Shaw *where Gibbs CJ spoke of the need that apprehended bias be "firmly established"*.

42. In the course of the hearings in *Keating v Morris* there were a number of matters that supported the contention of apprehended bias. These included interventions by the Royal Commissioner during evidence given by witnesses which did not seek information or discussion but were made as aggressive assertions, contemptuous or dismissive of certain classes of bureaucrats and medical administrators. They went beyond exploratory or tentative statements of issues with a view to testing their correctness or to giving witnesses an opportunity to respond to a provisional view. In this respect the Court referred to examples of similar conduct: *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568. In that case, the trial judge made critical statements as to the defendant's medical witnesses based on their evidence in previous cases and of the insurer who had retained them anticipating that they would give evidence favourable to its case.

43. Moynihan J referred in his judgment to a number of matters that arose during the course of the conduct of the inquiry that were said to have heightened the risk of a perception of bias and to "the climate" in which the inquiry was being held at [157]. The Court was ultimately satisfied that the applicants had made out a case of ostensible bias in respect of matters arising under the Inquiry's terms of reference at [158].

44. In *Duncan v Ipp* (2013) 304 ALR 359, the New South Wales Court of Appeal considered the application of the "apprehension of bias' test in proceedings involving the ICAC (NSW). Bathurst CJ (with whom Barrett JA agreed) said at [146]:

> *The manner in which the test is to be applied was set out by the High Court in* Ebner *in the passage which I have cited above; see also* Michael Wilson & Partners. *Translated into the present case**, this involves consideration of whether the matters raised by the applicant have a logical connection with the feared deviation by the Commissioner from the course of determining the issues raised in the inquiry on the merits, by virtue of***

> ***pre-judgment. Pre-judgment in the present case means having a closed mind, in the sense of not being open to persuasion by any additional evidence or submissions from the parties****, that the grant of the licence the subject of the inquiry was procured by corruption involving the then Minister for Mines and that the applicant and his associates were beneficiaries of that conduct (the corrupt conduct):* McGovern v Ku-ring-gai Council*;* Minister for Immigration and Multicultural Affairs v Jia Legeng *[2001] HCA 17; (2001) 205 CLR 507 at [71]-[72]*. (Emphasis added).

Her Honour, Ward JA observed (at [221] – [222]):

> *It is not disputed that what was required was that the applicant firmly establish that a fair-minded lay observer, having regard to the conduct identified by the applicant, might reasonably apprehend that the Commissioner might have a closed mind or might not be open to persuasion on the relevant issue or issues for determination by the Commissioner.*
>
> *While the "double might" test for apprehended bias does not require that prejudgment (or a closed mind) be the inevitable conclusion that a fair-minded lay observer might reasonably reach, it* ***does require that there be a logical or rational connection between the matter that is said might reasonably give rise to an apprehension of bias in the mind of such an observer and the matter in respect of which it is apprehended that the decision-maker might be biased.*** (Emphasis added).

45. In *Isbester*, supra, it was also observed (at [20], per Kiefel, Bell, Keane and Nettle JJ):

> *The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.*

46. A judge should not disqualify himself or herself on the ground of bias or reasonable apprehension of bias unless "substantial grounds" are established: *Bienstein v Bienstein* (2003) 195 ALR 225 at 233 [36], per McHugh, Kirby and Callinan JJ. It has been observed:

> *. . . that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties.*

(Per Dixon CJ, Williams, Webb and Fullagar JJ in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Limited* (1953) 88 CLR 100 at 116.)

47. In relation to the role of a fair-minded lay observer, the following propositions have been enunciated:

- The "observer" is understood to be a lay person, not a lawyer: *McCloy v Latham* at [50]. However, the observer is taken to be aware of the way in which a commission undertakes its inquiries and of the general terms of the various powers that it has to obtain evidence before conducting a public hearing: *McCloy v Latham* at [50];

- The fair-minded observer does not make snap judgments: *Johnson v Johnson* (2000) 201 CLR 488 at 494, [14];

- He or she is taken to be reasonable: *Johnson v Johnson* at [12];

- He or she knows commonplace things and is neither complacent nor unduly sensitive or suspicious: *Johnson v Johnson* at [53];

- Knowledge of all the circumstances of the case must be attributed to the fair-minded observer: *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 355, 359, 368; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87-95;

- The fair-minded observer is an informed observer. This entails that the observer has taken the trouble to inform himself or herself on all matters that are relevant and considers such matters in the relevant context;

- The *Ebner* test, in relation to an investigative commission, would be applied on the assumption that the hypothetical fair-minded observer would have a general appreciation of the powers and functions of the Commissioner of the investigative commission. In this respect the statute under which the relevant decision-maker carries out his or her functions must be part of the assessment process from the outset and the content of what the test requires will vary from one statutory context to another: *McGovern v Ku-ring-gai Council* [2008] NSWCA 209; (2008) 72 NSWLR 504 at [6]-[7] per Spigelman CJ; *Duncan v Ipp*, supra, at [54] per Bathurst CJ;

- In the application of the test for apprehended bias what is required is that a fair-minded observer might perceive a *logical connection between the matters raised and the possibility of the decision-maker not bringing an impartial mind to the issue*:

Duncan v Ipp, supra, at [147] per Bathurst CJ.

48. The question as to whether the decision-maker's mind reasonably thought to be closed on the issues to be decided, it has been held, is ultimately one to be dealt with on the balance of probabilities: *McCloy v Latham*, supra, at [46].

49. The requirement for "strong grounds", it has been held, has particular significance where a plaintiff relies upon apprehension of bias to forestall the completion of any investigation by the making of a report: *McCloy v Latham*, supra, at [47]. In that case, reference was made to the observations of Keane CJ, Lander and Forster JJ in *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (2011) 279 ALR 468 at [55] as follows:

> *It will usually be difficult for a party to make a sufficient case to forestall the making of a decision on the ground of apprehended bias. That is because of the expectation that the decision-maker will decide fairly on the basis of the evidence.* ***The difficulty which confronts a litigant who seeks to invoke a reasonable apprehension of bias in order to forestall the making of a decision by a decision-maker appointed by Parliament to make that decision is illustrated and explained by the decision of the High Court in*** **R v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd . . .** ***where the point was made that the existence of a preconceived opinion on the matters in issue is not inconsistent with the making of an unbiased decision on the evidence.*** (Emphasis added).

50. In *McCloy v Latham*, supra, one of the grounds relied upon to support the contention of a reasonable apprehension of bias was that the ICAC was pursuing a predetermined case theory that particular persons had engaged in wrongdoing and that publicity demonstrating this or making findings of this nature against certain persons had been a priority in the investigation.

51. As to that contention the Supreme Court of NSW (McDougall J, at [16]) observed that it would be extraordinary for a body such as the ICAC having powerful and important investigative and reporting functions to launch an investigation, and as part of that inquiry conduct lengthy inquiries, without having at least a "case theory" that the subject matter of the investigation involved corrupt conduct within the Commission's jurisdiction and that the persons to be examined at the public inquiry might reasonably be suspected of having been engaged in that corrupt conduct.

52. In *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214, it was argued that the commissioner conducting the investigation behaved in a manner which was abrupt, intemperate and sarcastic and involved so many interruptions during submissions, as to leave a reasonable observer with the apprehension that he had preconceived views that were biased against the plaintiff. The Supreme Court of New South Wales (Wood J, as his Honour then was) in rejecting the argument observed:

- There was nothing wrong with the helpful indication of a point of view by a judicial officer or a commissioner, to whom it is axiomatic that the view will remain provisional until the proceedings are concluded.

- When the test of the reasonable observer is taken into account, he or she should be credited with the knowledge that judicial officers and legal practitioners have of the legitimacy of exposing provisional views for debate. Particularly is that so in a long-running and complicated inquiry where the notion of "judicial silence" is likely to be counter-productive.

53. A commissioner, unlike a judge, may both call witnesses and examine them. He may do so, as appropriate, with necessary vigour. However, he or she must not conduct himself/herself in a manner which suggests a closed mind. Wood J added:

> *There is an ill-defined line beyond which the expression of views and robust response to argument can threaten the appearance of impartiality and absence of prejudice. Judgment as to whether it has been crossed, on a perusal of the transcript or even a listening of the tape recordings of the proceedings, is difficult because of the problems in reflecting the atmosphere and feeling of the hearing. Nevertheless it will be appropriate to intervene where the line has been crossed.*

54. In *Carruthers v Connolly* [1998] 1 Qd R 339, in relation to a contention that apprehension of bias arose from the way in which a Royal Commissioner conducted an inquiry, Thomas J observed (at [19]):

> *It must be remembered that the cut and thrust of forensic work may produce tensions and that denigratory comments to counsel, sarcasm and hard words from time to time may not be amiss. It is also to be remembered that although there are the trappings of court procedure, the investigation is essentially inquisitorial and the Commissioners are to be expected to play a far more active role in ascertaining the facts than occurs in a court. A wide range of expression and conduct must be permitted for a Commissioner, and one*

should not interpret robust conduct as a badge of bias.

55. Similarly in *R v Carter; Ex parte Gray* [1991] Tas R 174, the Full Court of the Supreme Court of Tasmania stated:

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

56. The following matters were taken into account in that case in evaluating the charge of apprehended bias:

- The full transcript of evidence, the Court observing that a close study of the transcript, was necessary as particular excerpts were not to be weighed in isolation from the commission's conduct of the whole of the inquiry.

- The inquisitorial role of the investigation. That role entitled the commissioner to play a far more active role in ascertaining the facts than when a similar exercise occurs in a court.

- The dynamics of the interplay in cross-examination. The Court emphasised that these are not always easy to examine after the event.

- The material objective facts to be taken into account by the notional fair-minded reasonable lay observer. These included but could go well beyond an examination of the transcript of the hearings

- All of the circumstances of the case. Courts on many occasions have emphasised the importance of taking into account the duty to inquire along with the discrete factual matters in assessing whether disqualifying bias or apprehension of bias has been established.

Part E: The matters under investigation

57. In order to place the applicant's arguments and contentions in context, in this Part of the reasons reference is made to some, but not all, matters and issues that fall within the scope and purpose of the public inquiry as identified in the opening address of senior counsel assisting the Commission at the commencement of the public inquiry.

58. The public inquiry is investigating whether land belonging to the ALALC, which was the registered proprietor of a number of properties in the Lake Macquarie area, was targeted for the promotion of land sale transaction schemes to investors and developers. In particular, the public inquiry is investigating whether such schemes were disclosed to the board of the ALALC, and whether the board authorised any of the transactions purported to have been entered into as part of those schemes. Further, the public inquiry is investigating whether any persons who promoted and/or assisted in promoting such schemes (including Mr Petroulias, one or more board members of the ALALC, and the lawyer who purported to act in the interests of the ALALC and on behalf of other parties to one or more of the transactions), engaged in conduct that was improper or unlawful in any respect, and if so whether any such conduct constituted corrupt conduct within the meaning of the ICAC Act.

59. The ALALC board members being investigated by the Commission are Ms Debbie Dates and Mr Richard Green, who, at all material times, were Chairperson and Deputy Chairperson of the ALALC board respectively. Each of Ms Dates and Mr Green had public official functions or acted in a public official capacity, and was therefore a 'public official' as that term is defined by s 3 of the ICAC Act. Additionally, pursuant to s 248 of the ALRA, the ALALC is taken to be a 'public authority' for the purposes of the ICAC Act. As board members, Ms Dates and Mr Green occupied official positions and were assigned continuing duties (see ss 176 and 177 of the ALRA) and functions (see ss 52 and 62 of the ALRA) of a public nature. In this way also they were each a 'public official' within the meaning of s 3 of the ICAC Act.

60. The Commission is investigating a number of matters related to the series of transactions, or attempted transactions, involving ALALC land. They include the question as to the entitlement of the ALALC to monies paid by a company, Sunshine Property Investment Group Pty Ltd ("Sunshine") to the ALALC via the trust account of Knightsbridge North

Lawyers ("KNL") in respect of a transaction referred to as the "Sunshine transaction". The sole Director and shareholder of that company was Mr Tony Zong. The ALALC did not receive any of those monies. There is evidence of the monies having been disbursed but not for the benefit or at the direction of the ALALC. A question arises to who received, directly or indirectly, the benefit of the monies paid into the trust account of KNL from what has been referred to as "the scheme", and whether any individual who benefitted did so, though having no entitlement to any monies paid into the trust account of KNL.

61. The land transactions purported to burden or affect the ALALC's interests in the properties to which the transactions related and to create rights in outsiders, the developers, in respect of such properties. Matters that have so far arisen for examination in the investigation include whether the board of the ALALC was informed of or knew and appreciated the effect and significance of the transactions upon ALALC property; what legal advice was or was not provided to it; and how the transactions were entered into if there had been no disclosure to the board as to material matters concerning them. The purported retainer of the solicitor to act on behalf of the ALALC and the circumstances in which that came about has been the subject of evidence so far adduced in this public inquiry.

Overview of the transactions

62. The transactions that are the focus of the inquiry had a number of common features. One common feature was that each transaction involved Mr Petroulias. In relation to two purported transactions, Mr Petroulias is alleged to have acquired rights to purchase a number of parcels of land owned by the ALALC; in subsequent purported transactions, Mr Petroulias attempted to onsell those rights. Mr Petroulias was later involved in a series of agreements purportedly entered into by the ALALC through a corporate vehicle that he had established and in which he had a 25 per cent shareholding that conferred an option in favour of that company to acquire a substantial portion of the landholdings of the ALALC. The ultimate purchase price was expressed to be $30 million.

63. Another common feature is that Mr Petroulias has used a number of different aliases during the course of these transactions. These included Nick or Nicholas Piers, Nick or Nicholas Pearson and Nick or Nicholas Peterson.

