19 October 1992

The Honourable W P Pidgeon
Deputy of the Lieutenant Governor and
Administrator of Western Australia
Government House
St George's Terrace
PERTH WA 6000

Your Honour

In accordance with the Commission issued to us on 8 January 1991 and subsequently varied, we have the honour to present to you Part I of the report of our inquiry into the terms of reference set out therein.

This is an interim report delivered to you pursuant to the power contained in paragraph (3) of our Commission.

Yours sincerely

G A Kennedy
Chairman

R D Wilson
Commissioner

P F Brinsden

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CHAPTER 1

INTRODUCTION

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1.1 Commission terms of reference

1.1.1 On 19 November 1990, the Premier, Hon Carmen Lawrence MLA, announced the intention of her Government to appoint a Royal Commission to inquire into certain matters. On 8 January 1991 His Excellency the Governor approved the issue of the following Commission:

> "To: THE HONOURABLE MR JUSTICE GEOFFREY ALEXANDER KENNEDY;
> THE HONOURABLE SIR RONALD DARLING WILSON AC KBE CMG QC; and
> THE HONOURABLE PETER FREDERICK BRINSDEN QC:
>
> By this Commission issued with the advice and consent of the Executive Council, I, the Governor)
>
> (1) Appoint you to be a Royal Commission to inquire and report as follows:
>
> 1. To inquire whether there has been)
>
> (a) corruption;
> (b) illegal conduct; or
> (c) improper conduct,
>
> by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations in respect of the matters referred to in Schedule 1, and to report whether)
>
> (d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or
>
> (e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.
>
> Schedule 1
>
> 1.1 The matters referred to under the headings `WA State Government Funding of Rothwells following October 1987 Stock Market crash', `Share Trading by the SGIC and the GESB in Rothwells and Paragon shares' and `SGIC trading in Bell Group shares' in the annexures to Chapter 11 of Part I of the

`Report of Inspector on a Special Investigation into Rothwells Ltd' by M J McCusker QC.

1.2 The purchase by the State Government Insurance Commission of shares in the Broken Hill Proprietary Company Limited from interests associated with the late Robert Holmes a Court.

1.3 The Kwinana petrochemical project.

1.4 Central City property transactions entered into from 1984 onwards by the Western Australian Development Corporation, the Government Employees Superannuation Board (formerly the Superannuation Board) and the State Government Insurance Commission (formerly the State Government Insurance Office).

1.5 Government Employees Superannuation Board (formerly the Superannuation Board) involvement in the Fremantle Anchorage and Halls Head developments.

1.6 The acquisition of Northern Mining Corporation NL in 1983.

1.7 The purchase of the Fremantle Gas and Coke Company by the State Energy Commission of Western Australia in 1986.

1.8 The sale of the Midland Abattoir site in 1986.

1.9 Financial assistance by Government to Bunbury Foods Limited.

1.10 The natural gas sales agreements entered into by the State Energy Commission of Western Australia for the purchase of natural gas from the North West Shelf Joint Venturers and the contracts relating to the Dampier to Perth natural gas pipeline project.

1.11 The Burswood Island Casino.

1.12 The Teachers Credit Society and the Swan Building Society.

2. To inquire whether there has been)

(a) corruption;
(b) illegal conduct; or
(c) improper conduct,

by any person or corporation in respect of the matters referred to in Schedule 2 which in your view warrant further investigation after present police inquiries are completed, and

To report whether)

(d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or

(e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.

Schedule 2

2.1 Allegations of bribery with respect to planning decisions of the City of Stirling for Observation City.

2.2 Other allegations arising from the trial of Robert Mark Smith and Robert Paul Martin held in The District Court of Western Australia before His Honour Judge Keall and a jury in October 1990, including those with respect to surveillance activities.

2.3 The adequacy of the police investigation of the matters referred to in items 2.1 and 2.2 of this Schedule;

(2) Declare that without limiting the powers otherwise available to you)

(a) in conducting the inquiry you are to seek to avoid prejudice to pending or prospective criminal or civil proceedings and to the interests of the State in pending or prospective civil proceedings in such manner as you think fit and, in particular, by taking evidence or otherwise proceeding in private, precluding the publication of evidence, or deferring the taking of evidence, where you consider any such course to be appropriate;

(b) you may, during the course of the inquiry, refer any matter to the Solicitor General or another appropriate authority with a view to the institution of criminal proceedings, where you consider that delaying such action to the completion of your report would be undesirable;

(3) Declare that you are to report within 12 months of the issue of this commission and that you may publish interim reports;

(4) Declare that, by virtue of this commission, you may in the execution of this commission do all the acts, matters and things and exercise all the powers that a Royal Commission may lawfully do and exercise, whether under the Royal Commissions Act 1968 or otherwise;

(5) Declare, without derogating from the powers which you otherwise have, that you may, whether simultaneously or at different times, act separately to take evidence or otherwise conduct the inquiry; and

(6) Appoint, under section 6 of the Royal Commissions Act 1968, the Honourable Mr Justice Geoffrey Alexander Kennedy to be the Chairman of the Royal Commission for the purposes of that Act."

1.1.2 Pursuant to the provisions of section 22 of the *Royal Commissions Act 1968*, the Attorney General, Hon J M Berinson MLC, appointed Mr Anthony Templeman QC, Mr Brian Martin QC, Mr David Wicks (now Mr David Wicks QC), Mr Michael Barker, Mr Roger Davis and Mr Christopher Rowe to assist the Commission. Mr Wicks assumed the role as Principal Solicitor to the Commission. As the scale and size of the task confronting the Commission became more readily apparent, on 21 November 1991 Mr Berinson appointed two further barristers to assist the Commission, namely Mr Allan Fenbury and Mr Michael Buss.

1.2 Relevant statutory enactments

(a) The Royal Commissions Act 1968

1.2.1 At an early stage the Commissioners expressed concern about two matters arising under the *Royal Commissions Act 1968*. The first was that, while the Commission purported to authorise the Commissioners to act separately to take evidence or otherwise conduct the inquiry, the Act contained no such express power, leaving open to possible argument that a Commission appointed under section 5 of more than one person, could only authorise those persons to act jointly and a Commission purporting to appoint them severally might be beyond the scope of the enabling power. As the terms of reference were extensive, the Commissioners were of the view that there would be occasions when evidence could properly be taken before one of the

Commissioners acting alone and that to do so would not only expedite the work of the Commission, but also save expense and hasten the completion of the hearings. Consequently, the Solicitor General, Mr Kevin Parker QC, was asked to approach the Government with a request that the *Royal Commissions Act* be amended to permit persons holding a Commission under the Act to act separately in taking evidence for the purpose of an inquiry if they should so agree among themselves, and that the amendment be made specifically referable to the present Royal Commission.

1.2.2 There was another matter of concern to the Commissioners, being the lack of a power within the Act of search and seizure as distinct from a power to summon witnesses to produce documents.

1.2.3 The approach by the Commissioners was viewed favourably by Government and an Act to amend the *Royal Commissions Act 1968* was passed by Parliament. An amendment to section 7 enabled a Commission, comprising more than one Commissioner, to determine from time to time whether in any respect one or more of the Commissioners should act separately from the other or others. A new section 18 allowing for search and seizure, with the authority of the Supreme Court, was also inserted. The Amendment Act was deemed to have come into operation on 8 January 1991.

(b) *The Royal Commission into Commercial Activities of Government Act 1992*

1.2.4 The terms of reference in paragraph 1 required the Commission to "inquire whether there has been -

(a) corruption;
(b) illegal conduct; or
(c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations in respect of the matters referred to in Schedule 1, and to report whether -

(d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or

(e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest."

Paragraph 2 related to Schedule 2, but was in substantially similar terms.

