Chapter 1

Inquiry methodology
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This chapter outlines the approach taken by the Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities.
1. INTRODUCTION AND TERMS OF REFERENCE

1.1 Introduction

The ‘Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities’ (Inquiry) was established by direction of the Honourable Mr Eric Ripper MLA, Acting Premier and Minister for Public Sector Management. The direction that established the Inquiry was made pursuant to section 11 of the Public Sector Management Act 1994 (‘PSM Act’) and given to Inquiry members under cover of letter dated 15 January 2002.

Any express Terms of Reference of an administrative inquiry must be interpreted against the background of the inquiry’s enabling (or governing) legislation. The subject matter, text and purpose of that legislation may all be important in that process of interpretation.

The PSM Act is concerned with the management and administration of the Public Sector of Western Australia and the maintenance of the Public Service. Specifically, sections 11 to 14 and Schedule 3 of the PSM Act provide the legislative framework for the conduct of the Inquiry.

The Terms of Reference require the Inquiry to examine how the Public Sector of Western Australia is dealing with—or may in the future deal with—the critical issues of family violence and child abuse in Aboriginal communities.

The term ‘Public Sector’ is defined in section 3 of the PSM Act as including agencies, ministerial offices and some other specified organisations ‘established under a written law’. Some specific entities are excluded from the definition of ‘Public Sector’; for example, courts and tribunals, universities, and certain entities whose primary function is commercial rather than of a public nature. Entities of that character are therefore not subject to powers or procedures enacted in the PSM Act unless otherwise stated in their governing legislation. In short, most government departments and instrumentalities form part of the Public Sector. The scope of the Inquiry will be further discussed throughout the report insofar as it is relevant.

1.2 Terms of Reference

1.2.1 Focus of the Terms of Reference

In light of the Terms of Reference and the scheme of the PSM Act, the Inquiry is clear that its function is to focus on ‘Response[s] by Government Agencies’. The Inquiry’s function does not include the pursuit of evidence of family violence and child abuse, let alone the making of findings of such conduct itself. Nor does the Inquiry’s function encompass recommendations as to the laying of charges against alleged perpetrators, or the commencement of any other legal process.

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*All Acts referred to in this report are Western Australian Acts, unless otherwise indicated.*
Whilst the Inquiry has explained its Terms of Reference thoroughly to those being consulted, from time to time comments have been made to the Inquiry that indicate a misunderstanding of the Terms of Reference. As stated in its 'Interim Report' (Gordon et al. 2002), the Inquiry has reinforced the proper ambit of the Terms of Reference against their statutory foundation when any such misunderstanding has been perceived.

1.2.2 Key definitions
The key terms: ‘family violence’, ‘child sexual abuse’, ‘child abuse’ and ‘sexual abuse’ used in the Inquiry’s Terms of Reference have been subject to ongoing interpretation through relevant government agencies and other bodies.

Definitions of such terms can vary between different agencies, peak bodies, communities and individuals. Not only is this a significant issue for the Inquiry, it is also a significant issue for service providers. The Inquiry—mindful of these various definitions—has not confined itself to forming a view on any ‘correct’ definition of ‘family violence’ or ‘child abuse’ (see Appendices 1 to 4 for a range of definitions).

As noted in the Interim Report, the Inquiry proceeded on the basis that ‘family violence’ and ‘child abuse’ were to be broadly and liberally construed—in particular, to encompass intangible matters such as emotional or economic deprivation and significant denial of opportunity. Chapter 2 of this report explores the changing definitions of family violence and child abuse. In conducting its inquiries, the Inquiry has predominantly been presented with—and therefore considered—material concerning responses to the more publicly recognised forms of family violence and child abuse, such as violence within intimate relationships and physical, sexual emotional abuse, and neglect of children.

The Inquiry defined ‘Aboriginal’ as:-- pertaining to the original inhabitants of Australia and to their descendents and ‘Person of Aboriginal descent’ means any person living in Western Australia wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted as such in the community in which he lives.' (Aboriginal Affairs Planning Authority Act 1972: PI s4)

This definition is adapted from the Aboriginal Affairs Planning Act 1972.