64. At this point it is noted that the opening address of counsel assisting referred to a particular transaction that sought to deal with land owned by the ALALC. It was identified as a Heads of Agreement dated 15 December 2014, between Gows Heat Pty Ltd ("Gows Heat") and the ALALC ("the First Gows Agreement"). This purported agreement involved Gows Heat purchasing five properties from the ALALC. It was signed by Mr Green, then deputy chairperson of the Land Council, and by Jason Latervere, who was said to be a director of Gows Heat. At the time of the execution of the agreement this could not be so because Mr Latervere was deceased so the signature was obviously not his. As it turned out, the person who executed the document, apparently pursuant to a power of attorney, was Mr Petroulias. Not only could Mr Latervere not have signed the agreement but he also could not have been a director. At the time he was apparently appointed to the role in 2014 he had already passed away.

65. By the First Gows Agreement, Gows Heat, and it was claimed in effect Mr Petroulias, secured a right to purchase five lots of land owned by the ALALC with an estimated value of around $12.6 million. There is evidence that Gows Heat was a $2 company controlled by Mr Petroulias who at that time had recently been made a bankrupt. Neither Gows Heat nor Mr Petroulias paid any money to the ALALC to secure this right. Counsel assisting submitted that Gows Heat and Mr Petroulias secured a significant windfall. He "sold" this right around ten months later, and as later described received around $1.1 million as a result.

66. The second transaction that sought to deal with the ALALC land involved three parties, Sunshine or a corporate vehicle created by them to pursue this arrangement, Gows Heat and the ALALC. Negotiations commenced in around May 2015 and by 30 June 2015 an agreement was reached between these parties that involved the buying out of the purported right created under the First Gows Agreement and the substitution of Sunshine in the place of Gows Heat.

67. To give effect to this transaction a number of agreements were prepared. One of which was the Surrender Agreement and Release, which is undated, and the Sunshine Heads of Agreement dated 2 October 2015. For the ALALC each agreement, it was noted, was executed by Mr Green and Ms Dates.

68. By clause 1A of the Surrender Agreement and Release, Sunshine agreed to pay Gows Heat $1.6 million to in effect buy out what was described in the agreement as the right of Gows Heat to acquire property at valuation from the ALALC arising, *inter alia*, from the First Gows Agreement. Under the Sunshine Heads of Agreement Sunshine acquired the right previously held by Gows Heat to purchase the five lots owned by the ALALC for a purchase price of $6.3 million plus completed houses on land of not less than $6.3 million in value.

69. Further, by clause 2.5 of that agreement, the sum of $1,102,000 was to be paid into the trust account of KNL by 7 October 2015 and the sum of $48,000 previously held by KNL was to be disbursed towards the payment of Gows Heat pursuant to its Surrender Agreement and Release.

70. The third transaction that sought to deal with land was an attempted transaction with Solstice Property Corporation Ltd. The attempts to effect this arrangement commenced in around November 2015 with Mr Green and Ms Dates executing an agreement purportedly on behalf of the ALLAC on 19 November 2015. Counsel assisting noted that that was at the time there was a concluded agreement with Sunshine and that this might be seen have been an attempt to replicate the Sunshine transaction with another party. Counsel assisting submitted that "*Mr Petroulias, with the assistance of Mr Green and others, sought to sell the interest allegedly created by the Gows Heat heads of agreement to Solstice without disclosing to Solstice that it had already been sold to Sunshine.*"

71. The negotiations relating to this attempted transaction continued into 2016 but by May 2016 no agreement had been reached and the proposed deal was not pursued.

72. In June and July 2016 the ALALC purported to enter into a number of transactions with Advantage Property Experts Syndications Pty Ltd and/or Advantage Property Syndications Ltd and a number of other entities.

73. Mr Green was a member of the ALALC board and its Deputy Chairperson during the period of these transactions. He ceased being a board member on 13 October 2016, when the Minister appointed an administrator to the ALALC. Mr Green, counsel assisting observed, was also a common denominator to each transaction. He signed, on behalf of the ALALC, each of the agreements being investigated by the Commission. The Commission is investigating, at least in relation to the first three transactions mentioned

above, whether he had authority of the board to execute these agreements and bind the ALALC; whether he disclosed the existence of these transactions to the board; and if he did, whether any disclosure was full and complete.

74. Ms Dates was a member of the ALALC board and its Chairperson in the relevant period, aside from the period 2 November to 28 December 2015, during which she was suspended from this role. She ceased being the chairperson on 27 July 2016 and a board member on 13 October 2016, when the Minister appointed an administrator to the ALALC. With the exception of the First Gows Agreement, Ms Dates signed on behalf of the ALALC each of the agreements being investigated by the Commission. As with Mr Green, the investigation is examining whether she had the authority of the board to execute these agreements and bind the ALALC; whether she disclosed the existence of these transactions to the board; and if she did, whether any disclosure was full and complete.

75. Ms Bakis is a solicitor and practised as a sole practitioner under the name Knightsbridge North Lawyers, or KNL. The role of Ms Bakis and that firm features throughout each transaction. She undertook, it seems, much of the legal drafting that was required in connection with the four transactions. How that firm came to be apparently retained by the ALALC is a matter that is being investigated by the Commission. At the time that Ms Bakis and KNL were apparently retained by the ALALC in late 2014, Ms Bakis was a sole practitioner based in Sydney who had never before acted for a land council and who had no relevant experience in undertaking the legal work in connection with a land transaction or land transactions of the kind that she was apparently tasked to undertake for the ALALC.

76. Her connection to the ALALC came via Mr Petroulias, who introduced her to Mr Green. It should be pointed out that Mr Petroulias and Ms Bakis were at that time in a domestic relationship and had been so for nearly 20 years, notwithstanding that it might be described as an “on again, off again” relationship.

77. The First Gows Agreement concerned five properties in Warners Bay that were owned by the ALALC. These properties were also the subject of the Sunshine transaction. For the proposed Solstice deal the arrangements were different. In the initial proposal the land that was sought to be the subject of this transaction was described as Lot 7393 Deposited Plan 1164604 and Lot 101 Deposited Plan 1180001 (which, in turn, had been

the subject of a second purported agreement between Gows Heat and the ALALC, also dated 15 December 2014). In a later version of the proposed arrangement with Solstice, described as a call option agreement between Solstice and the ALALC dated 4 April 2016, the subject land was far more extensive and the proposed purchase price on the exercise of the options similarly more substantial. The nominated purchase price was identified in clause 2.1 of the option agreement as $30 million.

78. The ALALC land involved in the Advantage transaction (via a call option deed dated 7 June 2016) was more extensive still, despite the purchase price remaining fixed at $30 million. In the period between 2014 and 2016 the ALALC was the registered proprietor of 38 properties in the Newcastle and Lake Macquarie area. Through the Advantage transaction an option was to be granted over 32 of those 38 properties.

79. Senior counsel assisting made the following comments in his opening about the ALALC and its functions:

> *Under the Act the Land Council must protect the interests of Aboriginal persons in its area in relation to the management, use, control and disposal of its land. That the interests of Aboriginal persons in the Land Council's area are made paramount is ensured by various protective measures in the Act relating to land dealings by land councils. For example, before approving a land dealing, a Local Aboriginal Land Council must consider the impact of the proposed land dealing on the cultural and heritage significance of the land to Aboriginal persons. Further, the New South Wales Aboriginal Land Council may refuse to approve a proposed land dealing if it considers that the dealing is or is likely to be contrary to the interests of the members of the Land Council or other Aboriginal persons within the area of that council.*
>
> …
>
> *Being an incorporated body, section 61 of the Act provides that the Land Council has a board consisting of at least five but not more than 10 board members. The functions of the board are prescribed by section 62(1) of the Act, and they include relevantly to direct and control the affairs of the council and to review the performance of the council in the exercise of its functions and the achievement of its objectives.*
>
> *A board of a Local Aboriginal Land Council may, subject to any directions of that council, exercise any of the functions of the council on behalf of the council, other than*

those functions that are expressly required to be exercised by resolution of the voting members of the council, for example, relevantly, approval of land dealings, as well as any function delegated to the board under section 52E of the Act.

80. Finally, senior counsel assisting outlined in his opening address the need to examine particular records. These included handwritten minutes of an ALALC board meeting held on 31 October 2014. Behind the formal minutes are handwritten minutes taken during the meeting. On 31 October 2014 the minute taker was John Hancock, an ALALC board member. These minutes, senior counsel assisting observed, are at odds with the formal minutes and it seems the words "including Gows" have been added to it. On the face of them, and when understood in the context of the typed minutes and formal resolution of the board meeting on the day, a question arises as to whether these minutes have been falsely altered. Senior counsel assisting foreshadowed that he expected there to be a body of evidence that the name Gows Heat was never mentioned during that meeting and that its participants, possibly with the exception of Mr Green, had never heard of that entity.

81. The circumstances of and the events surrounding the meeting on 31 October 2014 are the subject of evidence including whether the minutes have been falsely altered and if so the purpose for its creation, who might be motivated to falsely alter the minutes and who actually did alter them. Senior counsel assisting noted that the examination of the meeting on 31 October 2014 will also involve investigating whether this resolution was falsely created and if so the purpose for its creation, who might be motivated to falsely create the resolution and who actually did create it.

Part F: The grounds in support of the application

The factual bases for the allegations made in the application

Insofar the grounds of the application contend or rely upon alleged conduct of the Commission and/or of Counsel Assisting during the hearing process it is necessary to examine whether the facts as to such alleged conduct have been accurately stated in the grounds upon which the application is based. In the event that the grounds relied upon are afflicted with error then such error must be identified and its impact assessed.

The Allegations

82. Mr Petroulias' application is wide-ranging, and makes serious and detailed allegations of procedural unfairness and bias. Before dealing with those allegations, it is proposed to identify what, in substance, they are:

a) First, ***Conduct by the Commission shutting out evidence*** – the allegation is Commission has a 'fixed' view of the matters being investigated and that, consistent with this alleged view, it has *"shut out"* Mr Petroulias from adducing evidence that is either 'exculpatory' or capable of providing an alternate explanation to the matters of fact said to inform the 'fixed' view the Commission is said to have (see [1], [4.5]-[4.6], [5.3], [5.5], [5.7], [5.10] – [5.13], and [7.1]). In furtherance of this complaint, it is said that the Commission has sought to preclude any cross-examination that might yield evidence contrary to its 'fixed' view of the investigation (see [3.21] – [3.34]).

b) Secondly, ***Selective tendering of documents*** – the allegation is that senior counsel assisting has, contrary to the duties said to be upon him, *"selectively tendered documents"* and, because this has occurred, distorted the matters upon which submissions can be put (see [3], [3.21], [3.22A], [4.6], [4.7], [7.1], [7.2]). It is suggested by Mr Petroulias that this conduct has resulted in a *"flawed system of inquiry"* (see section 3 of the application).

c) Thirdly, ***Excluding key witnesses*** – the allegation is that key witnesses *"are excluded from giving evidence which is favourable"* to Mr Petroulias' interests (see [6.1], [7]).

d) Fourthly, ***Duties of counsel assisting to assist*** - theallegation is *that* the Commission and counsel assisting owed Mr Petroulias duties as a self-represented litigant to assist him in *"presenting his case"* (see [3.38]-[3.39], [8]).

e) Fifthly, ***Order or Sequence of Witnesses*** – the allegation is that there has been a perversion of the usual order in which witnesses are called, and cross-examined, and that this is evidence of bias, and has occasioned unfairness to Mr Petroulias (see [8.1]-[8.3], [9], [10.1]-[10.7]). Mr Petroulias suggests that the Commission has taken this approach *"in bad faith and to exploit my psychiatric vulnerability"* (see [8.3]).

f) Sixthly, ***Failure to pursue relevant evidence*** – the allegation is that the Commission is biased because it has not, during evidence, followed lines of inquiry said to be relevant (see [3.35]), which has extended to an allegation that there has been *"[s]hutting [out] key evidence against false agreement"* and other matters resulting in a 'closing off' of relevant lines of inquiry (see [5.4]-[5.5], [5.10], [5.11] – 5.13]); that there has been 'differential treatment of witnesses' – a fact asserted to exist, and supportive of a conclusion of bias (see section 3, and [5.2]-[5.3]).

g) Seventhly, ***Hurdles that Hinder Cross-examination*** – the allegation is that 'prohibitive hurdles' have been placed before Mr Petroulias, which he has been required to overcome before he is to be permitted to cross examine witnesses and the Commission has sought to conceal documents – those documents being material produced by Gows Heat (see [7.1]-[7.4]).

h) Eighthly, ***Mental Health of applicant – Commission's knowledge and lack of knowledge*** - the allegation is that procedural fairness has been denied to Mr Petroulias "*by reason of [his] mental health impairment"* (see [11]).

i) Finally, ***Applicant misled as to the investigation*** - the allegation is that Mr Petroulias has been misled as to what it was that the Commission was investigating, and that the 'true' allegation being investigated has been concealed from him (see section 2 of the application, and [2.1]-[2.5], [3.39]).

Ground 1: the Commission has a 'fixed view' and 'exculpatory' evidence has been excluded

83. Mr Petroulias contends that the Commission commenced the investigation on the basis of a 'fixed view' and has not permitted 'exculpatory' evidence to be adduced that may be contrary to or in conflict with this view of the evidence. In support of these allegations, Mr Petroulias points to the directions given to him on 8 February 2019 and relatedly, the Commission's purported treatment of two boxes of documents voluntarily produced to the Commission by Gows Heat ("the Gows Material") under cover of letter dated 1 February 2018 from Mr Gregory Vaughan (in his capacity as director of Gows Heat) (MFI 29), my treatment of certain witnesses appearing before the Commission (including himself and Ms Bakis) and the approach taken by me to cross-examination conducted by Mr Petroulias.