1.2.5 It will be observed that both paragraphs require the Commission to "inquire whether there has been (a) ... (b) ... (c) ..." but then to "report whether (d) ... or (e) ...". This distinction between "inquire" on the one hand and "report" on the other gave rise to contention as to the precise scope of the obligation resting on the Commission. It was argued by Counsel appearing for some of the parties represented before the Commission that with respect to corruption, illegal conduct and improper conduct, that is, paragraphs (a), (b) and (c), the Commission was bound to inquire but was not empowered to report the result of that inquiry. Notwithstanding the apparent absurdity of the outcome of such an interpretation of the terms of reference, the submission was pressed on the Commission. Thereafter, the Parliament enacted the abovementioned Act. The Act provided, in relation to both paragraphs 1 and 2, that the Commission shall inquire and report as required by the terms of reference, but as though each paragraph commenced with the words "To inquire *and report* [our emphasis] whether there has been -

(a) corruption;
(b) illegal conduct; or
(c) improper conduct,

by any person or corporation ...".

1.2.6 It would now seem to be perfectly clear that the Commission is required to inquire and report whether there has been, in the context of the specified terms of reference, corruption, illegal conduct or improper conduct. Nevertheless, these words require careful consideration. The Commission believes it to be imperative, if the interests of justice are to be observed and protected, that proper notice be taken of the nature of this Commission. It is an administrative body, or perhaps now, in the light of

the Act, an administrative body with a statutory flavour. It is not a court of criminal justice charged with the determination of the guilt or innocence of persons prosecuted for breaches of the law. It is not bound by the rules of evidence. The fact that this Commission has been conducted by present and former members of the judiciary should not be seen as constituting it a "judicial" inquiry or giving it the status of a court. While it is the function of a judge or a jury to determine issues, at least as far as the law is concerned, the purpose of a Royal Commission is to find facts and report them, and often, as in this case, to make recommendations. It has no power to affect the legal rights of individuals.

1.2.7 In these circumstances, the Commission has sought to determine, through the words of the Act, the true intention of the legislature. Careful consideration has led us to conclude that we are required, by the Commission as affected by the Act, *inter alia*, to report whether there is material which should be considered by the appropriate authority charged with responsibility for the institution of criminal proceedings. It is for that authority, not this Commission, to determine whether there is a *prima facie* case warranting prosecution. Far less is it the task of this Commission to make an express finding of the commission of a criminal offence. Such a finding would have no consequence in law and could be highly prejudicial.

(c) *Service and Execution of Process Amendment Act 1991*

1.2.8 The abovenamed Act being passed by the Commonwealth Parliament, was assented to on 23 August 1991. It introduced a new Part 3A dealing with service and execution of process of investigative tribunals. The provisions of the amendment enable, *inter alia*, service of process such as a subpoena, interstate when such process has been issued by an investigating tribunal, which phrase includes a person appointed by the Governor of a State to inquire into and report on any matter. The amendment was very timely as it enabled the Commission to issue subpoenas addressed to persons interstate to compel them to give evidence before the Commission.

(d) Amendments to the *Income Tax Act 1936*

1.2.9 On 12 April 1991 Mr David Wicks, the Principal Solicitor Assisting the Commission wrote to the Honourable Paul Keating, Treasurer, requesting an amendment to the *Income Tax Assessment Act 1936*, similar in terms to the existing section 16A, which would enable the Commission to have access to income tax records and other information held by the Commissioner of Taxation. By letter dated 21 May 1991 (but not received until 24 June), the Treasurer declined this request citing the continued confidentiality of income tax information and good tax administration as reasons for the refusal, and indicated that "the Government is strongly of the view that the current level of secrecy of income tax information should not be disturbed". However, he pointed out that information would be supplied under existing legislation to a law enforcement agency, provided it related to a particular offence by a specified person. The Commission was not a law enforcement agency in the terms of the Act.

1.2.10 The Commission continued to press the matter in correspondence but was unsuccessful in obtaining access to the information sought.

1.2.11 During his submissions in relation to terms of reference 1.1 to 1.4 on 12 May 1992, Senior Counsel Assisting the Commission tendered the correspondence, between the Commission and successive Treasurers, into evidence.

1.2.12 On 15 May 1992, the Prime Minister announced the intention of the Government to amend the *Taxation Act*. The Commissioners publicly welcomed the

proposal. The Act was later amended in a manner which facilitated the Commission's work.

1.3 Premises and administration

1.3.1 Prior to the announcement of the Commission, the Office of Government Accommodation had negotiated a five year lease on the 12th, 13th, 14th and 16th floors of the Natural Mutual Centre at 111 St George's Terrace. It was decided that the Commission would use the 12th, 13th and 16th floors while the 14th would be equipped for future use by the Supreme Court of Western Australia. About two weeks after 8 January 1991, the Building Managing Authority had completed preliminary plans and let a $297,000 contract to John Holland Interiors of Perth to convert open space to offices and hearing rooms. The contract, which would have taken three to four months under normal circumstances, was completed in about half that time. By 25 February, staff had moved into the new offices, having worked from temporary accommodation on another floor, and by 12 March public hearings had begun. The achievement was quite extraordinary and reflected great credit on the efforts of the Chief Executive of the Commission, Mr Gordon Pearce and his staff.

1.3.2 A security system was installed whereby all major exits and the Commission's operational areas were fitted with alarm panels activated by Mil key, motion detectors were fitted in ceilings, and duress buttons were installed in public and reception areas and connected to off-site surveillance services.

1.3.3 On completion, the 13th floor comprised three hearing rooms fully furnished and equipped. Upon vacation by the Commission, it will be immediately available for other uses. Specifically, the 13th floor could provide three courts, one large enough to sit three judges and three associates, together with three sets of chambers, a secretarial area, and a room equipped as a library. The Commission's computer and other technological facilities will also be available for use by other State Government departments.

1.3.4 The support of the Western Australian Government must be acknowledged. The Premier and Treasurer indicated several times during the inquiry that every possible resource and assistance would be made available to ensure the

effectiveness of the Commission. We believe few inquiries could claim to have been as well resourced. That support included supplying access to Cabinet records.

1.3.5 Difficulty was experienced initially determining the appropriate level of resources, primarily because so little was known about the scale of what needed to be done. Spending in 1990/91 totalled $6.9 million and included the cost of establishing hearing rooms and offices for the Commission in rented premises in central Perth. For the 1991/92 year a separate appropriation was made by Parliament of $7.75 million based on the Commission's then expected reporting date of 8 January 1992. Extra finance then was approved when the Commission was extended to 30 June and later to 1 November 1992. Expenditure in 1991/1992 amounted to $10.393 million from the Consolidated Revenue Fund and a further $368,000 from the General Loan Fund. A provision of $2.821 million has been included in the estimates for 1992/1993 which should be sufficient to meet the Commission's requirements until 31 October 1992. It is anticipated that the total cost of the Commission will be about $20.5 million. That sum does not include the cost of representation before the Commission of a number of individuals and corporations who were funded by Government.

1.3.6 Details of the record keeping function, the recording and transcription service and the information technology used by the Commission are included in Appendix 4.

1.4 The media

1.4.1 To assist in managing the intense media interest that the Commission was expected to generate, a media liaison officer, Mr Robert Millhouse, was seconded to the Commission to handle extensive media inquiries and requests for information from both inside and outside the Commission, plan and establish facilities for journalists covering the Commission, draw up guidelines for media attendance at hearings, plan accreditation for journalists, and establish a system for the release of administrative information before and during Commission hearings.

1.4.2 On 23 January 1991, the Commissioners, the Principal Solicitor, the Chief Executive and the media liaison officer, met 25 media executives and journalists to discuss concerns and requirements. While many of the problems of media coverage

were shared by all news organisations, the television networks argued strongly for cameras to be permitted in hearing rooms and radio stations and newspapers argued for the use of tape recorders. All highlighted the problems of deadlines. This first meeting also gave the Commission an indication of media numbers which proved helpful in designing seating for hearing rooms and media facilities generally.