1.3 Interim Report
The Inquiry delivered an ‘Interim Report’ to the Premier on 26 April 2002, pursuant to the Terms of Reference. The ‘Interim Report’ explained the processes and procedures of the Inquiry and canvassed some of the themes emerging from the research material and oral evidence led to that point. The ‘Interim Report’ did not make any findings or recommendations. (Gordon et al. 2002)
2. CONDUCT OF THE INQUIRY

2.1 General

The Inquiry is established and conducted under certain provisions of the PSM Act. Accordingly, the Terms of Reference must be examined against the background of the legislation.

Section 13 of the PSM Act is intrinsic to the processes and procedures of the Inquiry. This section provides, in part, that a special inquiry shall act on any matter at issue according to equity, good conscience and the substantial merits of the case without regard to the technicalities or legal forms. It is not bound by the rules of evidence, but may be informed on any such matter in such manner as the special inquiry considers appropriate.

The Terms of Reference expressly provide that ‘the Inquiry is to consult widely, including with representatives of Aboriginal communities, youth, health services and related organisations’. This, along with the content of section 13 of the PSM Act, has informed the manner in which the Inquiry has sought evidence and information.

This material has been received and obtained in seven key ways:

1. Written submissions from government, non-government agencies and individuals
2. Documents and information provided by government agencies pursuant to section 12 of the PSM Act
3. Consultations with Aboriginal communities
4. Consultations with and visits to government, non-government agencies, various facilities and individuals
5. Formal hearings before Inquiry members, involving the taking of evidence on oath
6. Collection and analysis of relevant research material
7. Material provided by government departments as part of final submissions and consultations.

2.2 Specific means of informing the Inquiry

2.2.1 Advertisements in national, state and regional newspapers and radio discussions

The Inquiry placed advertisements in a range of national, state and regional newspapers to invite submissions. A copy of that advertisement is at Appendix 5. A list of newspapers where the advertisement was placed is at Appendix 6.

The Chairperson was also interviewed on a number of radio programs, which helped advertise the Inquiry and encouraged people to make submissions. A list of those radio stations appears at Appendix 7.
2.2.2 Written submissions

A range of government and non-government agencies and individuals has provided written submissions to the Inquiry—both upon invitation and of their own initiative.

Confidentiality is discussed in greater detail below at sections 4.3 and 5.1 of this chapter. Importantly, in submissions where individuals and non-government agencies requested confidentiality, this has been maintained. The Inquiry received a number of written submissions where this was the case. The list of written submissions made to the Inquiry appears at Appendix 8; this list excludes written submissions made where the author expressly requested their submission be kept confidential.

Whilst the Inquiry attempted to consider all material provided, 30 June 2002 was chosen as a cut off date on receipt of submissions. As such, submissions received after that date may not have received the consideration and analysis that the Inquiry would have liked, and the Inquiry cannot guarantee that the views of those submissions are represented in this report.

2.2.3 Documents and information provided by government agencies

Section 12 of the PSM Act provides for certain coercive powers for special inquiries. In particular, section 12(1)(b) empowers a special inquiry to, by notice in writing, require a person to produce to it any book, document or writing that is in the possession or under the control of the person.

The Inquiry issued state government agencies numerous notices to produce documentation under section 12(1)(b) of the PSM Act. Those government agencies provided what is, in most cases, a large volume of files and other documents to the Inquiry. The Inquiry also requested documents from bodies and individuals not subject to the power to coerce production of those documents. Generally, requests were well received and the body or individual concerned provided the information requested.

The Inquiry was, in most instances, significantly assisted by the relevant government agencies. In particular, the response provided to the Inquiry by allocated ‘contact officers’ within key departments when requests were made for documents or other assistance was most commendable.

2.3 Consultations with Aboriginal communities

At the commencement of the Inquiry, a list of Aboriginal communities and organisations Appendix 9 was provided by the Department of Indigenous Affairs (DIA) and was used by the Inquiry as a basis for its consultation schedule. This list is used extensively by DIA and the Aboriginal and Torres Strait Islander Commission (ATSIC) in the course of those agencies’ business.