The directions made on 8 February 2019: Procedure for taking evidence – information available on procedures of the Commission

84. One of the objects of the directions hearing held on 8 February 2019 was to address a written application that had been made by Mr Petroulias (received by the Commission on 6 November 2018), to cross-examine a number of witnesses (T3198.4-6; T319913-16). It was apparent from that application that Mr Petroulias considered there to be matters of fact relevant to this investigation that would require further evidence to be elicited from certain witnesses (who would need to be recalled for that purpose) as well as evidence to be elicited from a further person who had not been called by the Commission to give evidence. Accordingly, I as the presiding Commissioner indicated, for the benefit of Mr Petroulias and others present within the hearing room, the procedure by which an affected person can seek to have exculpatory evidence placed before the Commission (T3199.17-3200.6; T3202.21-28). This procedure is set out in the Standard Directions for Public Inquiries dated February 2018 and the Public Inquiry Procedural Guidelines, copies of which have been placed on the bar table each day of the public inquiry. Both the guidelines and standard directions are also published on the Commission's website. Senior counsel assisting also made reference, during the directions hearing, to the proper procedure to be adopted by affected persons and invited Mr Petroulias to make contact with the Commission staff to give notice of evidence that he considers should be adduced by the Commission (T3198.37-43; T3209.17-32).

85. Mr Petroulias refers to the assistance I and senior counsel assisting sought to provide to him at the directions hearing variously as "surreal", "a pantomime" and "a performance" acted out by myself and senior counsel assisting (A1, at [4.6] and [7.1]). By implication, Mr Petroulias asserts that I had pre-judged the matters referred to in Mr Petroulias' cross-examination application and further, that senior counsel assisting had already determined not to give consideration to eliciting further evidence from the witnesses referred to in that application. In reality, what I was seeking to do was to draw Mr Petroulias' attention to the procedure to which all affected persons appearing before the Commission are required to adhere. This was not the first time that efforts have been made by the Commission to alert Mr Petroulias' attention to this procedure.[4]

[4] On 6 March 2018 when Mr Petroulias was served with a summons to attend and give evidence at the public inquiry, he was provided with a copy of the Standard Directions and Procedural Guidelines. On 27 March 2018 I drew Mr Petroulias' attention to the standard directions, reminding him that his leave to appear was subject to the Standard Directions, and that he was required to comply with them (T83.6-24). On 6 August 2018 I indicated to Mr Petroulias that if he wished to cross-examine Mr Green, he would be required to comply with

86. The applicant has failed to demonstrate that the directions given were "surreal" etc as asserted by him and it cannot be accepted that these efforts are illustrative of the Commission bringing a "fixed view" to the investigation, or of the Commission having determined to exclude exculpatory evidence. To the contrary, the directions given (as with the previous assistance provided to Mr Petroulias by the Commission staff) evidence treatment that is in accordance with the treatment afforded to all interested parties and demonstrate a preparedness to consider any evidence that Mr Petroulias contends is exculpatory. As is evident from the transcript of these directions hearings, to the possibility that Mr Petroulias wished to have further evidence called by the Commission was apparent Mr Petroulias was being reminded of - - the means available to him to bringing that to the attention of counsel assisting or Commission staff so that due consideration could be given to the calling of that evidence (T3202.21 - 45):

> THE COMMISSIONER: Mr Petroulias, I've been at pains also this morning to emphasise that if there's any material, any evidence at all which has not yet been called which you think should be called, the correct procedure is to draw the attention to Commissioner officers, in particular Mr Broad, the solicitor who's been handling this matter, and Counsel Assisting, indeed myself are bound to look at those matters to determine whether or not the evidence is sufficient as it is or whether it's not, and if it's not, then it should be supplemented.
>
> MR PETROULIAS: Simply, simply - - -
>
> THE COMMISSIONER: I understand your concern that all relevant material be placed in public session before the Commission, and I've emphasised what I've already said, that I expect that Commission officers and Counsel Assisting will examine anything that you draw to their attention which you say should be called, as the subject of evidence called in this public inquiry. Any such matter will not be overlooked. The processes of this Commission, different from a court, ensure that it's through Counsel Assisting and myself that a determination is made as to whether evidence should, in fairness and in the interest of sound decision making, be called - - -
>
> MR PETROULIAS: Okay, well let's give it - - -

the Standard Directions, and in particular, [13]: T1993.40-43. On 17 September 2018 I once again drew Mr Petroulias' attention to the Standard Directions, and the onus they place on Mr Petroulias to identify why he should be permitted to cross-examine any particular witness: T2835.44-46.

THE COMMISSIONER: - - - and not shut out.

87. In any event, I it was made clear on 8 February 2019 that on a provisional basis leave was being granted to Mr Petroulias to examine four of the seven witnesses Mr Petroulias had identified, subject to two conditions (T3200.16-23). First, that he comply with standard direction 13 by identifying whether a contrary affirmative case is to be made (T3200.29-37).[5] And secondly, that Mr Petroulias first provide to the Commission his account in respect to the matters the subject of the investigation (T3200.40-44). This second condition is one of the further grounds upon which Mr Petroulias seeks to have the public inquiry discontinued, and is dealt with separately below.

The Gows Material

88. Mr Petroulias takes issue with the assistance that I and senior counsel assisting sought to provide to him at the directions hearing on 8 February 2019 because it is his contention that the evidence to which he referred in his cross-examination application was "not new" (see [4.6]). According to Mr Petroulias, the documents contained within the Gows Material set out his case and position on the matters under investigation (see [4.6] and [3.5]). He complains that no attempt has been made by the Commission to consider this material, which he says may be favourable to "the defendants" (said to include himself, Ms Bakis, Mr Green and Ms Dates (see [2.3] and [7.1]) and that this is because it does not accord with the Commission's 'fixed view'. No premises or grounds for this ground exists. These contentions are rejected for the reasons that follow.

89. First, the procedure by which exculpatory evidence may be placed before the Commission is set out in the Procedural Guidelines (see in particular, [3.7]). This procedure (to which, as mentioned above, Mr Petroulias has been alerted on numerous occasions), has not been followed by Mr Petroulias in connection with the Gows Material, although it remains open for Mr Petroulias to do so.

90. Secondly, notwithstanding the above, the Commission did review the Gows Material, and documents contained within it have been introduced into evidence by senior counsel assisting. By way of example, the Commission compiled a bundle of documents, entitled "Volume 53 KNL Materials", which became MFI 33.[6] It contains a number of file notes,

[5] Mr Petroulias is yet to comply with the direction that he reformulate his application for cross-examination.

[6] It should be noted that there are other examples of documents that can be found within the Gows Material having been adduced into evidence by Counsel Assisting, and some of these will be identified below. Further, in view of

letters and other material that were extracted from both the Gows Material and the files produced by Ms Bakis. That material, generally speaking, appeared to record versions that might be taken to be consistent with versions propounded, or possibly propounded, by Mr Petroulias or Ms Bakis. It was made available to all interested parties, and introduced into evidence by Counsel Assisting. Further, all witnesses who have given evidence before the Commission with an interest in this material have been examined in relation to it.

91. It is clear from that material, and at least some of the evidence from Mr Green (and Ms Dates), that there is a significant controversy about what occurred as between Mr Green, Mr Petroulias, Ms Bakis and Ms Dates in relation to, at least, the circumstances surrounding the creation of the Gows Heat Heads of Agreement dated 15 December 2014. In recognition of the fact that there was such controversy, and that there had in fact been an omission or a failure to cross-examine Mr Green on behalf of Ms Bakis to put her version of events, it was apparent that the interests of Ms Bakis and, by extension, Mr Petroulias could be prejudiced by this failure to cross-examine. Although, the Commission of course, is not in a position to advise those participating in the public inquiry it did take a number of steps to have this omission remedied. Those steps included providing written advice to counsel about the Standard Directions 17 (annexed to these reasons) in relation to cross-examining witnesses on significant issues of fact and inviting consideration to whether leave should be sought to further cross-examine Mr Green (T1957.34-40). Once leave had been granted for further cross-examination of Mr Green, and it became apparent that a possible affirmative case for Ms Bakis had not been put, attention was drawn to this fact and a further invitation given to cross-examine further (T1976.1 – 1977.45; T1980.28 – 1981.12). These matters may be seen as completely contrary to the proposition that the Commission has a 'fixed view'. They additionally can be seen as contrary to what has been contended by the applicant in the present application, namely, 'shutting out' material that might be viewed as exculpatory.

92. Thirdly, the Gows Material contains much material that is on the letterhead of Ms Bakis' firm, Knightsbridge North Lawyers and Mr Petroulias has contended only in the most general of terms and without any reference to any particular document that the material is exculpatory. In other words the contention is little more than mere assertion. There is

the use that has been made of the documents within MFI 33 during the course of the public hearing it is obvious that that material will be tendered.

material within that file that relates generally to the period being investigated by the Commission. By way of example, it includes a letter dated 19 December 2014 from Ms Bakis to Mr Green, entitled "Memo of Preliminary Advice and Scoping Report" (MFI 33, pp 4 – 6).[7] It also includes a letter dated 7 January 2016 from Ms Bakis to Mr Green and Ms Dates entitled "Governance Checklist Process for Engagement of Professionals" (MFI 33, pp 96 – 98),[8] a Briefing Paper for Board Meeting 8 March 2016 dated 6 March 2016 addressed to Ms Dates (MFI 33, pp 80 - 81),[9] and a "Memorandum of Advice – Instruction" dated 4 April 2016 (MFI 33, pp 33 - 36).[10] It is perhaps worth noting that at no stage has Ms Bakis, who has been represented for the entirety of the public inquiry by counsel and who was the solicitor for Gows Heat at the relevant times, sought to suggest that there are other documents that are exculpatory that are not within MFI 33 or the public brief that is in evidence and nor has she sought to have any further documents tendered through counsel assisting. This illustrates that there is a real question about the materiality of the remaining documents within the Gows Material.

The Commissioner's treatment of certain witnesses

93. Mr Petroulias alleges that the 'fixed view' or 'closed-minded' approach taken by the Commission is evident during the examination by senior counsel assisting of Ms Bakis, in connection with the funds that were received by Gows Heat as a result of the transaction with Sunshine (see A1 at [4.1] – [4.5]). In particular, Mr Petroulias seeks to complain about the treatment of the objection made by him during this segment of senior counsel assisting's examination as being illustrative of his contention that the Commission is proceeding by way of a "pre-determined script". It is instructive to set out this portion of senior counsel assisting's examination and the manner in which I dealt with Mr Petroulias' objection (T2023.20-2024.48, emphasis added):

[7] The extent of the cross-examination of Mr Green by counsel for Ms Bakis, Ms Nolan, on this document was to ask whether Mr Green recalled receiving this advice. Mr Green's evidence was that he did not recall receiving the document. See T1965.31 – 1966.2.

[8] Ms Nolan did not cross-examine Mr Green about this letter but cross-examined him about the "Governance Checklist" (to which Ms Bakis refers in this letter, stating "I will start to create a checklist governance form which contains a checklist of matters relevant to KNL's engagement"). The "Governance Checklist" is dated 8 January 2016. A copy appears in MFI 33 at pp 99-100, and a version that has been annotated by hand and apparently initialed by Ms Dates and Mr Green appears at MFI 33 pp 101 – 102. Mr Green was asked by Ms Nolan whether he remembered ticking and initialing the checklist with Ms Bakis and he stated that he did not remember such a process (T1983.39-42). He denied that the matters set out in the checklist were explained to him (T1984.14) and said that "nothing was explained to us" (T1984.28).

[9] Neither Ms Dates nor Mr Green was cross-examined by Ms Nolan about this document.

[10] Neither Ms Dates nor Mr Green was cross-examined by Ms Nolan about this document.

MR CHEN: So, Ms Bakis, do you accept that about $1 million has been received by Gows Heat as a result of this transaction involving Mr Zong's company, Sunshine?---Sounds right.

Now, we do know that Gows Heat was your client, wasn't it?---Yes.

And that the person behind Gows Heat was in fact Mr Petroulias. Isn't that so?---Yes.

And you were taking instructions from him, were you not?---Yes.

And the instructions that you received were to pay money into the Gows Heat bank account. Isn't that right?---So instructions received from whom?

Well, Mr Petroulias.---No.

THE COMMISSIONER: From your client.

THE WITNESS: No. That was, there was a whole deed behind that, but yes. It wasn't Mr Petroulias that directed that money to be paid there, it was Mr Zong's written signed instructions.

MR CHEN: Sure. But the coordinates, the bank coordinates given to you to permit you to transact that money into that account came from Mr Petroulias. Isn't that right?---Correct.

Now, that's money that Mr Petroulias has received, isn't it?---Yes.

And this is at a time when Mr Petroulias was a bankrupt?---Hmm - - -

Well, you've accepted that, Ms Bakis.---Yes, yes, sorry, yeah.

And, Ms Bakis, what disclosure did Mr Petroulias make to your knowledge to the trustee in bankruptcy that he'd received this money?---I don't know.

MR PETROULIAS: Objection. It hasn't been established that I received that money at all.

MR CHEN: I thought it - - -

MR PETROULIAS: The company, Gows Heat, received the money, but not Petroulias, and in fact it wasn't even Gows Heat, it was a collection agency company, it was a collection agency trust.

THE COMMISSIONER: It will all come out, Mr Petroulias, don't worry. If it wasn't you we'll identify who received it and there's records here that establishes beyond any argument, so we'll come to that.

MR PETROULIAS: No, no, with respect, Commissioner, it's never been suggested that I personally in my name received the money from Mr Zong. Gows, Gows received it.

THE COMMISSIONER: Well, where do you say the money went?---To, it went to Gows Heat Collection Agency Trust. I think that was – and that's

---

And who, who was behind that trust?

MR PETROULIAS: Who was behind the trust?

THE COMMISSIONER: Were you behind the trust?

MR PETROULIAS: I was, I was the Gows representative.