1.4.3 On 31 January, the Commissioners held their first news conference where they announced their decisions on many of the media's requests. In doing so, they broke new ground in the provision of media facilities, the use of tape recorders, television coverage, and media access to transcript and exhibits. The facilities provided to the media for their coverage of Commission hearings was unprecedented for any tribunal in Western Australia.

1.4.4 Throughout the inquiry, the Commission advertised its intention to commence inquiries into new terms of reference and called for public submissions. News releases accompanied the advertisements and the Commission's hearing schedules were regularly listed in *The West Australian.* The Principal Solicitor, Mr Wicks, was nominated spokesman for the Commission and gave many interviews during the inquiry. His nomination freed the Commissioners and Counsel Assisting from the pressures of media inquiries and helped to maintain a consistent public approach.

1.4.5 Details of the facilities provided to the media, the arrangements made for media coverage of the hearings and a list of the news organisations which attended the Commission together with the names of the principal reporters, are included in Appendix 4.

1.5 Advertising for information

1.5.1 A media release by the Commission on 25 January 1991 announced that people with information relating to the matters being investigated were to be asked to bring that information forward. Press advertisements to be lodged in papers around Australia from the following weekend invited contact with the Commission. After setting out in summary form the terms of reference, the media release invited people to feel free to contact the Commission about any matter thought to be relevant. The means

of contact were described by citing the address for those wishing to communicate by letter and the appropriate telephone and facsimile numbers.

1.5.2 As indicated in the media release, on the weekend of 2 and 3 February 1991, there appeared in newspapers throughout Australia an advertisement summarising the terms of the Royal Commission and inviting persons or organisations with information or documentation relating to any matter under investigation or which might indicate a possible line of investigation, or which might otherwise help the Commission, to contact the Commission as soon as possible. The advertisement also directed the means by which such communication could be made.

1.5.3 At the news conference on 31 January 1991, the Commissioners announced that public hearings would commence on 12 March 1991. That announcement was followed by a public advertisement in *The West Australian* on 16 February, advising the first item of business to be inquired into as the purchase of Fremantle Gas & Coke Company ("Fremantle Gas Co") by the State Energy Commission of WA ("SECWA") in 1986. Thereafter, a similar procedure was followed whereby, upon about a month's notice, the public was advised of the hearing date for the commencement of hearings on the next term of reference. Any person who considered that he or she had a special interest in the subject matter of the particular term of reference and wished to take part in the Commission's hearings was invited to attend the hearing at the date and time specified, in person or be represented by Counsel to make application for leave to appear.

1.5.4 As the hearings of the Commission received considerable publicity, in the print media and on television and radio, it is unlikely that anybody in Australia having access to any of the ordinary media outlets would have been unaware of the existence of the Commission and, in general terms, the nature of its inquiry. As a result of the Commission's own advertising and the prominence given to its deliberations by media outlets, the Commission is satisfied that all reasonable steps have been taken to provide an opportunity for those persons and organisations having relevant knowledge of assistance to the Commission, to provide it with that knowledge. The Commission wishes to acknowledge that it has received considerable help from members of the public in response to its invitations. Indeed, almost to the last days of the Commission, new information was being provided.

1.6 The work of the Commission

(a) General observations

1.6.1 From time to time in the report, the Commission refers to an aspect of a term of reference and notes that lack of time has prevented the Commission from entering upon an investigation of it. Such instances are rare and, in our opinion, leave behind no reason for concern. In some cases, the matter was the subject of legal proceedings; in others they were only of peripheral significance to the term of reference.

1.6.2 Nevertheless, the Commission found it necessary to seek more than one extension of time in which to complete the inquiry. The initial time allowed was one year from 8 January 1991. In September 1991, the Commission provided the Premier with a report of progress to date and sought an extension of the closing date to 31 July 1992. An extension was granted to 30 June 1992. In March 1992, the Commission reported again to the Premier and requested an extension to 31 October 1992. In her reply, advising that an extension would be recommended, the Premier suggested that we endeavour to report on the specific terms of reference by 30 September 1992, with Part II by 31 October 1992. An extension was granted to that date. We again reported progress to the Premier by letter of 3 September 1992, with the observation that whilst we were still hopeful of concluding the inquiry by 31 October, it appeared likely that it would be the middle of October before Part I could be completed and 30 October before Part II would be ready. On 14 September 1992, the Premier replied. She referred to 30 October as being the deadline if Parliament were adequately to consider acting on any recommendation in the current session of Parliament and asked that Part I be delivered not later than Monday, 19 October 1992, so that it could be tabled in Parliament the following day. At the time of writing this chapter, the prospects of our being able to deliver Part I to His Excellency the Governor not later than 19 October appear reasonably bright. However, whether the Commission will need a further short extension of time in which to complete Part II of the report remains to be seen.

1.6.3 We believe it to be necessary to emphasise the magnitude of the burden placed on the Commission and its staff. It is true that the Commission has been provided with all the resources that it sought and that these have been considerable. But it must be noted that resources alone cannot determine the length of time required for

an inquiry of this kind. There is an optimum level of resources beyond which extra resources would have been unhelpful. What is extraordinary about this Commission is the range and number of terms of reference. We believe it to be unprecedented. The so-called "Rothwells" issues, outlined in clauses 1.1-1.4 inclusive of the first schedule, would ordinarily be expected to occupy a Commission such as ours for at least two years. However, in addition to those terms of reference were another 14 discrete items, many of them expressed in the most general terms. Several of them did not warrant the attention of this or any other Royal Commission. At least one, the sale of the Midland Abattoir site, had already been the subject of inquiries by select committees of the Parliament. Another, Swan Building Society, had been the subject of a lengthy Public Service inquiry. In other cases, there was real difficulty by reason of the absence of any allegations of impropriety on which to focus the inquiry. On some occasions, neither public advertisement nor private inquiry of persons including members of Parliament whom it was thought might be in a position to assist the Commission yielded any material deserving of investigation. Despite this, the Commission was obliged to sift through relevant and irrelevant material and call witnesses whose evidence served only to substantiate the material already in hand.

1.6.4 Additionally, whilst the appointment of three Commissioners enabled a saving of time in some directions, it also required extra time for each individual Commissioner to become familiar with the totality of the evidence tendered, followed by the necessity to spend time together in discussing the issues and in preparation of the Commission's report.

1.6.5 The Commission does not make these observations in a spirit of criticism of the Government for the manner in which the Commission was established. It is not our business to do that. In any event, it must be remembered that there was a sustained campaign by Opposition parties, and the media, to which the Government action was, to some degree at least, a response. The Commission's aim in drawing attention to these matters is to provide the relevant background against which the report is to be evaluated. The Commission has never been free of pressure and a sense of urgency. In addition, there has been a constant awareness that care had to be taken to ensure that no person who might be adversely affected by the Commission's report could have any reason to institute injunctive or other proceedings in the Supreme Court. Any such proceedings

could have had a disastrous effect on the Commission's efforts to complete the inquiry in a timely fashion.

1.6.6 Furthermore, another hazard encountered by this Commission, from which most Royal Commissions are spared, was the pendency of several criminal and civil proceedings arising out of matters into which the Commission was obliged to inquire. Whilst from the outset the Commission was committed to conducting the inquiry in public with appropriate facilities for the media, it was necessary from time to time, in order to avoid prejudice to those proceedings, to either suppress the publication of particular evidence or in some instances to close the hearing to all but the parties intimately involved. This was unfortunate, but necessary, and such intrusions on the public's right to know were kept to a minimum, allowed often only after detailed argument by Counsel.