2.3.1 Initial contact with Aboriginal communities

The Aboriginal communities on the list referred to above at Appendix 9 formed the basis for a mail-out advising of the Inquiry’s Terms of Reference, inviting submissions and attaching a questionnaire for them to return to the Inquiry.
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2.3.2 Consultation with Aboriginal communities outside the Perth metropolitan area
Over 40 town and Aboriginal communities were visited outside the metropolitan area, with surrounding Aboriginal groups and Aboriginal communities notified and invited to participate in meetings with Inquiry members. A list and map detailing the towns and Aboriginal communities visited appears at appendix 10 and 11, respectively.

The Inquiry developed a set of criteria which was used to determine the regional centres, towns and Aboriginal communities to be visited. These criteria provided a broad sample of different Aboriginal communities and allowed the Inquiry to consult with the largest number of communities possible in the time available.

As noted by the Inquiry in its Interim Report (Gordon et al. 2002: 8 s3.2.1), due to time restrictions, visits to Aboriginal communities have necessarily been brief. The Inquiry acknowledges that brief visits are not the best way of obtaining information from Aboriginal communities. It is also recognised that family violence and child abuse are difficult topic areas and communities—both Aboriginal and non-Aboriginal—have difficulty in discussing these matters freely (Gordon et al. 2002: 8 s3.2.1). There remains a concern that some Aboriginal community members may not have spoken freely because of a number of factors, including a fear of retribution.

2.3.3 Cultural considerations
However, whilst the Inquiry was mindful of cultural barriers during the consultation process, it believes that this process fulfilled its purpose as required by the Terms of Reference. Further, the Inquiry was particularly encouraged to receive recommendations from the communities for 'practical solutions'—as required by the Terms of Reference—which have been considered in preparing the report.

The timeframe and logistical issues faced by the Inquiry have necessitated a consultation process that does not always fit with culturally appropriate ways of gathering and giving information. The Inquiry has taken considerable care to acknowledge and respond to cultural sensitivities, issues of gender and other related matters.

On occasions, cultural and other community responsibilities meant that some community members were unable to attend meetings with the Inquiry. Inquiry members met with a significant range of people in the various communities. Sometimes this involved only council members; in others it involved broad representation from community members, as well as government and non-government agencies providing services.

2.3.4 Summary
The Inquiry has received a large volume of useful information during the course of consultations with Aboriginal communities. That information was analysed and comments sought from relevant government agencies, and now forms the basis for a significant part of this report.
2.4 Transcription of consultations

Informal consultations with Aboriginal communities, government and non-government agency representatives and interested individuals were recorded either by tape or by hand. A formal application (made on 6 June 2002 by Counsel for the five government agencies legally represented) sought access to the substance of any relevant material arising from those consultations that may have adversely affect the represented agencies (Transcript of hearing of 6 June 2002). On 12 June 2002, the Inquiry ordered that the represented agencies be given access to the relevant material arising from the informal consultations. The ‘material’ provided was that which may have formed the basis of findings adverse to those represented agencies, or otherwise raised significant issues. The material, generally in the form of a summary of the essence of the informal consultations, was presented in a way so as not to identify complainants, or otherwise unnecessarily compromise the confidentiality of the consultations. (Gordon et al. 2002b)

2.5 Protocols concerning information provided to the Inquiry

The Inquiry has received a large volume of information from various sources addressing the Terms of Reference. For example, 1600 submissions and other pieces of correspondence were received by the Inquiry. The Inquiry was also mindful of the criticism voiced by Aboriginal communities that they are often over-consulted, with little follow-through by government agencies on actions requested. The Inquiry established protocols for dealing with the information it received. In its role, the Inquiry was limited to making recommendations to government pursuant to the Terms of Reference. Certain more specific issues raised by Aboriginal communities were—with permission from the individual or community concerned—passed on to relevant government agencies for further action. Aboriginal communities which requested information from the Inquiry were also provided with such information as soon as possible.

2.6 Consultations and visits to a range of government and non-government agencies, facilities and individuals

The Inquiry conducted visits to a range of government and non-government agencies. Those visits were either at the Inquiry's initiation or the invitation of the relevant agency.

2.7 Website

An Inquiry Website was established at www.fvcaing.dpc.wa.gov.au to provide information to the public through the Internet. The Website included copies of the Terms of Reference, 'Opening Addresses' by the Chairperson and Counsel Assisting, guidance for making submissions, the questionnaire sent to Aboriginal communities and agencies, and the Interim Report.