THE COMMISSIONER: Yes. Were you a beneficiary of the trust?

MR PETROULIAS: No.

THE COMMISSIONER: Well, who was?

MR PETROULIAS: Oh, there's a trust deeds in evidence I think somewhere.

THE COMMISSIONER: No, I'm asking you, who is the beneficiary of the trust?

MR PETROULIAS: I don't recall. You tell us.

94. Several points may be made in connection with the way in which the examination proceeded, the objection made by Mr Petroulias and whether or not it suggests that the Commission is proceeding by way of a "pre-determined script". First, the objection was without proper foundation. This is because *Ms Bakis, moments before Mr Petroulias objected, had accepted that Mr Petroulias had received the money deposited in the Gows Heat account* (T2023.46). As the solicitor for Gows Heat she would be well placed to know this. She would also be well placed to know this because her earlier evidence was that although she established the Gows Heat bank account in 2011 (into which the money was deposited), she handed over the details to Mr Petroulias for Mr Petroulias to operate from that time (T2902.17). Mr Petroulias' assertion that it had not been established that he had received the money was incorrect; senior counsel assisting had just adduced evidence from Ms Bakis to the contrary.

95. Secondly, Mr Petroulias asserted that *contrary to the evidence Ms Bakis had just given* to the Commission, a trust by the name of "Gows Heat Collection Agency Trust" had received the money. I called upon Mr Petroulias was called upon to identify the beneficiaries of the trust with a view to elucidating who it was that had received the money, if not Mr Petroulias. Rather than this exchange being an example of the Commission seeking to exclude possibly exculpatory evidence or exhibiting a 'fixed view' of the evidence, when attention is given to the entire exchange it may be seen that

the exchange was attempting to provide Mr Petroulias with an opportunity to provide to the Commission evidence that may put a different complexion on that which had been adduced from Ms Bakis.

96. Thirdly, it was open at that time, and remains open to Mr Petroulias to seek to have the Gows Heat Collection Agency Trust Deed admitted into evidence (or any other evidence that he asserts may go to establish that he did not receive the money paid into the Gows Heat account), by following the procedure set out in the Standard Directions and Procedural Guidelines. He has not sought to do so.[11]

The approach taken by the Commissioner to Mr Petroulias' cross-examination

97. Finally, Mr Petroulias alleges that the Commission has sought to preclude any cross-examination that might yield evidence contrary to its 'fixed' view of the investigation (see [3.21] – [3.34]). He alleges that I have sought to "ring fence" the evidence put before the Commission by precluding any cross-examination by Mr Petroulias or counsel for Ms Bakis, that his cross-examination of Mr Zong was initially subject to a 30 minute time limit and that I improperly curtailed his cross-examination in relation to a factual matters said to be relevant to the investigation. Each of these matters will be addressed in turn.

98. First, it must be observed that one of the means by which the Commission regulates the conduct of public hearings conducted before it is by controlling the way in which cross-examination is allowed to proceed. As I observed at paragraphs 26 - 27 above, it is statutorily entitled to do so.[12] Persons appearing before the Commission are not permitted, as of right, to cross-examine a witness. Rather, it is within the presiding Commissioner's discretion to determine whether a person has sufficient interest to cross-examine a witness (see [12] – [13] of the Standard Directions, and [5] of the Procedural Guidelines). Further, it is within the Commission's discretion to impose limits on the subject-matter upon which a person is permitted to cross-examine a witness (see Procedural Guidelines, [5.2]).

[11] It is noted that some pages from what appears to be the Gows Heat Collection Agency Trust Deed were included in the Gows Material but it is not a complete copy. This partial copy of the Gows Heat Collection Agency Trust Deed has been admitted into evidence (Volume 39, page 18).

[12] *ICAC Act*, s 34(1).

99. Secondly, both Mr Petroulias himself, as well as his counsel, Mr Menzies QC, were given leave to cross-examine the witnesses that have appeared before the Commission during the course of the public inquiry. [13] So too, has counsel for Ms Bakis. To the extent that Mr Petroulias has not yet cross-examined certain witnesses, this is not because he has not been denied due to any refusal to grant leave to do so.[14] Rather, as the following sequence of events demonstrates, the programming of various witnesses' cross-examination and re-examination has been scheduled specifically to accommodate Mr Petroulias' particular circumstances.

100. On 21 June 2018 Mr Petroulias was arrested and remanded in custody. Immediately prior to the public inquiry resuming on 16 July 2018, arrangements were made by the Commission to bring Mr Petroulias from custody so that he might attend and hear the evidence given. However, as Mr Petroulias indicated that he did not wish to attend the public hearing, a direction was made by me that he be excused from attending the public hearing commencing on 16 July 2018. Instead, when the public hearing once again resumed on 6 August 2018, the Commission gave to Mr Petroulias a copy of the transcript and copies of the exhibits for the public hearing held between 16 – 20 July 2018 (T1955.20-25). As Mr Petroulias remained in custody when the public hearing reconvened on 6 August 2018 arrangements were made by the Commission to facilitate Mr Petroulias' attendance so that he would have the advantage of hearing the evidence as it was given to the Commission (T1956.15-34). I determined that Mr Petroulias should not be required to cross-examine Mr Green, who was part-heard as at 6 August 2018, or any other witness, until he had had sufficient time to prepare the necessary applications for leave to cross-examine (T1956.10-15). It should be emphasised that by deferring Mr Petroulias' cross-examination of Mr Green and any other witnesses appearing during Mr Petroulias' period of incarceration, the Commission was not seeking to prevent or preclude Mr Petroulias from cross-examination, but rather, sought to facilitate any cross-

[13] Mr Petroulias himself has cross-examined the following witnesses who have given evidence at the public inquiry: Mr Terrence Lawler (T83 – 124); Mr Omar Bin Abdullah (T145.23-146.29); Mr Cyril Gabey (T200.1-30); Mr John Hancock (T259.10 – 266.40); Mr Bernard Michael Walsh (T299.31-301.10); Ms Eleanor Swan (T258.40-361.1); Ms Debra Swan (T385.8-388.17); Mr Matthew Fisk (T488.27-516.24); Mr Tony Zong (T620.1-662.28 and, through Mr Menzies QC at T1121.11-1132.42); Mr Larry Slee (T721.9-734.1); Mr Leonard Quinlan (T834.43-838.27); Mr Raymond Kelly (T905.44-914.34) and Mr Ronald Jordan (T940.9-944.24). Mr Menzies QC, who appeared for Mr Petroulias from 11 April 2018 to 14 May 2018, cross-examined: Mr Keith Rhee (T1008.26-1018.38); Mr Sayed (T1089.7-1098.8); Mr Tony Zong (T1121.11-1132.42); Ms Nicole Steadman (T1185.20-1200.26); Ms Candy Towers (T1238.23-1256.20) and Mr Clayton Hickey (T1325.11-1334.39).

[14] This is with the exception of Mr Sheriff, in relation to whom Mr Petroulias was declined leave to cross-examine (see T1293.16-1295.40).

examination Mr Petroulias might wish to conduct, by accommodating the circumstances in which Mr Petroulias found himself.

101. With respect to Mr Petroulias' cross-examination of Mr Zong, it is not the case that a limitation of the kind suggested by Mr Petroulias was imposed (see [3.21]). True it is that an initial limitation was placed on Mr Petroulias' examination, but he is incorrect both about the bounds of that initial limitation, and its purpose. Mr Petroulias commenced his cross-examination of Mr Zong on the afternoon of 5 April 2018 (T620.1). At 3:45 pm that afternoon, I determined that the Commission would sit extended hours until 4:15 pm to permit Mr Petroulias additional time in which to cross-examine Mr Zong and indicated that Mr Petroulias would have a further 30 minutes the following morning in which to conclude his cross-examination (T632.28-30). On the morning of 6 April 2018 Mr Petroulias cross-examined Mr Zong for a further 30 minutes (T648-662). These limitations as to time were not in an effort to "ring-fence" the evidence adduced by counsel assisting, but rather, were imposed to accommodate the programming of witnesses that the Commission already had in place, and only after consideration had been given to the estimate given by Mr Petroulias of the time he would need to cross-examine Mr Zong (T520.12-19; T590.10-14). In any event, that morning, the Commission received an application from Mr Petroulias entitled "Basis for cross-Examination of Tony Zong and Further Applications" (MFI 14), in which he sought, *inter alia*, further time in which to conduct his cross-examination of Mr Zong and in relation to which I indicated I would give consideration and deliver reasons as soon as possible (T659.29-660.5).[15] As events happened, Mr Petroulias subsequently retained Mr Menzies QC, who was given leave to further cross-examine Mr Zong on 12 April 2018 (see T1120.6 – 29 on the question of leave, and T1121-1132 for Mr Menzie's cross-examination of Mr Zong).[16] Mr Menzies QC did not adhere to the areas for cross-examination that had been identified by Mr Petroulias in his (subsequently amended) application further to cross-examine Zong (MFI 22), but instead indicated that his cross-examination would be "within a very narrow compass" (T1119.45), and chartered his own course.

[15] Mr Petroulias subsequently served on the Commission a document entitled "Amended Basis for Further Cross-Examination of Mr Zong and Further Applications", dated 8 April 2018 (MFI 22).

[16] At T1106.8, Mr Menzies QC accepted the observation of mine that Mr Petroulias' amended application to cross-examine Mr Zong was really a lengthy submission about matters going to the merits of some of the issues the subject of the investigation.

102. Mr Petroulias has catalogued a series of instances in which, he says, his cross-examination of Mr Zong was improperly curtailed (see [3.23] – [3.34]). First, Mr Petroulias suggests that he was precluded from cross-examining Mr Zong about the capacity in which Mr Sayed and Mr Rhee acted in the Sunshine transaction, that is, whether or not they were acting as agents for Mr Zong (as Mr Petroulias appears to contend) or the ALALC (which was the evidence of Mr Zong (T532.17-32) and Mr Fisk (T474.17-20 and T506.21-25). This line of questioning is said by Mr Petroulias to go to Mr Zong's credibility. It should be observed that leave will only be given to cross-examine a witness as to their credibility when the presiding commissioner considers that the credibility of the witness is of sufficient relevance to the Commission (Procedural Guidelines at [5.3]). Further, at no point was either Mr Rhee or Mr Sayed cross-examined by Mr Menzies QC as to whose behalf they were purporting to act or whose interests they were representing, as between Mr Zong and the ALALC. If a contrary affirmative case about this issue was to be put by Mr Petroulias, then it ought to have been put to Mr Rhee and Mr Sayed themselves, and it was not.

103. Secondly, Mr Petroulias asserts that he was precluded from asking Mr Zong about a commission paid to Mr Rhee (see [3.24]). An examination of the transcript reveals that Mr Petroulias was **not** precluded from cross-examining Mr Zong about the amounts paid to both Mr Rhee and Gows Heat and in fact did so (T626.1 – 627.24). Additionally, Mr Petroulias states that he was precluded from "securing collaboration about my payment of Sayed's commission of $105,000 as part of the 3 December 2015 agreement". At no point did Mr Petroulias seek to put to Mr Zong any question about the payment by him to Mr Sayed of $105,000. Furthermore, it was Mr Sayed's evidence that the $105,000 was paid to him by Mr Petroulias (T1073.33-36) but that it was for work he had carried out for Mr Petroulias in connection with the United Land Councils venture (T1088.18). Mr Sayed was not challenged by Mr Menzies QC in relation to this evidence.

104. Mr Petroulias then identifies a number of occasions I rejected questions put to Mr Zong by Mr Petroulias (see [3.25], [3.26], 3.27], [3.28], [3.29] and [3.30]). Again, an examination of the transcript makes clear that Mr Petroulias was not "shut down" from cross-examining Mr Zong in relation to the subject-area referred to by Mr Petroulias. Rather, the particular questions were each rejected because of the form of the question (T633.12; T633.42; T635.27-35; T636.34-35). I do not accept that Mr Petroulias was precluded from cross-examining Mr Zong in a way that permitted him to protect his

interests. Both he, and Mr Menzies QC, did this. It is worth repeating that Mr Menzies QC cross-examined Mr Zong and at no point did he suggest that his cross examination was curtailed in any way.

Ground 2: The selective tendering of documents and Counsel Assisting's duties

105. Mr Petroulias contends that counsel assisting has the duties of a prosecutor, and that in breach of those duties, counsel assisting has "selectively tendered documents" and evidence that is exculpatory to him or inconsistent with what Mr Petroulias alleges is the preconceived view of the Commission (or counsel assisting) is not tendered (see [3], [3.21], [4.7]). It is suggested by Mr Petroulias that this conduct has resulted in a "*flawed system of inquiry"* (see section 3 of the application).

The duties of counsel assisting

106. The starting point of Mr Petroulias' arguments is that counsel assisting has prosecutorial duties. That is not so. The duties of counsel assisting are prescribed by the *Legal Profession Uniform Conduct (Barristers) Rules 2015* – specifically, rules 96 to 100 inclusive. Relevantly, rules 83-95 prescribe a prosecutor's duties. Rule 96 provides that "Rules…83 - 95 do not apply to a barrister who appears as counsel assisting an investigative tribunal." In any event, rules 83-95 have been complied with by counsel assisting.