1.6.7 Finally, for the benefit of those who may be disappointed by the seemingly innocuous nature of the Commission's findings in some of the more controversial of the terms of reference, we observe that no inquiry can rise higher than its source. That source is the capacity and willingness of those who know the truth to come forward and disclose it as well as the availability of relevant documentation. No commission of inquiry can ever be satisfied that it has discovered the whole truth; it can only do its best.

(b) Commencement of hearings

1.6.8 As mentioned previously, Commission hearings began on 12 March 1991 in respect of item 1.7, dealing with the acquisition of Fremantle Gas Co. The Commission sat jointly in respect of item 1.7 which was followed by a joint Commission hearing of item 1.6, then item 1.11. Item 1.7 was chosen to be the first heard because there had been a greater degree of preliminary investigation by others into the acquisition prior to the commencement of the Commission. As one term of reference was the subject of a hearing, Commission staff were engaged in investigation and preparation towards a hearing in one or more further terms of reference. The Rothwells related matters, terms of reference 1.1 to 1.4, comprised by far the largest term of reference, both in scope and breadth, as well as in the number of potential witnesses and documents which required examination. The hearing of those terms 1.1

to 1.4 did not commence until 12 August 1991. It was only after the hearing of the Rothwells terms of reference had proceeded for a considerable period that investigating staff were able to present evidence in additional terms of reference to enable the Commissioners to sit separately. The first separate hearing was of item 1.8, the sale of the Midland Abattoir site in 1986. That hearing began on 2 December 1991.

1.6.9 In pursuing its investigations into the terms of reference, the Commission was at all times mindful of the need to balance the scope of the investigations with their cost and the time within which the Commission report was required to be delivered. Though, as previously mentioned, the time for reporting was extended twice, that did not materially affect the need for balance, but merely recognised that no adequate inquiry into all the terms of reference could be pursued and reported on without such extensions. Consequently, the Commission elected on occasion not to pursue a particular line of inquiry because it was not thought of sufficient significance to be worth pursuing, taking into account the constraints involved or because the time which such an investigation would entail would not allow the Commission to do justice to it, even within the extended time for reporting. As with all Commission inquiries, it was inevitable that some inquiries initially thought worth pursuing, on investigation proved to be of little or no significance. The Commission, however, is of the opinion that it has utilised the resources at its disposal in the most useful manner within the limited time available.

1.6.10 Public Commission hearings, having begun on 12 March 1991, continued thereafter, either jointly or separately, on every Monday to Thursday inclusive with the exception of public holidays and for a short period from 23 December 1991 to 6 January 1992. Hearing hours usually were from 10 am to 1 pm and from 2.15 pm to 4.30 p.m. but on a number of days hearings lasted from 8.30 am to approximately 6.00 pm. Initially Fridays were reserved as briefing days to allow Commissioners, Counsel and investigators to prepare adequately for the following week. However, in the light of subsequent pressures, this practice had to be abandoned.

1.6.11 When the Commissioners commenced sitting separately, administrative difficulties were encountered. The problem was twofold. First, even with the increased number of legally qualified persons to assist the Commission, that number at times was insufficient to service three separate hearings, though always able to support two. Secondly, an interested person who had sought and been granted representation might

have an interest in being represented at two or more of the simultaneous hearings. This problem was usually overcome by the attendance of the person's junior Counsel or solicitor at one of the hearings or by adjustment in the order of witnesses.

(c) Granting leave to appear

1.6.12 In granting leave to a person, organisation or corporation to be represented by legal Counsel at the hearing of a term of inquiry, the Commission adopted the approach of Sir Gregory Gowans QC when dealing with applications for leave to appeal at the Land Deals Board of Inquiry 1977, quoted in *Hallet, Royal Commissions and Boards of Inquiry* at page 197, where he stated:

> "The question of whether leave to appear should be granted is a discretionary matter for this board. It is not to be accorded to everybody who merely feels interested in the subject matter. Representations should be confined to those who have a peculiar and material interest to protect or advance. I use the word `peculiar' in the sense of an interest attaching to the individual and not merely shared by him or with a substantial section of the public. I use the word `material' in the sense of describing something more than a self-inspired or a merely temporary or passing interest."

1.6.13 The Commission applied those principles in respect of applications on the opening day of the hearings of 12 March 1991 and continued to do so throughout the Commission. A list of Counsel granted leave to appear and their clients is annexed as Appendix 2(b).

(d) Past, present and foreshadowed civil and criminal proceedings

1.6.14 As we have said, usually a Royal Commission precedes the institution of any civil and criminal proceedings in relation to its subject matter. They usually flow from the Royal Commission's report. In this case, there were already underway a significant number of criminal and civil proceedings which related, to a greater or lesser extent, to matters within the terms of reference. In that situation, the law obliged us to ensure that inquiries would not prejudice those judicial proceedings. Paragraph (2) of the terms of reference requires that, in conducting the inquiry, the Commission is "to

seek to avoid prejudice to pending or prospective criminal or civil proceedings and to the interests of the State in pending or prospective civil proceedings in such manner as you think fit and, in particular, by taking evidence or otherwise proceeding in private, precluding the publication of evidence, or deferring the taking of evidence, where you consider any such course to be appropriate." Those injunctions do not mean that we were obliged to sit behind closed doors every time the evidence touched upon a subject which might be likely to be canvassed in judicial proceedings, but they did mean that we had to give careful consideration to any claim that measures should be taken to avoid prejudice to pending or prospective criminal or civil proceedings. As events turned out, it was not necessary for evidence to be taken in-camera on many occasions. Subsequent examination of such evidence as was taken in-camera, it was decided that a large amount of that evidence could be released to interested parties, if not unconditionally. At times we also suppressed the publication of evidence, primarily because the publication of it might be thought to be capable of prejudicing a current or immediately prospective criminal proceeding. On relatively few occasions we also suppressed evidence on application where it was thought that the immediate publication of that evidence might unfairly prejudice reputation. In most instances, very shortly after, in a matter of hours or days, the suppression orders were lifted.

1.6.15 The question of potential prejudice to pending prospective criminal or civil proceedings did not occasion the Commission significant difficulty. In many cases, it was sufficient for the Commission to suppress the publication of the evidence. In some cases, the Commission took evidence in camera, and excluded the legal representatives of certain persons, including the Crown, where there was a possibility of prejudice to pending civil proceedings. The transcript of much of that evidence was released subsequently, following legal argument, where the Commission was satisfied that the risk of prejudice was minimal. A very limited amount of evidence taken in camera remains protected, it being confined to evidence which might possibly be prejudicial to the interests of the State in civil proceedings now pending between the State and Bond Corporation. Nevertheless, the Commission believes the risk of prejudice is so slight as not to warrant the inconvenience of our reporting in confidence on that evidence; consequently, we have dealt with it, discreetly, in the ordinary course of our report. It is always open to officers of the Crown, if so minded, to withhold particular passages of the report from publication.

1.6.16 We also had to consider past criminal proceedings. In the term of reference 1.5, concerning the Fremantle Anchorage development, we had to consider the effect that should be given by the Commission to the acquittal of Mr L K Brush, who was at all material times the Chairman of the Government Employees Superannuation Board, and Mr R P Martin, the principal and chief shareholder of a company which had an interest in the Fremantle Anchorage development. Both were charged and acquitted respectively of offences under sections of the *Criminal Code of Western Australia*, section 82(1) in respect of Mr Brush and section 82(2) in respect of Mr Martin.