*As at 16 July 2002.*
3. FORMAL HEARINGS BEFORE THE INQUIRY

3.1 General

The Inquiry conducted hearings in which Inquiry members heard oral evidence and received written material in the form of exhibits. Under section 12 and Schedule 3 to the PSM Act, the Inquiry had certain powers to compel the attendance of persons to give evidence. In most instances witnesses presented before the Inquiry upon the invitation of Counsel Assisting. In relatively few instances was it necessary for the power to compel attendance to be used.

The Inquiry heard evidence both in public and private (or ‘in-camera’) hearings, however the vast majority of hearings were open to the public. Any decision to take evidence in private took into account a variety of factors sourced in the nature of the proposed evidence and the overall public interest.

The format for taking evidence in formal hearings was inquisitorial rather than adversarial. Although the Inquiry observed certain formalities of a court setting and took evidence under oath, the examination of witnesses by Counsel Assisting was dissimilar to the taking of evidence in orthodox adversarial proceedings. Secondary and other indirect sources of evidence were often employed. Witnesses were freely encouraged to express personal opinions. Comments on reports and other documents were by no means confined to witnesses who had authored those reports. Overall, witnesses were encouraged to provide Inquiry members with the widest possible benefit of their insights and understanding.

Witnesses called to give evidence to the Inquiry were drawn from a variety of sources, but were predominantly from government agencies. A list of all witnesses who gave evidence appears at Appendix 12, excluding those witnesses who gave evidence in private.

3.2 Selection of witnesses to appear before the Inquiry

The complexity of the issues encompassed by the Terms of Reference necessitated a selective approach to the calling of oral evidence. Counsel Assisting made decisions as to the nature of the evidence to be formally led, and the identity of witnesses accordingly. Generally, Counsel Assisting sought to present a picture of aspects of governmental response to the issues of family violence and child abuse in Aboriginal communities that most efficiently and economically addressed the Terms of Reference in the time available.

3.3 Representation of certain government agencies

On 13 February 2002 an application was made by Ms Kate McDonald and Mr Michael Jenkin, both of the Crown Solicitor’s Office of Western Australia, for leave to appear on behalf of the Commissioner of Health, the Commissioner of Police, the Director Generals of the Departments of Justice, Education and Community Development (Transcript of hearing of 13 February 2002). Such leave was granted to Ms McDonald and Mr Jenkin, who were then present for the vast majority of the formal hearings. On 26 June a further application was made by Ms McDonald, together with Mr Jenkin, to appear on behalf of the Director General of the Department of the Premier and Cabinet. Such further leave was duly granted. (Transcript of hearing of 26 June 2002)
3.4 Protection afforded to witnesses appearing before the Inquiry

Clause 6(2) of Schedule 3 to the PSM Act provides that witnesses before a special inquiry under the Act have the same protection and are subject to the same liabilities as witnesses who appear in any civil or criminal proceeding or as a witness in any case tried in the Supreme Court.

4. OTHER MATTERS

4.1 Examination of further cases

The Inquiry received information about specific matters or 'cases' in two ways:

1. Pursuant to notices issued under section 12 of the PSM Act seeking documentation
2. Through contact initiated with Inquiry staff by victims, third person informants and during consultations with Aboriginal communities.

The Inquiry was of the view that some cases needed to be examined insofar as they shed light on the Terms of Reference by forming practical examples of government responses to complaints of family violence and child abuse. Of those brought to the attention of the Inquiry, 15-20 key cases were selected for further consideration. Nine were selected and reviewed by an independent expert, others were examined by the Inquiry staff and key themes developed. This is discussed in further detail in Chapter 18.

4.2 Reviews of relevant research

The Inquiry was expressly required to consider current research into the prevalence, causes and solutions to Aboriginal family violence. The Inquiry was of the view that the Terms of Reference 2 and 3, to be fully and properly addressed, likewise required consideration of current research into those aspects of child abuse in Aboriginal communities.

The Inquiry commissioned reviews of research relevant to the Terms of Reference from the National Child Protection Clearinghouse and the University of Western Australia. The Department of Community Development (DCD) provided an overview of research findings on coordination. In addition, significant research findings and other Inquiry reports were examined by the Inquiry. The research commissioned from the National Child Protection Clearinghouse is attached as Appendix 13.