The alleged "selective tendering"

107. It is further said (see [3.3-3.6]) that material has been provided to the Commission and counsel assisting has failed to present it. This contention is erroneous. As will be clear from paragraphs 90 and 92 above, this is not the case. In addition to the documents contained within MFI 33, counsel assisting has introduced into evidence other documents that are alleged by Mr Petroulias to have been excluded. At [4.7] of his application, Mr Petroulias contends that contemporaneous memorandums and advice letters and "documents explaining the events at certain points of time" have been excluded entirely. Those documents to which he has referred with any degree of specificity in relation to this allegation and their treatment by the Commission are as follows:

    a) the transcript of hearing before the Upper House Committee on Crown Lands, 15 August 2016 at which Mr Green, Mr Petroulias and Mr Faraj spoke, on behalf of an organisation by the name of United Land Councils ("ULC"). Contrary to what Mr

Petroulias has alleged, this document has been included in the public brief and is in evidence (see Volume 17, page 90);

b) Papers "written by me and others". It is not possible to infer from this description alone to which papers Mr Petroulias refers. However, MFI 33 (which is to be tendered by Counsel Assisting at the resumed public hearing) includes papers that on their face appear to have been written by Ms Bakis. These include, *inter alia*:

   i. A letter from Ms Bakis to Ms Dates entitled "Briefing Paper for Board Meeting 8 March 2016, Governance Ratification Resolution(s)" (MFI 33, page 80);

   ii. a "Memorandum of Advice" on KNL letterhead dated 4 April 2016 (MFI 33, page 33);

   iii. a "Briefing Paper on Potential Property Agreements for Board Meeting 8 April 2016, Legal Issues in the Selection of Property Proposals" dated 5 April 2016 (MFI 33, page 37; MFI 16);

   iv. a "Briefing Paper on Advantage Property Agreements for Board Meeting 2 June 2015, the Replacement of Solstice [sic] with Advantage as the Preferred Developer and Purchaser" dated 29 May 2016 (MFI 33, page 53; MFI 17);

   v. a "Memorandum of Advice, The NSW Aboriginal Land Council Policy on Assessing and Approving Land Dealings Under Division 4A" (MFI 33, page 61;

   vi. a letter from Ms Bakis to the ALALC directors entitled "Advice concerning AGM Scheduled for 29 June 2016", dated 17 June 2016 (MFI 33, page 65);

   vii. a "Briefing Paper on Undertakings Given to the court and Legal Litigation for Board Meeting 8 July 2016" dated 6 July 2016 (MFI 33, page 71);

   viii. the Joint Legal and Financial Brief to Board of the ALALC Priorities for the ALALC to Comply with the ALRA" (MFI 3 page 85; MFI 20);

c) The Community Disclosure Statement, dated 20 July 2016. This has been marked for identification (MFI 6), and steps can be taken to have it tendered in tendered in the appropriate way.

d) Versions of documents "ratified and countersigned" by representatives of Gows (other than Mr Petroulias) and versions of the Sunshine transaction documents bearing multiple signatures of Mr Petroulias, Ms Dates and others. It is not correct to say that particular versions of documents that might be exculpatory to Mr Petroulias or others have been excluded from tender. By way of example, on 18 September 2018 Ms Bakis produced a bundle of original documents to the Commission bearing the signatures of Ms Dates and Mr Green etc and these were marked for identification. Further, exhibits 108, 111, and 112 are original documents extracted from the KNL file provided by Ms Bakis to the law firm K & L Gates, which were adduced into evidence on 15 – 17 August 2016 during Ms Bakis' evidence. Further, it should be observed that if there are versions of documents that have not been tendered the appropriate procedure can and should be followed, yet Mr Petroulias had not done so.

e) The Deed of Rescission between the ALALC and Gows Heat dated 12 October 2015. Mr Petroulias says that by this deed, Gows Heat was required to rescind its agreement with the ALALC in return for a payment of $1.6 million and that this supports "the priority of payment" and the application of funds consistent with the ALALC having never received any funds to their benefit from Mr Zong. It is implied by Mr Petroulias that this document has been excluded from evidence. In fact, it is in evidence (and has been in evidence since 27 March 2018) it appears in the public brief (at Volume 7, page 71). Secondly, it would appear that Mr Petroulias was intending to refer to the Surrender Agreement and Release (which is also in evidence and appears in the public brief, at Volume 7, page 136), as the Deed of Rescission was: (a) superseded by the Surrender Agreement and Release; and (b) refers to a payment of $666,666.66 to Gows (whereas the Surrender Agreement and Release refers to a payment of $1.6 million).

108. Furthermore, as has been observed at paragraph 84 above, the Standard Directions published by the Commission, to which Mr Petroulias' attention has been drawn on numerous occasions both in writing and during the course of the public hearings, provide a means by which Mr Petroulias may seek to have any of the documents to which he has made 'general' reference tendered by counsel assisting. He has not sought to do so.

The evidence of Mr Zong

109. Mr Petroulias asserts that the "paradigm" adopted as the premise of the Commission's investigation is based on a version of events adopted by Mr Zong that is inconsistent with previous versions of events sworn by Mr Zong. It is said that other evidence or matters are available that would place Mr Zong's evidence in a different light and that, in breach of his duties, counsel assisting has excluded or ignored this evidence (see [3.4] and [3.20]). The gravamen of this complaint is that, to the extent the Commission investigates the conduct of Mr Petroulias and Ms Bakis, it is relying (at least in part) on Mr Zong's evidence, notwithstanding inconsistencies in the evidence given by Mr Zong. The underlying premise of this contention must be rejected. Mr Zong's evidence relates to one transaction out of a series being investigated. He is but one of 32 witnesses who have given evidence at the public hearings conducted by the Commission in connection with this investigation to date. Furthermore, the public inquiry that has taken place over a number of weeks over the course of 2018, is but one part of the investigation that has been and continues to be conducted by the Commission. Having regard to the matters in evidence in the public inquiry the contention that the Commission relies on or could be said to be basing its investigation upon the evidence of one witness (in particular Mr Zong) is manifestly incorrect. Additionally, it is incorrect to say that the Commission has sought to exclude or ignore material relating to Mr Zong that could be said to be exculpatory to Mr Petroulias.

110. Mr Petroulias refers to the Sunshine Statement of Claim (the **Sunshine SOC**) (see [3.3-[3.4], and [3.22A]). In those proceedings brought by Sunshine, it is alleged that this pleading is inconsistent with the evidence Mr Zong gave before the Commission.[17] For example, at [54] of the Sunshine SOC it was pleaded that on about 3 December 2015 Sunshine authorised KNL to release $400,000 to Gows. Before the Commission, Mr Zong's evidence was that he signed the release of funds held in the KNL trust account in the amount of $400,000 on 3 December 2015 (T582.3) (knowing it was to be released to Gows: T583.44) because Mr Petroulias told him he had to release it or there would be no

[17] Mr Petroulias also refers, at [3.36] to the "version of events" provided by Mr Zong to the Legal Services Commissioner (in the form of an unsworn affidavit) and notes that his request remains outstanding. On 6 April 2018 Mr Petroulias made a written application requesting that the Commission issue a notice to produce to Mr Zong for, *inter alia*, an affidavit sworn by him and provided to the Law Society regarding the conduct of Ms Bakis and Mr Petroulias in 2015-2016.On 29 October 2018 Mr Petroulias, in effect, amended this application, and requested the unsworn affidavit provided by Mr Zong to the Law Society. A decision will be made as to whether or not this document is to be provided to Mr Petroulias. **[THIS NEEDS TO BE DEALT WITH IN SOME WAY. FOR DISCUSSION].**

deal (T583.17-20). (By contrast, in the Sunshine Amended Statement of Claim of Claim – to which Mr Petroulias has not referred - the original pleading at [54] is deleted, and it is instead alleged that a total of $400,000 was paid to the ALALC on or about 23 October 2015, and further, at [66], that Sunshine authorised KNL to release $400,000 to the LC.) It is not correct to say that counsel assisting has concealed the Sunshine SOC from the public. Mr Petroulias was permitted to cross-examine Mr Zong in relation to it (at T653 – 662). And although at no point has Mr Petroulias utilised the process available to him to have the document tendered, the Commission will receive that document into evidence (as it will the associated Sunshine Amended Statement of Claim), bearing in mind the use that has been made of it in public hearing. It should also be observed that whether or not the evidence Mr Zong gave before the Commission is accepted on the issue of the release of funds direction he appears to have signed on 3 December 2015 (as to whether or not he signed it, what was said to him before he signed it and by whom, and for whose benefit he understood the funds would be released) will have no impact on the jurisdictional foundation of this investigation. That is, the contention that Mr Zong's evidence (either on this issue, or any other) is the basis of the Commission's jurisdiction to conduct this investigation is completely without foundation.

111. It should be observed that Mr Petroulias also refers (at [3.36]) to the "version of events" provided by Mr Zong to the Legal Services Commissioner (in the form of an unsworn affidavit) and notes that his request remains outstanding. On 6 April 2018 Mr Petroulias made a written application requesting that the Commission issue a notice to produce to Mr Zong for, *inter alia*, an affidavit sworn by him and provided to the Law Society regarding the conduct of Ms Bakis and Mr Petroulias in 2015 - 2016. On 29 October 2018 Mr Petroulias, in effect, amended this application, and requested the unsworn affidavit provided by Mr Zong to the Law Society. I am of the provisional view that this document should be disclosed to Mr Petroulias at an appropriate time, to be determined.

112. Mr Petroulias also refers, at [3.7], to "contemporaneous notes at the time" which purport to contain, to counsel assisting's knowledge, an explanation of the Sunshine transaction and the funds paid by Mr Zong commensurate with that offered by "the defendants" (Mr Petroulias, Ms Bakis, Mr Green and Ms Dates). The relevant time, it can be inferred, is December 2015 when funds were released from KNL's trust account to the account of Gows Heat. At no point in his application does Mr Petroulias specifically identify the contemporaneous notes to which he refers. However, at [3.20] Mr Petroulias refers to the

"Memorandum of Investment" that he asserts Mr Zong signed, which he states was consistent with the 3 December 2015 settlement recorded in the contemporaneous memorandum. This document, which is in fact entitled "Memo regarding Investment arrangements", is in evidence (Exhibit 57, page 16) and Mr Zong was examined about it by counsel assisting, commencing at T593.1. Mr Zong denied having ever seen the document (T593.20). He denied having signed it or having authorised anyone to sign it on his behalf (T593.14-18). Mr Zong denied having ever entered into an agreement with United Land Councils or ULC (T593.31) and denied entering into any other agreements involving Mr Petroulias other than the ones involving the transactions for the ALALC land (T593.34). Further, nowhere in the document does it record that funds were to be paid by Mr Zong or Sunshine to either ULC or Gows Heat in furtherance of or pursuant to that agreement. Of significance on this aspect is that Mr Petroulias did not seek to cross-examine Mr Zong about this document or its contents, and nor did his counsel Mr Menzies QC.

113. Mr Petroulias also refers to the "Deed of Acknowledgement and Guarantee" dated 21 December 2015 ([A1 at [3.22A]). This document is also in evidence (Exhibit 57, page 1). Counsel assisting examined Mr Zong in relation to it (T572.44 – 574.17), as well as Mr Green (T1548.26 – 1550.34), Ms Bakis (T2421.11-2428.33) and Ms Dates (T2771.31 – 22773.21). Mr Petroulias refers to clause 3 of the clause and suggests, if only implicitly, that counsel assisting should have examined Ms Bakis and Mr Zong about this clause because "*it evidences Zong's acknowledgment that Sunshine made payments made* [sic] *to Gows and Keeju but* ***no payment whatsoever to ALALC***" (emphasis in the original). Three points may be made about this contention. First, it is likely that Mr Petroulias intends to refer to clause 2 of the Deed, rather than clause 3. Secondly, clause 3 does not contain an acknowledgement by Sunshine of monies already paid, but rather, the clause is directed to the ALALC, and purports to provide a guarantee on its behalf to Sunshine for any loss, including "*any payments made by the Purchaser to Gows and Keeju, of $926,667.00 and $250,000*". The point, though perhaps a subtle one, needs to be made: the clause does not provide that payments of that kind have *already* been made but instead guarantees all loss suffered by Sunshine, including for payments that are or may be made in the future. Thirdly, although according to Mr Petroulias this clause is corroborative of his affirmative case, neither he nor Mr Menzies QC sought to cross-examine Mr Zong about it or in relation to the Deed more generally.

114. Mr Petroulias contends that "contemporaneous notes", of which Counsel Assisting is apparently aware, explain that Mr Zong paid $926,000 as part of a deal with Mr Petroulias that included an investment by Mr Zong in an organisation by the name of United Land Councils or ULC (A1 at [3.7]). Aside from the documents referred to above, the only other purportedly "contemporaneous notes" of which the Commission is aware are the file notes contained within MFI 33. A file note entitled "File note addition 21 December 2015" [MFI 33, page 23], which was produced by Ms Bakis among the KNL files, purports to record a meeting between Ms Bakis, Mr Green, Mr Petroulias and Ms Manton. It refers to needing a "loose" arrangement with Sunshine such that Sunshine "gets the first right to market each development". While it refers to ULC, it does not refer to Mr Zong paying money to Gows Heat as an investment in ULC. There is also the "Addendum 5" to the "Running Memorandum", dated 22.12.15 [MFI 33, page 24]. At [18] a table is included that provides that "as a result of the various variations to the arrangements" $926,000 is payable to Gows Heat, less $105,000 for SS [Sayed], "leaving $821,000 to invest in furthering ULC and projects where TZ gets priority." It is accepted that, taken at face value, both these documents could provide some support for the affirmative case put by Mr Petroulias. Yet, at no stage to date has Mr Petroulias sought to use the process available to him to seek to have these documents tendered. Furthermore, the proposition that Mr Zong paid the funds to Gows Heat as an investment in ULC was not put to him by either Mr Petroulias or his counsel, Mr Menzies QC.

115. Finally, Mr Petroulias refers, at [3.9] to Mr Zong's "promotional material", which he asserts was sent to the ALALC in order "to induce confidence in him". At [3.20(c)] this same material is referred to as "a fraudulent marketing document". The implication appears to be that this material should have been referred to by Counsel Assisting as it goes to Mr Zong's credibility, and also that it shows that a presentation was prepared by Sunshine for the ALALC community. When asked about this document by Mr Petroulias, Mr Zong's employee, Mr Fisk, did not accept that it was prepared for the LC (T493.7-10). Mr Petroulias did not put to Mr Fisk that the material was fraudulent or misleading in any way, nor did he cross-examine Mr Zong about the material. It appears that the material was sent by email by Mr Zong to Mr Rhee on 14 July 2015, but Mr Rhee refers to it as "a company profile", rather than a presentation (T1015.19). Mr Rhee's evidence was that he thought it was sent to the ALALC (T1015.21). However, there is no evidence to suggest that it was received by the Board of the ALALC.