1.6.17 There were also other charges against both men dealt with at the same time in respect of sections 473 and 474 of the *Code* in respect of which they were also acquitted. The legal question which arose for the Commission was to determine whether, pursuant to the term of reference 1.5, it should inquire into the circumstances in which these offences arose and, in particular, whether, notwithstanding the verdicts of acquittal, there was in respect of the dealings arising out of those circumstances, any element of corruption, illegality or improper conduct on the part of either Mr Brush or Mr Martin. We determined, after review of a number of legal authorities and the terms of our Commission, we should not embark upon an inquiry into whether there was any corruption or illegality arising out of the facts which necessarily had been considered by the jury. We accepted the principle that Mr Brush and Mr Martin were entitled to the full benefit of their acquittals. In our view, however, it remained open for us inquire whether there was any improper conduct on the part of either Mr Brush or Mr Martin or any other person, arising out of those facts.

1.6.18 Mr Laurie Connell's name appears in our discussion of evidence led on many of the terms of reference. He presently faces criminal proceedings on a number of charges. He gave evidence to the Commission on a number of occasions. There were many occasions when evidence given by other witnesses was capable of reflecting adversely on Mr Connell but it was given in the the absence of Mr Connell or counsel representing him. Consequently such adverse evidence was not the subject of cross-examination by him or on his behalf. The Commission was told that Mr Connell lacked the resources to enable him to be represented throughout the entire inquiry. In any event, it is imperative to remind the readers of this report that Mr Connell has not been on trial in this Commission. If he eventually does appear before a judge and jury in

criminal proceedings, the members of that jury must not be affected in their consideration of the evidence then put before them by any findings or views that we may have expressed in this report.

(e) Standard of proof

1.6.19 Unlike some letters patent which have set out the standard of proof to be applied before a Commission makes findings, no standard of proof is referred to in the letters patent appointing this Commission. The Commission is required to inquire and report whether there has been any corruption, illegal conduct, or improper conduct on the part of any person or corporation in respect of the matters referred to in both schedules. The Commission may also report whether any matters should be referred to an appropriate authority with a view to the institution of criminal proceedings. It follows that because of the potential for the Commission to make findings which might bring about criminal charges or cause damage to reputation, it is of great importance that the appropriate standard of proof be applied in reaching findings. In our view the correct standard of proof to be applied by this Commission is as in a civil action, that standard being applied in accordance with the gravity of the allegation being considered. This is clearly established by the authority of *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J, as he then was, at 362; *Helton v Allen* (1940) 63 CLR 691, 714 and *Rejfek v McElroy* (1965) 112 CLR 517, 521-522.

(f) Hearsay evidence

1.6.20 This Commission was a commission of inquiry required to conduct as thorough an investigation as it could into the various matters referred to it. There were no "parties" to the inquiry and this in itself made the rule against hearsay evidence difficult, if not inappropriate, to apply. The Commission could not be, and was not, conducted as if it were a court of law. In some hearings hearsay evidence was presented, not only as evidence going to establish the truth of what was being asserted, but to enable further investigation to be undertaken. Overwhelmingly, the vast majority of the evidence presented was evidence which would be admissible in a civil or criminal court.

1.6.21 Before the Commission made any determination of fact involving the assessment of hearsay evidence, it considered all the available evidence on the issue in question. Hearsay evidence was then given whatever weight such consideration

suggested it deserved. If additional evidence suggested hearsay evidence about any particular matter lacked credibility, then that hearsay evidence was disregarded.

(g) Private hearings

1.6.22 The *Royal Commissions Act 1968* recognises the Commission's power to order that any evidence may be taken in private: see sections 7, 19(5) and 19A. When so doing a person not expressly authorised by the Commission to be present, shall not be present and, notwithstanding any other law, the Commission is not required to authorise the presence of any person except a person authorised by the Commission to appear to represent that witness. Furthermore, the Commission is not required to make known to any person during the course of the inquiry the content or nature of any evidence taken in private.

1.6.23 Problems of confidentiality and the reluctance of people to provide voluntary statements prompted the Commission to use private hearings before a single Commissioner to enhance its investigative powers. Each private hearing was attended by a Commissioner, Counsel Assisting, the person to be examined, and a transcript recorder. Where requested, the person being examined was permitted legal representation.

1.6.24 Upon completion of the private hearing the evidence was examined to decide whether it was of sufficient materiality to be led in open hearing. If so, the witness was called and examined in an open hearing. Many private hearings did not result in the witnesses being called to give evidence at an open hearing, though what some of them told the Commission at private hearings was useful in furthering the Commission's investigative progress. Furthermore, the risk of adducing unnecessary confidential information in public was considerably diminished if not entirely eliminated. In considering relevant evidence for the purpose of writing its report, the Commission entirely excluded evidence obtained through private hearings and not repeated at a public hearing.

(h) Passage of time since events

1.6.25 In substance, the terms of reference encompass a period of time between the mid seventies and the late eighties. It follows that inevitably, with the passage of time, recollection of events fades. Furthermore, a matter which now appears to be

material, at the time it occurred may not have seemed important to a participant who consequently may not have seen any reason to specifically remember it. The Commission has noted the submission by Counsel for Mr David Parker with respect to reference 1.7, in the following terms:

> "Most of the events the subject of this inquiry took place between five and nine years ago. Human memories of events that long ago are unreliable, particularly in relation to details, dates, time sequences and the like. That is particularly true of people such as ministers of the Crown, senior businessmen, senior public servants and professional people who were daily involved in meetings concerned with important events and regularly involved in large scale and important transactions."

Notwithstanding these considerations, the Commission was surprised at the number of times various witnesses resorted to "I can't recall". A computer check of the number of times this phrase was used reveals that it was too many for the computer to continue to record. And so it gave up! As will be seen in further chapters of this report, the Commission has been unable to accept as honest the response of a number of witnesses who have professed an inability to recall. The inability or unwillingness of witnesses to recall material matters has, to some extent, hindered the Commission's ability to find the truth about certain matters. In those cases, it has expressly stated that it has been unable to reach a finding by reason of the inadequacy of the evidence.

(h) Impossibility of detailing all the evidence

1.6.26 In each chapter of this report the Commission has outlined, as far as it has felt necessary, details of the evidence led in respect of that particular item. It has not been possible to detail all the evidence since to do so would be needless and wasteful. In appreciating the enormity of the task presented to us in writing our report, it is to be remembered that the transcript of evidence amounted to approximately 50,000 pages with 4,550 exhibits covering in excess of 525 sitting days. Evidence or exhibits not specifically referred to in the report have been considered by the Commission.

(i) Relevance

1.6.27 This Commission, as with all other Commissions appointed under the Act, was required to inquire into the matters specified in the appointment. In the course of its inquiry it was necessary to investigate matters which had only the possibility of a connection with the primary subject matter it was considering. As Hallett, in the work previously cited, rightly expresses it at page 97, an inquiry is often a fishing expedition, digging and probing to find a clue or a lead to assist it. Thus, if any concept of relevance is applicable, it is a different concept from that which is applicable in an ordinary civil action. It was necessary for the Commission to remind Counsel from time to time of this essential difference not only on objection taken at public hearings to evidence sought to be led, but also on objections to subpoenas.

(j) Procedural fairness

1.6.28 The charter given to the Commission by reason of its appointment pursuant to the letters patent of 8 January 1991, coupled with the provisions of the *Royal Commissions Act 1968*, does not give the Commission authority to determine questions affecting the rights of any person. Nevertheless, findings of the Commission may well affect reputation. In those circumstances, the Commission observed the rules of natural justice, often referred to nowadays as procedural fairness. The Commission accepts that the relevant rules are succinctly set out in the judgment of the Judicial Committee of the Privy Council in *Mahon v Air New Zealand* (1984) 1 AC 808 at 820-821: see also *National Companies and Securities Commission v. News Corporation Limited* (1984) 156 CLR 296 and *Annetts v. McCann* (1990) 170 CLR 596. In *Mahon's* case, at page 820, their Lordships indicated the relevant rules of natural justice could be reduced to two:

> "The first rule is that the person making a finding in the exercise of ... (investigative) jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him, or would

have so wished if he had been aware of the risk of the finding being made."