4.3 Confidentiality considerations

The Inquiry is mindful that much of the material it received is highly sensitive and needed to be treated with a high level of confidentiality. In order to maintain the confidentiality of material received, the Inquiry:

(a) obtained appropriate undertakings from all persons who had access to any material provided to the Inquiry during its course

(b) put in place stringent records management policies and procedures to ensure material provided to the Inquiry was handled with the strictest confidentiality at all times
(c) clearly explained those processes to people considering giving information to the Inquiry.

On 8 March 2002, an application was made on behalf of Western Australian Newspapers Pty Ltd (WAN) and the Australian Broadcasting Commission (ABC) ('the Applicants') for access to all material received in the form of exhibits by the Inquiry during the course of hearings (Transcript of Hearing of 8 March 2002). The Applicants’ position was, in essence, based on openness and an assertion that access to the exhibits was necessary for fair and open reporting of the hearings. The submission placed substantial weight upon a perceived public interest in the fair and accurate reporting of the affairs and workings of government.

After hearing submissions from the Applicants’ Counsel, Counsel Assisting and Counsel for represented government agencies, the Inquiry deliberated and concluded that:

"In weighing up those matters, the committee is of the view that the balance firmly favours the non-disclosure of documents that have become exhibits. To release those documents to any party external to the Inquiry would compromise the confidentiality through which persons have availed themselves of the services of government agencies, perhaps irreparably so. It would also run counter to the format and method of the taking of oral evidence and the balance that has been struck in that regard ..." (Gordon et al. 2002a)

The Inquiry Members then made a direction under section 13(4) of the PSM Act that documents made an exhibit to the Inquiry were not to be provided or made available to any person beyond the Inquiry itself, its staff and Counsel representing the government agencies themselves. The management of documents in possession of the Inquiry, including exhibits, is discussed below at section 5.1.

4.4 Recurrent legal themes

Certain legal themes and doctrines have recurred throughout the course of the Inquiry. Two of them warrant brief treatment.

4.4.1 Natural justice

In the broadest sense, the rules of justice require that persons be afforded a fair and unbiased hearing before decisions are taken which affect them. What is often termed the ‘hearing rule’ required a decision maker to hear a person before making a decision affecting the interests of that person. The so-called ‘bias rule’ provides for disqualification of a decision maker where circumstances raise a doubt as to that decision maker’s impartiality. (Aronson 2000: 299, 300)

These essential components of the doctrine serve to illustrate its concern with the process or manner of administrative decision making, rather than seeking to evaluate the merits—let alone the ‘justice’—of a decision. ‘Natural justice’ is not a mechanism to review the conclusions or findings of a decision maker on the basis of any perceived ‘natural’ concepts of right or wrong.

‘Procedural fairness’ is often used as a synonym for ‘natural justice’. The terms are used interchangeably in this report.
The principles of natural justice are applicable to administrative inquiries such as special inquiries under the PSM Act. The content of those principles varies—at times considerably—with the nature of particular administrative inquiries and their governing legislation. It is well established, however, that a person or entity under inquiry is entitled to notice of any finding adverse to it, with a reasonable opportunity to be heard before that finding is confirmed.

The Inquiry was at pains to ensure that natural justice, particularly in the last sense, was accorded to the government agencies under examination. To that end, lists of provisional findings with respect to the seven agencies primarily under examination were served on those agencies in the period 9 July 2002 to 11 July 2002. Responses to those lists were conveyed both verbally and in writing, including through Closing Submissions.

4.4.2 ‘Rights’

Individuals and government and non-government agencies have commonly used the term ‘rights’ in their submissions to the Inquiry. The term carries a variety of shades and nuances in meaning. The term ‘rights’ refers to the legal concept of ‘civil rights’, which are the rights or liberties of all individuals in Australia, including non-citizens. The Inquiry notes that there is no agreed statement of the subject matter of entitlements contained within the ambit of the concept of civil rights. (Halsbury 2002: 80-1)

‘Rights’ strictly so called are to be distinguished from freedoms. The latter concept denotes circumstances where laws are confined so as to create an immunity on the part of a citizen from being adversely affected by those laws. The implied freedoms of political communications protected by the Commonwealth Constitution are to be understood in that limited sense. A true ‘right’, by contrast, is an entitlement that may be enforced by, for example, the commencement of legal proceedings to obtain a remedy in vindication of that right.