116. In short, it is plain that counsel assisting has neither sought to preference one version of the events that are the subject of this investigation over another, nor attempted to exclude evidence that may be said to corroborate or be supportive of one version over another. The documents contained within MFI 33 will be tendered (as will the Sunshine SOC and Amended Statement of Claim), and other documents said by Mr Petroulias to be supportive of his affirmative case, such as the "Memo regarding Investment arrangements" and the "Deed of Acknowledgement and Guarantee" are already in evidence (see Exhibit 57, page 16 and Exhibit 57, page 1, respectively).

Ground 3: The exclusion of key witnesses

117. Mr Petroulias argues that key witnesses have been excluded from giving evidence, which is said to be evidence of bias (see [6.1]). In support of this contention, Mr Petroulias asserts that the Commission has not called evidence from Mr Hussein Faraj, of Advantage Property Experts Syndications Pty Limited, and refused to allow Mr Petroulias the opportunity to cross-examine Mr Vaughan and Ms Hayley Keagan (see [6.1(a) -(c)]).

118. Mr Petroulias has made an application to cross-examine each of Mr Faraj, Mr Vaughan and Ms Keagan (in addition to Mr Green, Ms Dates, Ms Bakis and Mr Kavanagh). This application has not finally been determined by me. Instead, on 8 February 2019 I gave a provisional ruling only (T3200.16-23). With respect to the evidence of Mr Faraj, I invited Mr Faraj to provide a statement to the Commission, which would then be examined, and only then would I be in a position to provide a ruling with respect to Mr Petroulias' application (insofar as it relates to Mr Faraj) (T3204.13-37). On 8 March 2019 Mr Petroulias served on the Commission a copy of a sworn statement provided by Mr Faraj. A determination as to whether or not it will be tendered, or Mr Faraj called, is yet to be made.

119. With respect to Mr Vaughan, Mr Petroulias asserts that he was called by the Commission "*in support of casting ignominy on Petroulias*" in connection with matters involving the unauthorised opening and running of bank accounts and forgery (see [6.1(b)]) and that, in refusing to allow Mr Petroulias to cross-examine Mr Vaughan, Mr Petroulias has effectively been denied the opportunity to set the record straight. Mr Vaughan is the current director of Gows Heat. He was also a director of a company by the name of Able Consulting Pty Ltd, a company who, on one view of the evidence, appears to have had a

role in considering various property proposals involving ALALC land, and also might have had a role in managing certain transactions involving ALALC land, had they gone ahead. Self-evidently, the Commission had a proper basis to call the evidence of Mr Vaughan and the contention that the Commission was otherwise motivated must be rejected. Further, as with Mr Faraj, there has been no final determination of Mr Petroulias' application to cross-examine Mr Vaughan, but instead the deficiencies in Mr Petroulias' application have been pointed out, namely that Mr Petroulias had failed to identify the factual matters upon which he wished to cross-examine him (T3206.33-47). On 8 March 2019 Mr Petroulias served upon the Commission a copy of a sworn statement provided by Mr Vaughan. As with the statement of Mr Faraj, a determination as to whether or not it will be tendered is yet to be made.

120. Finally, Mr Petroulias contends that he has been excluded from cross-examining Ms Keagan. Again, this complaint is, at a minimum, premature. I indicated at the 8 February 2019 directions hearing that I had made a provisional ruling in favour of calling four out of the seven witnesses Mr Petroulias sought to cross-examine, but that I had not made a ruling about the remaining three witnesses (including Ms Keagan) (T3205.32-47). It remains open to Mr Petroulias to press for Ms Kegan to be recalled. Furthermore, the suggestion that Ms Keagan was called by the Commission for an improper purpose, namely, "*to degredate* [sic] *Petroulias and Bakis*" (see [6.1(c)]) must also be rejected. Ms Keagan was an auditor in the employ of PKF Audit and Assurance Partnership Limited in Newcastle, the firm responsible for auditing the financial records of the ALALC for the financial year ended 30 June 2015 (T2957.10-27). In that capacity, Ms Keagan had cause to communicate with Ms Bakis (in the latter's role as the LC's accountant/book-keeper) (T2957.36-37). Ms Bakis' evidence before the Commission was that she had disclosed certain matters relevant to proposed transactions involving the ALALC (and the audit being conducted by Ms Keagan's firm) to Ms Keagan during a teleconference with her (T2247.45-47). It was entirely appropriate that the Commission call Ms Keagan to examine her in relation to these matters. There was no obligation on the Commission to provide to Mr Petroulias any notice of the evidence it anticipated Ms Keagan might give, nor is the Commission ever under any such obligation. That no such notice was provided cannot be perceived as evidence of bias.

Ground 4: The duty 'owed' to Mr Petroulias as a self-represented litigant

121. Mr Petroulias has argued that his cross-examination was 'shut down', and that this conduct was contrary to my *"positive duty to assist me as an unrepresented litigant"* (see [3.38]). The particular complaints – the 'breaches' of this duty – appear to be a failure to assist Mr Petroulias in framing questions to put to witnesses cross examined by him, or failing to show him some leniency in the way in which he has framed questions put to witnesses cross examined by him.

122. It is further said, in aid of this contention, that every assistance ought to have been afforded to him to help "*frame questions*" given that the Commission knew that Mr Petroulias "*was hospitalised at Northside Clinic for mental health issues*" and because of the "*special duty of fairness of a prosecutor that applies to the CA*".

123. Dealing with these last two points first, the position with respect to the duty upon counsel assisting has been earlier dealt with (see paragraphs 18 and 106, above). In relation to Mr Petroulias' hospitalisation at Northside Clinic, the Commission was aware that Mr Petroulias had been a voluntary inpatient of that Clinic between the period 20 May 2008 and 3 June 2008. The Commission was not aware of the nature of the underlying conditions that promoted that admission until 6 August 2018 when Ms Bakis provided Commission staff with a copy of historical medical reports relating to his mental health at the time. However, at no point prior to 25 July 2018, when Mr Menzies QC made a written application on Mr Petroulias' behalf for the resumption of the public hearing to be deferred until following Mr Petroulias' release from custody, was the Commission informed or made aware of any "mental health issues" affecting Mr Petroulias in any way.

124. Before moving to examine the complaint, something should be said about Mr Petrroulias being unrepresented. First, Mr Petroulias is a qualified lawyer, and has practiced as such. In his written application to appear before the Commission (MFI 1) he made express reference to his "20 years legal experience" which, he stated, would mean that any questions he asked would be "pointed and relevant". Secondly at the 8 March 2019 directions hearing I suggested to Mr Petroulias that he could avail himself of legal assistance through the Legal Representation Office: see T3195. Thirdly, at one point Mr Petroulias retained Queen's Counsel (who appeared on behalf of Mr Petroulias between 11 April 2018 and 14 May 2018), but ultimately Queen's Counsel withdrew because Mr

Petroulias desired to determine the nature and extent of cross examination, rather than that being a matter for his counsel (see T1292.37-47). Fourthly, Mr Petroulias subsequently retained a solicitor, Mr Aloysius Robinson, to appear on his behalf but for reasons not disclosed to the Commission, ultimately elected to limit Mr Robinson's retainer to an adjournment application only, which was made (and granted) in September 2018 (T2828.22-35). On 4 March 2019 he retained a different solicitor, a Mr Voros, again through the Legal Representation Office. The point being that this is not a situation where the unrepresented litigant is not legally trained, or who has filed evidence of a lack of financial capacity to secure legal representation. In any event it has been open to Mr Petroulias to obtain representation from the Representation Office. It is noted that on 5 April 2019 Mr Petroulias forwarded an email to the Commission advising that he has recently terminated his retainer with Mr Voros.

125. The legal principles concerning the duty of a court to an unrepresented litigant have been examined and explained in a number of cases. They were explained by Gleeson JA (Beazley P and Barrett JA agreeing) in *Bauskias v Liew* [2013] NSWCA 297 at [66] – [68]:

> *First, the Court's obligation in the case of a self-represented litigant is to give sufficient information as to the practice and procedure of the Court to ensure that there is a fair trial to both parties. The application of this principle will vary depending upon the circumstances of the case: see* Jae Kyung Lee v Bob Chae-Sang Cha *[2008] NSWCA 13 per Basten JA at [48];* Abram v Bank of New Zealand *(1996) ATPR ¶41-507, 43,341, 43,347;* Microsoft Corporation v Ezy Loans Pty Ltd *[2004] FCA 1135; (2004) 63 IPR 54;* Pezos v Police *[2005] SASC 500; (2005) 94 SASR 154.*
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> *Secondly, the Court's duty is not solely to the unrepresented litigant. The obligation is to ensure a fair trial for all parties. This is why the duty is usually stated in terms that require that the impartial function of the judge is preserved, whilst also requiring the judge to intervene where necessary to ensure the trial is fair and just: see* Tomasevic v Travaglini *[2007] VSC 337; (2007) 17 VR 100 at [95];* Barghouthi v Transfield Pty Ltd *[2002] FCA 666; (2002) 122 FCR 19 at 23;* NAGA v Minister for Immigration & Multicultural & Indigenous Affairs *[2002] FCA 944 at [11];* Nagy v Ryan *[2003] SASC 37 at [52]-[53].*

> *Thirdly, the duty of a trial judge to assist an unrepresented litigant does not extend to advising the litigant as to how his or her rights should be exercised. That is, it is not the function of the court to give judicial advice to, or conduct the case on behalf of, the unrepresented litigant: see* Bhagwanani v Martin *[1999] SASC 406; (1999) 2004 LSJS 449;* Clark v State of New South Wales (No 2) *[2006] NSWSC 914.*
>
> *Fourthly, the trial judge must remain at all times the impartial adjudicator of the matter, measured against the touchstone of fairness. In this regard, an unrepresented party is as much subject to the rules as any other litigant:* Rajski v Scitec Corporation Pty Ltd *(Court of Appeal, 16 June 1986, unreported) per Samuels JA at 14.*

See also *Pollock v Hicks* [2015] NSWCA 122 at [91] (Gleeson JA; Macfarlan and Emmett JA agreeing); *Aldous v State of NSW* [2018] NSWCA 261 at [63] (Payne JA; Basten and Macfarlan JJA agreeing).

126. The immediate difficulty in dealing with Mr Petroulias' contention (assuming for the moment the applicability of these principles to the Commission's investigation and public inquiry held as a part of that investigation) is that he has provided no examples of where there were any instances where the Commission (or counsel assisting) was somehow required to reframe questions for him; nor has he sought to identify where any injustice or unfairness might possibly have arisen in consequence.

Ground 5: The perversion of the order of witnesses, and their cross-examination

127. Mr Petroulias contends that there has been a perversion of the usual order in which witnesses are called and cross-examined, and that this is evidence of bias, and has occasioned unfairness to him (see [8.1] – [8.3], [9], [10.1] – 10.7]. It is alleged by Mr Petroulias that this "reversal of process" is made in bad faith and motivated by a desire to exploit his "psychiatric vulnerability" (see [8.3]). The difficulties with this contention are fourfold.

128. First, as discussed above, the cross-examination of each witness to give evidence appear before the Commission following the date of Mr Petroulias' incarceration in June 2018 was deferred to *accommodate* Mr Petroulias' particular circumstances, in recognition both of the difficulties he would have in preparing for cross-examination whilst in

custody, and of the fact that he was – by choice - unrepresented. It was a programming decision – again, made for Mr Petroulias' convenience – that has in fact disrupted the sequencing of evidence of several witnesses and inconvenienced the lawyers appearing for those witnesses (whose re-examination of their clients has also been deferred until after Mr Petroulias has had an opportunity to cross-examine). True it is that Mr Petroulias has been deprived, by virtue of this sequencing, of the "*early opportunity to respond*" to evidence to which he refers at [10.2], but this is not evidence of bias or a denial of natural justice. Rather, it the result of a programming decision taken expressly for the purpose of assisting Mr Petroulias' participation [REF].

129. Secondly, it is incorrect to say that there is a "natural order" for the witnesses who have given evidence before the Commission, and by extension, there is no basis to say that this order has been "perverted". It is open to the Commission to determine the order in which witnesses are called to give evidence [REF]. As I have referred to in Part C of these reasons, there are acceptable reasons for the Commission being able to determine the sequence or order in which witnesses are called (see also the Commission's *Standard Directions for Public Inquiries*, February 2018, paragraph 8). It would have been open to the Commission to call Mr Petroulias to give evidence when the Commission first held public hearings in March of 2018, prior to receiving the evidence of all other witnesses and, had it done so, there would have been no grounds for Mr Petroulias to assert that this ordering of the witnesses amounted to bias, and nor are there now.

130. Thirdly, the contention that the ordering of the witnesses and Mr Petroulias' cross-examination was calculated to exploit his purported "psychiatric vulnerability" is emphatically rejected. There is no medical evidence before the Commission that records or sets out an opinion in respect to the particular psychiatric vulnerabilities to which Mr Petroulias refers in terms of the ordering or sequencing of witnesses (see footnote 54 of the application). The only programming decisions that have to date been informed by expert medical evidence received by the Commission and which were favourable to Mr Petroulias are the decisions of the Commission to adjourn the public hearings in September and November 2018, and again in March 2019.

131. In any event, having regard to the fact that Mr Petroulias has been at liberty since September 2018, and has now had some considerable period of time to prepare for cross-examination, I have determined that that should take place before his examination.