1.6.29 Their Lordships went on at page 821, to indicate that:

> "What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive for the finding, if it be disclosed, is not logically self-contradictory.
>
> The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."

1.6.30 It is well established that, where the rules of natural justice are applicable, the procedural consequences will not necessarily be uniform, even in the same tribunal. In particular, the concept of fairness, inherent in the *audi alteram partem* rule, may require to be moulded to the particular circumstances of the case: *Salemi v MacKellar No 2* (1977) 137 CLR 396.

1.6.31 The Commission delivered a statement in public hearing on 21 January 1992 on its view of the precise application of the rules of natural justice as outlined by their Lordships in *Mahon*, applicable to the conduct of this Commission. The points made are explained in the following paragraphs.

1.6.32 It was clear from the reasoning in *Mahon's* case that a person would not relevantly "be left in the dark" as to the risk of a finding made against him if the matter had been put to him during the course of evidence. There was no suggestion to be found in *Mahon's* case that procedural fairness required some formal notification be given a person at risk as to an adverse finding prior to that person giving evidence. Their Lordships also appeared to draw a distinction between findings which were relevantly adverse and "findings of fact by the judge upon which there had been conflicting evidence, the reliability of which it was for him to assess". However, we agree with the

statement made by Mr Roger Gyles QC, the Royal Commissioner Into Productivity in the Building Industry in New South Wales, in his report:

> "I can say that I do not accept that in this type of inquiry an *adverse finding* is the equivalent of a finding of disputed fact, of any criticism of a party, or of the exposure of evidence or material which might reflect badly on a person. Nor do I accept that a warning must be given of all possible ramifications of each piece of evidence before it can be referred to in the Report. I do agree that a party should not be confronted for the first time in the Report with a true adverse finding upon a totally new point or issue which it could not have reasonably anticipated. I do not accept that this anticipation can only come from an express statement or warning by the Commissioner or Counsel Assisting." (at p.ix)

1.6.33 The Commission further observed that most persons whose conduct might potentially be the subject of adverse findings had been represented by Counsel who, supported by daily transcripts, were aware of the evidence as it was given. In fact, the Commission took every reasonable step to ensure that any affected person would be informed of any potential adverse finding. The Commission made it clear from time to time that it was open to any such Counsel to provide relevant information to Counsel Assisting with a request that witnesses be called or recalled, indicating the new evidence which might be given. During the currency of the hearing of evidence, Counsel given leave to appear were as capable as Counsel Assisting, of discerning evidence and possible inferences therefrom which might ground a finding adverse to their clients.

1.6.34 The Commission went on to observe that after all the evidence on any term of reference had been concluded, Counsel Assisting would address the Commission and, in that address, refer to such matters as he or she believed capable of grounding a finding adverse to any person. Following that address, we indicated our intention that there should be an interval of time during which Counsel given leave to appear would have an opportunity to prepare their addresses to assist the Commission.

1.6.35 The statement of 21 January 1992 was followed by a further statement by the Commission in a hearing in early February. On the latter occasion, the Commission indicated its expectation that in closing submissions Counsel Assisting would identify potential adverse findings. The Commission also recognised the

possibility that the suggestion of adverse findings not anticipated or canvassed in evidence, might arise during closing submissions. Although unlikely, it was also possible that during the Commission's deliberations after the conclusion of closing submissions, it might contemplate an adverse finding that was not the subject of submission. If either situation arose, the Commission indicated its intention to ensure that any person who might be adversely affected, be given a reasonable opportunity to present further submissions and, where appropriate, to call further evidence.

1.6.36 Following on the statement of early February 1992, as the Commission understood that concerns had been expressed by some Counsel with respect to that statement, the Commission made known, again in open hearing, that it was open to Counsel to make further submissions upon the application of the rules of natural justice. Such further submissions were requested to be made by 14 February. Some Counsel made further submissions, but no reason was advanced which persuaded the Commission to modify its approach.

1.6.37 On a number of occasions, both by circular and in open hearing, Counsel were advised of what the Commission proposed in respect of the communication of adverse findings and the willingness of the Commission to recall witnesses at the request of Counsel or an unrepresented person. On the occasions of a recall of a witness, all parties likely to be interested in that witness's evidence were notified of the time of the recall. A number of witnesses were recalled at the request of Counsel and on the initiative of Counsel Assisting the Commission. Full liberty to cross-examine these witnesses by anyone interested in the evidence of that witness was afforded, as of course had been given during the balance of the hearings of the Commission.

1.6.38 The risk of adverse findings was communicated to a person in a number of ways. In closing submissions Counsel Assisting identified what was believed to be possible adverse findings against a person. In many cases, written communication to a person identifying possible adverse findings preceded final submissions by Counsel Assisting. In other cases, the risk of adverse findings was communicated to a person or his or her solicitors subsequent to the completion of addresses in cases where perception of such a risk arose out of the evidence of recalled witnesses, or had not been perceived by Counsel Assisting at the time of his address, or at the direction of the Commission. The Commission is satisfied that all reasonable steps have been taken to inform any

person of the possible risk of an adverse finding and that such person was afforded all reasonable opportunity to adduce additional material which might have deterred the Commission from making an adverse finding.

1.6.39 The general policy adopted by the Commission throughout the hearing of each term of reference was to break for a few days at the conclusion or apparent conclusion of evidence on that particular term to enable Counsel Assisting to prepare submissions. Upon delivery of those submissions, the hearing was adjourned to enable people wanting to reply, either in person or by way of Counsel, to prepare and deliver written submissions. An opportunity was then afforded to each of them to speak to their written submissions in open hearing. Where some new point arose either by having been overlooked earlier or as a result of the calling of further evidence, or the risk of an adverse finding not previously referred to, further submissions were permitted. The Commission wishes to place on record the great assistance it has derived from the written and oral submissions it has received and heard.

(j) Availability of witnesses

1.6.40 In public hearings the Commission heard from 543 witnesses encompassing 847 appearances. Many of the witnesses came from interstate and a number from overseas. The majority of witnesses made themselves readily available to the Commission and, so far as was practicable, hearing times were arranged to suit the mutual convenience of both the witness and the Commission. There were, however, some who may have been able to give valuable information to the Commission, who died before the Commission hearings commenced or after they had begun. There were others who were unwilling to assist and were beyond the reach of compulsory process. A short reference is made to each of these persons.

1.6.41 Mr Peter Beckwith, up to the time of his death Chief Executive of Bond Corporation Holdings Ltd ("Bond Corporation"), should have been able to give considerable assistance to the Commission in a number of terms of reference. He died on 22 July 1990.

1.6.42 Mr William Burgess, more often known as Bill Burgess, had been a senior person in Rothwells, in experience and age. He enjoyed the close confidence of

Mr L R Connell. At all relevant times he was a director of Rothwells. There is little doubt that Mr Burgess would have been able to give valuable information to the Commission. He died on 15 May 1990.

1.6.43 Mr J M Goldberg, commonly known as Yosse Goldberg, formerly a director of Western Continental Corporation Limited ("Western Continental"), whose subsidiary Mathew James Pty Ltd acquired all the shares in Fremantle Gas Co in 1985. The events surrounding that acquisition of shares was a relevant matter in chapter 10 concerning the purchase by SECWA of the gas utility owned by Fremantle Gas Co. Mr Goldberg left Australia following the share market crash in October 1987 and now lives in Spain, a country with which Australia has no extradition treaty. He refused voluntarily to attend and give evidence. The Commission has been seriously disadvantaged in its consideration of the term of reference in chapter 10 by its inability to secure Mr Goldberg's attendance before it. He was unquestionably a major participant in events leading up to the purchase.