Further, some submissions referred to ‘human rights’ maybe defined as ‘basic rights for each human being and inalienable’ (Halsbury 2002: 80-10). These ‘human rights’ may form part of Australian—and indeed WA law—where they have been specifically enacted. ‘Human rights’ also form part of international law, however the status of such laws within Australia, and WA, varies.

Finally, neither Australia, nor any of its states or territories, have a Bill of Rights, unlike many other western countries, such as the United States, Canada and New Zealand. Rather, certain ‘rights’ may be found, expressly or impliedly, in the Commonwealth Constitution, other legislation and the common law.

*Mahon v Air New Zealand 12 [1984] AC 808
*Ainsworth v CJC [1992] 175 CLR 564
*Those agencies are Department of Community Development (DCD), Western Australian Police Service (WAPS), Department of Justice (DOJ), Department of Housing and Works (DHW), Department of Health (DOH), Department of Education (DOE) and Department of Indigenous Affairs (DIA). A separate list concerning matters of a ‘cross government’ nature was also prepared and served on the Crown Solicitors Office. In the case of DIA, a letter addressing certain themes and issues from these lists and noting the provisional findings was prepared and sent to that department’s Director General on 12 July 2002.
*Lange v ABC [1997] 189 CLR 520 at 560
5. CESSATION OF INQUIRY

At the conclusion of the Inquiry, the entity that is the ‘Inquiry’ will cease to exist. As such, all records, offices and fixtures shall be returned to the Department of the Premier and Cabinet.

5.1 Documentation – confidentiality and record keeping requirements

The Inquiry’s records are subject to the State Records Act 2000, which requires that a ‘Record Keeping Plan’ be created, registered and adhered to. Under the State Records Act, the Record Keeping Plan is a document that provides an accurate reflection of the records management program within the organisation. Generally the plan—for each individual agency—would include information about the organisation’s record keeping systems, disposal arrangements, policies, practices and processes.

Documents in the possession of the Inquiry will be transferred to the Department of the Premier and Cabinet at the conclusion of the Inquiry. A retention and disposal schedule has been developed and is awaiting approval by the State Records Commissioners. Once approved, this Retention and Disposal Schedule (at Appendix 14) will authorise the retention and disposal of all records accumulated by the Inquiry.

5.2 Budget

The Inquiry, at the outset, prepared a budget for the consideration of the Department of the Premier and Cabinet. As a result of this budgetary process, additional funding was made available to the Inquiry. It is anticipated that—when all accounts are finalised—the expenditure by the Inquiry will be within budget and within the initial funding allocation. A copy of the unaudited financial statement has been included at Appendix 15.

5.3 Fixtures and offices

On 31 July 2002, members and staff will vacate the Inquiry office—located on the 11th floor, London House, 216 St Georges Terrace, Perth, WA. All fixtures will be removed and relocated to the Department of the Premier and Cabinet. The hearing room, located on the 9th floor, was decommissioned on the 25 July 2002, with all fixtures relocated to the Department of the Premier and Cabinet.

Further correspondence relevant to the Inquiry should be directed to:

Department of the Premier and Cabinet
197 St George’s Terrace
Perth, WA 6000
Telephone (08) 9222 9888
REFERENCES
Gordon, S Hallahan, K & Henry, D (2002a) Inquiry decision response to Counsel for the media (the West Australian & the ABC) for access to documents tendered as exhibits, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities, Decision in response to request for documents, 8 March 2002, Perth.

LEGISLATION
Public Sector Management Act 1994 (‘PSM Act’) (WA)
State Records Act 2000 (WA)
Freedom of Information Act 1992 (WA)
Aboriginal Affairs Planning Authority Act 1972 (WA)
PSM Act see Public Sector Management Act

LEGAL CASES
Mahon v Air New Zealand 12 (1984) AC 808
Ainsworth v CJC (1992) 175 CLR 564
Lange v ABC (1997) 189 CLR 520