Ground 6: The shutting out of 'key' evidence and failure to follow lines of inquiry

132. Mr Petroulias contends that the Commission is biased because it has not, during evidence, followed lines of inquiry said to be relevant (see [3.35]), which has extended to an allegation that "key evidence" against the allegation of false agreements has been shut out, resulting in a 'closing down' of relevant lines of inquiry (see [5.4]-[5.5], [5.10], [5.11] – [5.13]) and that there has been 'differential treatment of witnesses' by counsel assisting – a fact asserted to exist, and support a conclusion of bias (see section 3 of the application, and [5.2]-[5.3]).

The failure to follow lines of inquiry

133. The example of a line of inquiry said to be relevant (at [3.35]) is the allegation that as part of Mr Zong's attempted transaction with the ALALC, he sought to extract secret commissions for himself. According to Mr Petroulias, such evidence, had it been adduced, "*would validate the defendants' case*". It is not possible to discern from Mr Petroulias' application why this would be so. Whether or not Mr Zong was motivated by or attempted to secure the prospect of secret commissions in connection with his attempted transaction with the ALALC is not relevant to the investigation. Even if it were positively established that Mr Zong desired or obtained a secret commission through this transaction, this fact alone could have no bearing on the issues relevant to this investigation, which include (to name but a few) whether or not the purported agreement between Gows Heat and the ALALC was authorised by the ALALC board, disclosed to the ALALC board, or whether Mr Green or Ms Dates had any authority to enter into that agreement on behalf of the ALALC, whether or not the agreements between Sunshine and the ALALC were authorised by the ALALC board, disclosed to the ALALC board, or whether or not Mr Green or Ms Dates had any authority to enter into those agreements on behalf of the ALALC.

The exclusion of "key evidence"

134. The "key evidence" against the allegation of false agreements, which Mr Petroulias contends has been shut out, relates to the conduct of Mr Green. Mr Petroulias asserts that I improperly closed down counsel for Ms Bakis' cross-examination in relation to a valuation Mr Green is said to have procured of the Newcastle Post Office. Mr Petroulias incorrectly asserts that I failed to give reasons for refusing this line of questioning and that the decision evidences prejudgment and political bias (see [5.7]). In reality, an examination of the transcript (at T1993.3-36) reveals that my basis for not allowing this

line of questioning was that counsel for Ms Bakis was unable to establish its relevance. Mr Petroulias asserts in his application (at [5.5]) that the line of questioning was relevant because by procuring this valuation, he could be seen to be behaving in *accordance with the Gows Agreement(s)* (see [5.4]-[5.5]). There are several difficulties with this contention. First, the Newcastle Post Office was not included in the land the subject of sale in either of the Gows Heat agreements. Second, the valuation to which counsel for Ms Bakis took Mr Green was contained in a letter from Ray White Newcastle (MFI 33, page 31) and was addressed not to Mr Green but to Ms Dates. Third, the letter containing the valuation was dated 23 February 2016. By this point in time, Mr Green (either on behalf of the ALALC or otherwise) could not have been acting in accordance with at least the first Gows Heat Heads of Agreement, as the "interest" in ALALC land which Gows Heat purported to have by virtue of that agreement had already been surrendered to Sunshine by operation of the "Surrender Agreement and Release", apparently entered into between the ALALC, Gows Heat and Sunshine in October 2015. By 23 February 2016, at least on the documents included in Ms Bakis' file, Gows Heat was "out of the equation" (see the letter from Ms Bakis to Mr Green and Ms Dates dated 23 December 2015: MFI 33, page 28) or "out of the way" (see the letter apparently from Ms Dates dated 11 January 2016 to Ms Bakis: MFI 33, page 30).[18] In any event, on no view could procuring a valuation of land not the subject of the agreements in question be evidence of Mr Green (or Ms Dates) acting in accordance with those agreements.

135. Mr Petroulias further asserts that evidence of Mr Green conducting himself in accordance with his duties as a ALALC board member has been "shut down" by the Commissioner. The example given is in relation to questioning of Mr Green by counsel assisting in connection with an ALALC board meeting on 6 May 2016. Mr Green was asked a series of questions about this meeting, with particular focus on why it was that the board resolved at that meeting to put one property proposal, made by a Mr Greg Cahill, to the ALALC community, and then subsequently resolved at the same meeting to allow Advantage to purchase the very land the subject of Mr Cahill's proposal (see T1616.20-28). Mr Green was directed by me (at T1616.37-38) to answer counsel assisting's question rather than provide detail about Mr Cahill's proposal. Self-evidently, directing a witness to answer the specific question put to him is not evidence of bias. In any event,

[18] Ms Dates' evidence was that she denied sending this letter (T2770). Ms Bakis' evidence was that Ms Dates could not have written this letter and that Mr Petroulias must have written it: T2453.

Mr Green was subsequently given an opportunity by counsel assisting to explain what he had wanted to say about Mr Cahill's proposal (see T1619.3-20). Mr Green was not "shut down" by me from providing this explanation.

136. Finally, Mr Petroulias contends that I "closed off" any evidence in respect of what he refers to as the "Steven Slee dispute" and its handling by the Registrar of the ALRA (see [5.11]). It is said that "*on the documents before ICAC*" the Registrar pre-emptively and summarily dismissed the concerns of Mr Green and Ms Dates (see [5.11]). Mr Petroulias contends that the exclusion of this evidence has the effect of precluding evidence of the "foundation of trust" established between Ms Dates and Mr Green on the one hand, and Mr Petroulias and Ms Bakis on the other (see [5.12]).

137. The "Steven Slee dispute" to which Mr Petroulias refers was an investigation conducted by the Registrar in 2015 into allegations made by Mr Green and Ms Dates against the then CEO of the ALALC, Mr Steven Slee. Mr Slee was suspended from his position as CEO for the duration of the Registrar's investigation. Ultimately, the Registrar attended a meeting of the ALALC Board in August 2015 and reported that he had found no evidence of any wrongdoing against Mr Slee. Four points may be made in response to Mr Petroulias' allegations. First, it is not correct to say that I prevented evidence from being received in connection with Mr Slee's suspension and ultimate termination or the Registrar's investigation into Mr Slee's conduct. To the contrary, evidence was called in relation to this issue from Mr Steven Slee himself, as well as several ALALC board members (including Mr Hancock, Ms Elenaor Swan, Ms Debra Swan, Mr Larry Slee, Mr Jordan, and Mr Quinlan, as well as both Mr Green and Ms Dates). Additionally, evidence was called on this issue from Mr Ian Sheriff, who was the lawyer for the ALALC who gave advice to the board about the investigation into Mr Slee and the Registrar's findings, and who attended the meeting of the board in August 2015 when the Registrar reported on his findings (see Mr Sheriff's evidence at T1286.21 – 1290.2).

138. Secondly, Mr Petroulias does not identify with any degree of specificity the documents that are said to be before the Commission that put a different complexion on the Registrar's investigation and no approach was made by him or his counsel Mr Menzies QC to counsel assisting to have any such documents tendered.

139. Thirdly, Mr Petroulias asserts that by closing off this line of inquiry into the Registrar's investigation, his cross-examination of Mr Hickey (the auditor of the ALALC) was

rendered less effective (see [5.12(a)]. Yet, this issue was not raised by Mr Petroulias when he cross-examined Mr Hickey, nor was Mr Hickey cross-examined by Mr Petroulias in relation to the Registrar's investigation.

140. Fourthly, Mr Petroulias asserts that this affected Ms Bakis' interests in a number of ways (A1 at [5.12(b) – (c)]), and yet no issue of this kind has been raised with the Commission by counsel for Ms Bakis. Finally, it is not clear how Mr Petroulias contends that the relationship of trust and respect as between Ms Dates and Mr Green on the one hand and Mr Petroulias and Ms Bakis that is said to have been forged as a result of the Registrar's investigation or the fall-out from that investigation, is exculpatory.

The differential treatment of witnesses

141. Mr Petroulias alleges that witnesses appearing before the Commission have been subject to differential treatment, depending on whether they are deemed to be "in the camp" of Mr Petroulias or likely to give evidence unfavourable to him and instead consistent with the Commission's "fixed view" (see section 5 of the application).

142. In support of this contention, Mr Petroulias refers to the treatment given to Mr Zong, Mr Fisk, Mr Lawler, Mr Hickey, Mr Strauss and Mr Kelly. He asserts, incorrectly, that each of these witnesses was protected from cross-examination. In fact (with the exception of Mr Strauss, whom Mr Petroulias has not applied to cross-examine), each of these witnesses were cross-examined by Mr Petroulias and other interested persons. He further asserts that these witnesses are "mollycoddled" and "approached in a sycophantic and ingratiating manner" (A1 at [5.2]). Mr Petroulias does not provide examples from the public hearing in support of these allegations. They are made in general terms only. It is therefore not possible for the Commission to consider whether they could be said to have any foundation. The lack of any particularity in the allegations undermines the capacity for any worthwhile assessment to be made.

143. Similarly, Mr Petroulias does not provide any specific examples of what he says is the contrasting treatment given by the Commission to the "defendants" (said to include Ms Bakis and Mr Vaughan). Mr Petroulias asserts that these witnesses are "overborne with outright hostility from the outset and intimidated" (see [5.2(a)]). Without examples of the specific questioning said to be intimidatory and hostile it is not possible for the Commission to form a conclusion about these contentions. In any event, I am satisfied

that senior counsel assisting without exception showed an appropriate measure of courtesy to all the witnesses he examined at the public inquiry.

144. Mr Petroulias asserts also, that Ms Bakis and Mr Vaughan were "prematurely threatened" with being evasive. Again, any proper consideration of whether or not there could be any truth to this assertion would require an analysis of the particular questions asked by counsel assisting and responses given by the witness. The Commission cannot conduct any analysis, in the absence of this complaint being particularised. A complaint of the kind in question, made by way of general assertion, prevents analysis.

Ground 7: The 'hurdles' place before Mr Petroulias to enable him to cross-examine witnesses

145. Mr Petroulias contends that 'prohibitive hurdles' have been placed before him, which he has been required to overcome before being permitted to cross-examine witnesses, and that the Commission has sought to conceal documents, namely, the Gows Material (see [7.1]–[7.4]).

146. The issue of the Gows Material and the Commission's treatment of it have been dealt with above at paragraphs 90- 92 above.

147. The 'hurdles' to which Mr Petroulias refers are the directions made by me that Mr Petroulias make a written application to cross-examine the witnesses who appeared before the Commission in July and September 2018 (T2835.36-48) and further that he provide to the Commission a statement of his affirmative case (T3196.19-34). These directions are within the Commission's discretion to make and fall within the bounds of Standard Direction 13.

148. Further, it must be observed that these directions were made at least in part with the object of streamlining the further progress of the investigation, in circumstances where the sequencing of witnesses and their cross-examination has been disturbed and deferred specifically in order to accommodate the predicament in which Mr Petroulias found himself (see paragraph 100 above). On 17 September 2018 I indicated to Mr Petroulias that I would not be requiring Mr Petroulias to make application to cross-examine the witnesses called that week, but that I would be requiring him to put in writing any such application so that it could be dealt with when the public hearing was due to recommence in November 2018 (T2835.36-48). The direction made on 19 November 2018 was

similarly directed towards ensuring the efficient further conduct of the public hearing when it was once again adjourned, this time to February 2019 (T3196.29-34).

149. It is not correct to say that Mr Petroulias was the only affected person who has been called upon to put in writing his affirmative case or application to cross-examine. Counsel for Ms Bakis was required to do so in connection with her application to cross-examine Mr Lawler (T102.39). But in any event, it must be emphasised that these directions were made because Mr Petroulias was not available, or in a position, to cross-examine witnesses as and when they appeared to give evidence before the Commission and therefore, would need to be re-called for his benefit. The contention that repeated efforts to assist Mr Petroulias' participation in the public inquiry were in fact calculated to deny him procedural fairness or stand as evidence of bias is rejected.

150. Mr Petroulias also refers to the sworn statements of Mr Vaughan and Mr Faraj that he has served on the Commission. He states that he did so under protest (see [7.4]). It should be observed that it was Mr Petroulias who, of his own motion, acted and provide these statements to the Commission(T3204.13-37; T3206.33-47). He did so without prior notice to or with the leave of the Commission.

Ground 8: Mr Petroulias' allegation of denial of procedural mental health impairment

151. Mr Petroulias contends that he has been denied procedural fairness "*by reason of [his] mental health impairment"* (see [11]). It is not clear how it is said that the Commission has denied Mr Petroulias procedural fairness in light of what he refers to as his "episode of mental health impairment" or "mental health deterioration" but the complaint appears to pre-empt a determination that has not yet been made by the Commission as to when or how it will proceed with the public inquiry, in light of Mr Petroulias' current psychiatric condition and the evidence the Commission has most recently received from forensic psychiatrist, Dr Jonathon Adams, and Mr Petroulias' GP, Dr John Lamont.

152. The allegation appears to be that in light of Mr Petroulias' current psychiatric condition, for the Commission to call him to give evidence in a public hearing will amount to a denial of procedural fairness, because it will cause him harm in the sense of further impairing his mental health (see [11.1] and [11.12]) and because his current condition is inconsistent with a capacity to properly participate in a public inquiry (see [11.2]).

153. If this assessment of the applicant's complaint is correct Mr Petroulias then the only appropriate response is that it is premature. There is not even the possibility of denial of

procedural fairness on this ground because the Commission did not proceed with its scheduled public hearing on 18 March 2019 by reason of the present application and the need for it to be considered as soon as possible.