1.6.44 Mr Robert Holmes a Court, at the relevant time, was Chairman of Directors of The Bell Group Limited. He could undoubtedly have assisted the Commission in a number of terms of reference relating to Rothwells Limited, but he died in August 1990.

1.6.45 Mr Thomas Hugall, a former secretary of Rothwells Ltd, was seriously ill at the time the Commission commenced its hearings. A limited examination was conducted at a private hearing at his home. His health deteriorated, making it impossible for him to give evidence at a public hearing. He died recently.

1.6.46 Mr Bruce Kirkwood was the former Commissioner of SECWA, having resigned from that position on 17 July 1987. He was the first witness heard by the Commission, but owing to his then state of health the hearing was conducted at his private home on 12 February 1991. Both by reason of his health and also that investigations of the Commission staff were at a very preliminary stage, he was not examined to the extent that would have been possible had he been in good health and given evidence later in the proceedings. He died during the proceedings.

1.6.47 Mr Terence McDonnell was a solicitor practising in West Perth. His involvement in matters covered by chapter 6 arose out of him acting as solicitor for some of the principals in the Fremantle Anchorage development. He may have been

able to assist the Commission with matters which arose incidentally in the inquiry. He died in January 1990.

1.6.48 Mr Andrew Mensaros had been a Minister in the Court Government during the time in which the events described in chapters 2-4 inclusive occurred. He held a number of portfolios during that period, including Industrial Development and Mines and Energy. Mr Mensaros died prior to the appointment of the Royal Commission.

1.6.49 Mr Peter Mitchell was a director, at all relevant times, of Bond Corporation. Mr Mitchell gave evidence in June 1991 in the Northern Mining term of reference but he should have been able to give valuable evidence to the Commission in respect of almost every matter in which Bond Corporation was involved. Early in 1992, correspondence began between the Principal Solicitor and Mr Mitchell's Sydney solicitors in an effort to persuade him to attend the Commission. The Commission was advised by those solicitors that Mr Mitchell was then currently working on projects which required him to travel in Europe and North America and that it was uncertain how long he would be required to work on these matters. He claimed to be unable to nominate a time when his business commitments would enable him to return to Australia. Having regard to the correspondence and the persistent efforts of Commission staff over a number of months to meet Mr Mitchell's convenience in respect of his attendance before the Commission, it became apparent he did not intend to co-operate with the Commission by making himself available to give evidence.

1.6.50 Mr Tony Oates was also a director of Bond Corporation and, if he had been available, should have been able to give evidence of considerable value to the Commission. Commission staff made a number of efforts to persuade Mr Oates to return from Poland where, apparently, he is currently working for a company called Australian Holdings Ltd. A provisional date for taking his evidence was fixed for 3 August 1992 and he was so advised by letter of 29 June 1992 which he acknowledged receiving by facsimile transmission on 4 July 1992. Later in July, the Commission received a further facsimile transmission from Mr Oates advising that his request for leave submitted to his employer had been refused. Having regard to the correspondence and the persistent efforts of Commission staff over a number of months to meet Mr Oates' convenience in respect of his attendance before the Commission, it became

apparent he also did not intend to cooperate with the Commission by making himself available to give evidence.

1.6.51 Dr Shrian Oskar played a very important role in the events which gave rise to the subject matter of the inquiry in chapter 4 concerning financial assistance by Government to Bunbury Foods Limited. His principal place of abode seems to have been the United Kingdom. On 3 September 1984 he was declared bankrupt in Australia and was subsequently convicted in the United Kingdom of various offences involving dishonesty and sentenced to a six year prison term. His release is not expected to occur until May 1993. The Commission believed that the cost involved in his attendance in Perth to give evidence was not warranted, even if his release from prison could have been negotiated for the purpose of giving evidence.

1.6.52 Miss Kim Rooney, who is married to Mr David Parker, was first requested on 25 March 1991 to make herself available for interview. She was then, and is now, and has at all material times, been residing in Hong Kong. Though every endeavour was made by Commission staff to find a suitable time for her to return to Perth, she declined to make herself available. The Commission had no power to compel her attendance.

1.6.53 Mr Jack Walsh, who figures prominently in chapter 7 and again in chapter 23, had worked at the relevant time for L R Connell & Partners and should have been able to provide very important evidence to this Commission. He died in August 1984.

1.6.54 A list of the witnesses whose testimony has been received by the Commission, both orally and in the form of statements, is annexed as Appendix 2(a).

(k) Corruption, illegal conduct and improper conduct

1.6.55 It is convenient in this introductory chapter to make some observations on the Commission's interpretation of "corruption", "illegal conduct" and "improper conduct" as those words are used in the terms of reference. We have proceeded on the basis that, for all practical purposes, corruption is that conduct which is characterised

as such in the *Criminal Code.* If it were not so, it might encompass conduct which lacks any proscription or sanction under the law, corresponding to the value judgment implicit in the phrase "improper conduct". Of course, this is not to say that there should not be changes in the law to deal more adequately than the *Code* may be thought to do with official corruption. We shall address that matter in Part II of our report.

1.6.56 As we have said, we have interpreted the obligation laid upon the Commission as one which, *inter alia*, requires it to draw the attention of the appropriate authority to evidence which may warrant the institution of criminal proceedings. We have sought to discover a way in which we may fulfil that task without injustice to any person. On the one hand, it is important that we disclose to the people of this State, as fully and faithfully as we can, the course of events as they occurred in respect of the different terms of reference; on the other, we seek to protect the persons involved in that course of events from the prejudice implicit in findings of illegal conduct. We have decided to rely on the phrase "improper conduct" to signify not only conduct which, lacking any legal sanction, is nevertheless improper in the sense that we shall discuss shortly, but also conduct which may be thought by the appropriate authority to warrant criminal proceedings. In this way the narrative will flow unimpeded by considerations of criminality. Then in a confidential schedule attached to Part I of the report, we shall identify those matters which in our view warrant consideration by the appropriate authority. We emphasise that the main body of the report should not be read as if a finding of improper conduct implies a finding of illegal conduct. In the majority of cases it will not do so.

1.6.57 It remains in this section to consider the meaning or meanings we attribute to the phrase "improper conduct", leaving aside any question of illegal conduct. Necessarily, the term has been discussed in different chapters of this report, dealing with specific terms of reference. In the course of the hearing of most terms of reference, argument has been advanced by Counsel with a view to persuading the Commission to attribute a limited meaning to "improper conduct". It was contended that for such a finding to be made there must be evidence that the person whose conduct was in question embarked deliberately on a course of conduct knowing it to be improper; in other words, *mens rea*, a guilty mind, is an essential element in any conclusion that such conduct has occurred. We accept that such arguments would allow for a concession that, at least in some circumstances, as is the case in the administration of the criminal

law, the requirement of a guilty mind may be satisfied by evidence of a reckless approach or the presence of wilful blindness on the part of the actor to the consequences of a particular course of conduct. But even with that concession, the Commission believes that such a definition of the term is too narrow. Certainly, it is to be expected that in most cases of improper conduct the conduct will be accompanied by an awareness that it is not right, or less than proper, or not the appropriate action in the circumstances, or otherwise open to criticism. Where conduct is improper by reason of the purpose for which it is undertaken, the pursuit of that purpose will ordinarily but not necessarily be accompanied by a consciousness of its impropriety. On the other hand, a course of conduct may be undertaken in good faith for what are believed to be desirable ends but yet, on objective analysis, be found to have been so misconceived as to render the conduct improper. Another example of improper conduct where there may be no awareness of impropriety arises if a person thoughtlessly places himself or herself in a conflict of interest situation by failing to have due regard to the circumstances. The improper conduct is a matter of objective fact rather than subjective knowledge. Of course, one must draw the line somewhere. Mere negligence or carelessness is unlikely to be characterised as improper.