154. Mr Petroulias complains that Dr Adams gave evidence before the Commission on 6 March 2019 in private, without providing any opportunity to Mr Petroulias to participate. It is important that the proper context as to how this arose be stated because, contrary to what has been asserted by Mr Petroulias, the Commission undertook to assess Mr Petroulias' fitness to participate in the public inquiry recognising that that was an important matter to be determined prior to the resumption of any public hearing. It was always envisaged that Mr Petroulias would be the subject of further examination by Dr Adams, in order to assess his capacity to participate at any resumed hearing – and Mr Petroulias consented to this further assessment. That examination took place on 4 March 2019. No report had been prepared so Dr Adams was requested to attend to give evidence to provide his opinion. Following that examination, a copy of the transcript was made available to Mr Petroulias and his legal representative, and arrangements were made for Dr Adams to be available to give evidence on 19 March 2019 in order to enable Mr Petroulias and his legal representative to cross-examine Dr Adams. As it happened, the lawyer representing Mr Petroulias, Mr Voros, indicated to the Commission that Dr Adams was not required to give further evidence.

155. The Commission also received evidence from Dr Lamont in a private hearing, which was attended by Mr Petroulias and his legal representative.

156. Mr Petroulias contends that it is improper of the Commission to ask Dr Adams to consider Mr Petroulias' competency to give evidence by reference to the test provided by s 13 of the *Evidence Act* 1995 (NSW). Again, the relevance of this test and whether or not the Commission is correct to give consideration to it (either on its own or in conjunction with other factors) are not matters requiring the Commission's attention in this application. Suffice to say, however, that Mr Petroulias' competency to give evidence (and the test for competency provided by the *Evidence Act*) could not fail to be a relevant consideration for the Commission in determining whether and how to receive the evidence of Mr Petroulias. Self-evidently, if Dr Adams had held the opinion that Mr Petroulias either did not have the capacity to understand a question about a fact (matters to which s 13 are directed) or did not have the capacity to give an answer that could be

understood to a question about a fact, then the Commission would not have been able to proceed to take Mr Petroulias' evidence at all.

157. Finally, Mr Petroulias makes a series of allegations that although not relevant to or supportive of this ground, should be addressed:

(a) He implies that Dr Adams is not independent to the Commission (see [11.1]). Dr Adams is entirely independent to the Commission. He is a forensic psychiatrist who has been asked by the Commission to provide, on two occasions during this investigation, his expert opinion as to Mr Petroulias' psychiatric condition. In both reports, he refers to and agrees to be bound by the Expert Witness Code of Conduct (found in Schedule 7 to the UCPR 2005 (NSW));

(b) He asserts that the Commission arranged for Mr Petroulias to be placed in solitary confinement whilst in custody. Obviously, the Commission has no such powers and made no such arrangements;

(c) He asserts that the Commission falsely represented to Dr Adams that Mr Petroulias was now legally represented. The Commission gave this information to Dr Adams after Commission staff were informed that Mr Petroulias was to be legally represented at the upcoming resumed public hearing.

Ground 9: The 'true' allegations against Mr Petroulias have been concealed from him

158. Mr Petroulias alleges that he has been misled by me, counsel assisting and Commission staff as to the proper characterisation of his interests in the inquiry and the matters to be investigated as they affect him. He contends that the 'true' allegation under investigation has been concealed from him (see section 2 of the application, and [2.1]-[2.5], [3.39]), and that he was only made aware of the matters in fact being investigated (insofar as they effect him) when he read the Commission's letter of instruction to Dr Adams, dated 9 November 2018 (see [2.4]). It should be observed that the letter of instruction was provided to Dr Adams so that he might report on issues surrounding Mr Petroulias' fitness to give evidence. The references within it to the matters that were being investigated by the Commission were by way of background, were generally expressed and could not reasonably be characterised as somehow containing a statement of any allegation that would have been new to Mr Petroulias or taken him by surprise.

159. Although not stated expressly, it may be inferred that Mr Petroulias asserts that this concealment, should it be found to have taken place, amounts to a denial of procedural

fairness. He does not say, however, what he would or could have done differently, had he not been labouring under a misapprehension about the true nature of the allegations. In any event, the contention that the Commission has concealed or sought to conceal the nature of the allegations the subject of this investigation must be rejected. The nature of the allegations were made plain by counsel assisting during his opening remarks made on 27 March 2018 (see T3 – 29). The true nature of the matters being investigated, insofar as they affect his interests, must also have been made abundantly clear to Mr Petroulias through the examination of witnesses such as Mr Green, Ms Dates, and Ms Bakis. Further, that Mr Petroulias had in fact grasped the nature of the allegations and was not at all deceived, is apparent from comments Mr Petroulias has put on record, and in writing, over the course of the public hearings.

The Opening

160. Finally from the outset of the public inquiry Mr Petroulias had the benefit of it and the scope and purpose of the inquiry as publicly announced. Mr Petroulias and others have been on notice of the nature of the allegations the subject of the inquiry since the time of the opening remarks by counsel assisting and Mr Petroulias' attention has been drawn to those remarks in recent correspondence from the Commission staff. In particular, in the concluding statements of counsel assisting's opening (at T28), he summarised the allegations facing Mr Petroulias and others in relation to the Gows Heat transaction, namely: (a) whether Mr Petroulias and Mr Green devised a scheme for the sale and/or development of the properties owned by ALALC via the use of a false agreement (the Gows Heat Heads of Agreement dated 15 December 2014), which was to be used as a means wrongfully to confer a financial benefit on each of them; b) whether and if so, the extent to which Mr Petroulias, Mr Green and Ms Bakis participated in and/or assisted with the implementation and execution of that scheme; and c) whether Mr Petroulias, Mr Green and Ms Bakis receiving benefits from their participation in this scheme.

The course of evidence

161. Since the opening, some 32 witnesses have given evidence before the Commission in public hearing. Mr Petroulias has attended all but one week of those public hearings and received from the Commission a copy of the transcript for the week he declined to attend. The examination of certain witnesses, and in particular, that of Mr Green, Ms Dates, and Ms Bakis, was such that Mr Petroulias could not have been under any misapprehension about the issues being investigated by the Commission.

162. For example, in relation to Mr Green, who gave evidence in May and July 2018, he was questioned in relation to the receipt of monies from Mr Petroulias, and the receipt being a benefit for him providing assistance to Mr Petroulias by signing, amongst other things, the Gows Heat and Sunshine agreements, and participating in a scheme with Mr Petroulias (T1707.25 -35; T1710.25-30). The matters put to Mr Green correlated with the way the inquiry was opened, and were clearly within it and the scope. By further example, in relation to Ms Bakis, it has squarely been raised with her that she was knew that Mr Green had no authority to execute any agreement on behalf of the ALALC and knowing of this agreed to participate in a scheme to try and on-sell the Gows Heat Heads of Agreement to a third party (T2537). And it had earlier been put to Ms Bakis that the Gows Heat Heads of Agreement dated 15 December 2014 itself created no legally enforceable right (T2333; T2336).

163. Finally, it is obvious on the basis of comments Mr Petroulias has made during the public hearings that have taken place that he is acutely aware of the matters being investigated, and in particular, how those matters may affect his interests. Examples of such comments are as follows:

    a) Mr Petroulias: *"I understand what this entire inquiry is based on my association with Ms Bakis and that somehow we acted jointly in a conspiracy"* (T1331.46-48, on 14 May 2018);

    b) Mr Petroulias: *"Well that assists a lot, Commissioner. I understand the inquiry is that this is one grand conspiracy by me as the principal, as the, as the, as the major conspiracy to do something naughty to the Land Council"* (T1332.4-8);

    c) Mr Petroulias: *"Are not both barrels pointed squarely at my head and I'm not, not number 1 wanted on this list? Am I missing something or am I in some other proceedings in a parallel universe?"* (T2339.3-5 in relation to his right to cross-examine Ms Bakis);

    d) Mr Petroulias*: "If I'm the grand conspirator who caused him [Mr Hickey] to be misled so that certain action wouldn't be taken that should have been taken, then that's exactly in my interests. Isn't that what this case is, this inquiry's about?"* (T1332.31-34, in relation to his cross-examination of Mr Hickey).

164. Similarly, the amended application Mr Petroulias made on 8 April 2018 to further examine Mr Zong (MFI 22) makes clear that Mr Petroulias was fully aware of the nature of the matters being investigated by the Commission insofar as they related to the purported transaction with Mr Zong and the ALALC. By way of example, at [4.1.1] of that application, Mr Petroulias refers to the case being advanced (by counsel assisting) "that Mr Zong was duped of his personal money because he was betrayed with a promise to obtain for him a 'dealing certificate' by me (and Ms Bakis)". This statement betrays a complete understanding, as early as April 2018, of the allegation referred to by Mr Petroulias in his Application at [2.4(b)], namely, that "Ms Bakis and I dishonestly obtained $1m from Zong as a result of making false or misleading representations".

165. In short, the contentions that the Commission intended to conceal the true allegations against him, or that Mr Petroulias failed to understand what they were, have no foundation whatsoever.

Part G: Consideration

Counsel Assisting

Given that Mr Petroulias has made a number of serious accusations and allegations against counsel assisting the Commission it is essential that I make the following general observations.

1. Both senior and junior counsel have demonstrated a complete understanding of both the role of counsel assisting thoughout the public inquiry to date and the factual issues and complexities of the matters under investigation in Operation Skyline.

2. Equally important are the following:

    i. All witnesses called by counsel assisting to date have been extended the professional respect expected of counsel during the examination of witnesses called before the Commission.
    ii. The examination of witnesses by counsel assisting has at all times been exemplary. I have specifically noted the clarity and precision with which

witnesses have been questioned which has enabled witnesses to clearly understand the point upon which their evidence has been sought.

iii. Whenever documents or page references to documents have been sought by a witness or his/her legal representative counsel assisting have been astute in attending to assist in locating the relevant reference.

iv. The conduct of counsel assisting in the examination of witnesses has, without exception been fair and in no way overbearing or unreasonable. At times the questioning has appropriately been firm but always fair.

166. An examination of the 'grounds' of *"bias and/or denial of procedural fairness"* to support the application *"that the proceedings be discontinued"* indicates that there is no allegation or assertion relied upon by the applicant as to any particular statement or expression by me in the nature of a concluded view evidencing pre-judgment of a specific issue of fact or matter falling within the scope of the public inquiry. The focus of the applicant's arguments and contentions instead is essentially directed to particular aspects of conduct occurring in the course of the inquiry by me as Commissioner and that of counsel assisting. Such conduct is relied upon either as evidence of bias and/or of a denial of procedural unfairness.

167. The specific grounds have been identified in Parts B and F of these reasons. The errors and assumptions made by the applicant have been identified in the discussion of the grounds. The observations of alleged bias and procedural fairness are entirely without substance.

168. For completeness, it is observed that even if Mr. Petroulias had established one of other of the grounds he relied upon, the result or outcome would not result in the discontinuance of the public inquiry. A procedural fairness ground, if established, may in some circumstances require a Commissioner to recuse himself/herself. The public inquiry however would be continued by the Commission reconstituted:

> *ICAC Report on Investigation into allegations made by Louis Bayher against* the Member for Londonderry, Pail Gilson MP (December 1988).

169. The application for discontinuance is, with respect, misconceived on other grounds:

a) There has in fact been no exclusion of witnesses as asserted by the applicant and, in particular, no exclusion of witnesses who it may be claimed were or are capable of giving evidence that is favourable to the applicant or to his interests.

b) There is no duty as asserted in the Commission to assist the applicant present his 'case' or testing evidence.

c) There is no mandatory order or sequence of witnesses which I or counsel assisting have 'perverted'.

d) There has been no demonstrated action that has 'shut out' effective testing of evidence other than questioning that sought to pursue issues that were not relevant to the investigation.

e) No basis has been identified to support the proposition that *"the investigation commenced by the basis of a fixed view"* (see [1] of the application).

f) There is no basis for the contention that counsel assisting was required to formulate *"a competent allegation"* against the applicant (see [3] of the application).

g) There is no '*premise of the investigation*' said by the applicant to be based on "the events adopted by Zong" that is inconsistent with previous sworn versions by him (see [2] of the application).

h) At no time did the Commission or counsel assisting proceed with the public inquiry affixed with the knowledge of the applicant being subject to a "mental health impairment" (see [10] of the application). To the contrary, the Commission adjourned the proceedings on three separate occasions following such an issue being raised by the applicant.

170. Finally, and most importantly, the applicant has failed to establish any actual bias or other disqualifying bias by reference to or in accordance with relevant tests enunciated in the case law authorities to which reference has been made in Part D of these reasons for decision. In this respect:

a) The applicant has failed to address or have regard to the differences between court proceedings and decision-making in investigative commission proceedings.

b) The applicant has failed in constructing his arguments as to bias or denial of procedural fairness to apply the objective test and related principles discussed above.

c) The applicant, in particular, has failed:

i. To identify a factor that it is hypothesised might cause a question in the investigation to be determined or resolved otherwise than as the result of a neutral evaluation of the merits.

ii. To articulate how any matter raised by him constitutes a factor as referred to in (a) above that might cause a deviation from a neutral determination of the merits.

iii. To establish the reasonableness or rational connection of such apprehension of deviation being caused by such a factor in that way.

171. As the analysis in Part F of these reasons indicate many of the arguments and contentions made by the applicant are factually incorrect. Such errors undermine the integrity and foundation for the assertions made in respect of the conduct of the proceedings including the conduct of counsel assisting.

172. The legal test that requires the applicant to establish strong grounds for an application of the kind in question has not been satisfied. Not only are the grounds of the application afflicted with error as noted in Part F of these reasons, but also, they fail to apply or give effect to the test for disqualifying bias by application of the analytical steps referred to in 4(iii) about and mandated by authority: Isbester v Knock City Council, supra, per Gageler J at [59].

173. I have concluded that as there is no basis for a contention of actual or apprehended bias or any denial of procedural fairness the application must be dismissed.

174. Accordingly, the application for discontinuance of the public inquiry made by the applicant on 14 March 2019 is dismissed.