1.6.58 The Commission resolved that it would be a mistake to attempt to frame a precise definition of improper conduct that would be capable of application to all circumstances. As we have explained in chapter 9, the hearing of the Midland Abattoir term of reference provided an opportunity for discussion with Counsel as to how the Commission should approach the question of improper conduct on the part of public servants. It was recognised in that discussion that the words are somewhat chameleon-like, their meaning varying with the circumstances. A degree of consensus emerged, and was adopted by some Counsel in other terms of reference, that improper conduct would be established where there was a gross departure from those standards of public administration the public are entitled to expect and which is otherwise inexplicable. An alternative form of words for the final phrase would be "and which defies rational explanation". It will be appreciated that this understanding of improper conduct was hammered out in a context where it was accepted, at least for the purposes of argument, that there was no evidence that the officer concerned had deliberately abused the authority of his or her position for improper ends. If there was such evidence, one would not be concerned with the more elaborate understanding that has been outlined.

1.6.59 The Commission has not only been concerned with the question of improper conduct on the part of public servants. On many occasions it has been the propriety of the conduct of ministers of the Crown that has been the focus of attention. Again, particularly in our report on the inquiry into the matters relating to Rothwells, we have been required to characterise a course of conduct in which senior executive officers of the public service or statutory instrumentalities have been so intimately involved with ministers of the Crown that, while the measure of responsibility may differ, the conduct itself admits of only one characterisation. What should we say, therefore, about the test of impropriety in relation to a minister of the Crown? In reference to the public service we have spoken about "the standards of public administration which the public is entitled to expect" of a public servant. Undoubtedly, those standards will differ in their terms from the standards expected of a minister of the Crown. Words like openness, accountability, integrity, commitment to the public interest come to mind, recognising the responsibility and freedom of the Government in relation to the formulation of policy. It follows that the question of purpose underlying a course of conduct undertaken or directed by a minister is likely to be very much more relevant.

1.6.60 The Commission has been assisted in its deliberations, in this as in other areas, by the submissions of Counsel given leave to appear before the Commission. Some, though by no means all, of the submissions received in this connection may be cited:

1.6.61 It was submitted on behalf of Mr Kevin Edwards:

> "While it is agreed that there is no particular objective standard by which the conduct can be measured and whilst propriety may not be susceptible of close definition, in our submission it must at least amount to conduct which is discreditable or dishonourable. The office of the particular person is relevant. Implicit in impropriety is that the behaviour in question is not appropriate for the particular person, ie, having regard to what is expected from his status or appointment or the trust reposed in him. It is well known that one of the tests of impropriety by a professional person is the norm of behaviour that might be expected of other members of his group so that the particular behaviour may be measured against same." ...

The submission then quotes from the report of a Royal Commission inquiring in 1958 into statements made concerning the then New South Wales Minister for Housing. The Royal Commissioner was the Honourable Mr Justice Herron, a Justice of the Supreme Court of New South Wales, later to become the Chief Justice of the Court. His Honour said:

> "In the context where the expression is used in the letters patent it suggests conduct which is discreditable or dishonourable or conduct which amounts to a serious or substantial breach of required standards of rectitude to be expected of a person clothed with the office of a Cabinet Minister."

1.6.62 On behalf of Mr David Parker, it was submitted:

> "... Mr Parker's duty as a member of the Government was to try to govern in the best interests of the State and its citizens. In a democracy such a duty must be exercised in the context of a particular view or philosophy of Government and politics."

1.6.63 An additional point was made on behalf of Mr Dowding to the effect that involvement in a Government agency entering into an *ultra vires* transaction should not be characterised as improper conduct. "In our submission the words do not include erroneous technical assessment of the statutory powers of Government agencies".

1.6.64 The Commission recognises the force of these submissions and others like them. In the case of Government Ministers we adopt the words of Mr Justice Herron to which we have referred, namely, "a serious or substantial breach of required standards of rectitude to be expected of a person clothed with the office of a Cabinet minister". Such a test allows ample room for differing political approaches or philosophies. But it does not allow for deliberately feeding misleading information to the public nor for the secretive pursuit of party-political advantage at the expense of what on any objective view would be recognised as the public interest. A truism, sometimes forgotten, is that Governments are elected to govern in the interests of all the people, not just those who voted for them.

1.6.65 We do not think it would be fruitful for the Commission in this introductory chapter to strain for a more definitive approach to the question of improper

conduct. In the course of our report, in every case where the Commission has made a finding of improper conduct, the circumstances provided by the context in which the finding is made enable the reader to understand clearly why the Commission believes the conduct to have been improper.

1.6.66 Finally, the expectations of the public in respect of the standards of public administration by both ministers and officers in the public domain are discussed further in Part II of the report, dealing with recommended changes in the law or in administrative or decision making procedures.

(l) The Privileges of Parliament

1.6.67 As we have seen, the Commission was required to inquire whether, in relation to the matters described therein, there has been corruption, illegal or improper conduct by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies. From the outset, it was apparent that a proper performance of the task would oblige the Commissioners, *inter alia,* to scrutinise the statements and conduct of persons who were members of Parliament at material times. It was apparent, also, that because certain of the terms of reference had already been the subject of scrutiny by committees of the Parliament, the work of the Commission would be facilitated if regard was had to the testimony of persons called as witnesses by those committees.

1.6.68 It was in this context that the question of the privileges of the Parliament arose, with respect in particular to freedom of speech and the protection of proceedings in Parliament.

1.6.69 On the initiative of the presiding officers of the two Houses, they, together with the clerks of the Parliament, met the Commissioners on 19 April 1991. It transpired from that meeting that the Commission would be obliged to pursue its inquiry without the assistance in evidence of any reference whatever to the proceedings in either House or any committee of the Parliament. It was asserted by the representatives of the Parliament that article 9 of the *Bill of Rights 1689*, as traditionally understood and applied, required nothing less.

1.6.70 Article 9 forms part of the law of Western Australia by virtue of the *Parliamentary Privileges Act 1891*. It reads as follows:

> "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

In its context, the importance of this provision to the Parliament in Westminster cannot be overstated. It represented the culmination of a long period of conflict between the King and Parliament extending over centuries and finally established the superiority of the law of Parliament over the common law and the independence of the High Court of Parliament over the courts in Westminster Hall. The conviction which sustained the House of Commons during this struggle was that it was not fighting for its own privileges and benefit but in its representative capacity for the sake of the people as a whole. Erskine May, 20th ed. (1983) at p. 77 cites the following passage from White, Eng Const. p. 440:

> "There could be no assured government by the people, or any part of the people, unless their representatives had unquestioned possession of this privilege ..."

1.6.71 At p 82, Erskine May makes the perceptive observation that the privilege which formerly protected members against action by the Crown now serves largely as protection against their prosecution by individuals or corporate bodies. Consistently with this trend, sight may have been lost of the original conception of the privilege as a protection devised in the interests of the public, rather than for the protection of the individual member against the public.

1.6.72 Following the meeting on 19 April, the Commission resolved, notwithstanding some disquiet over the breadth of the privilege as expounded by the presiding officers, to accept that view in order that the progress of the Commission should not be disrupted by controversy. However, believing that it was within the power of each House expressly to waive the protection afforded by the privilege in strictly limited and defined circumstances, the Principal Solicitor assisting the Commission on 3 May 1991, wrote to each presiding officer requesting that consideration be given to a resolution:

> "That this House resolves that, subject to the preservation of confidentiality with respect to in camera proceedings of the House or of a Committee of the House (whether general or select), the Royal Commission appointed to enquire into Commercial Activities of Government and Other Matters be authorised to make such use of Hansard and any materials furnished to the Commission with the authority of the House as the Commission may determine having regard to the needs and purposes of the enquiry while remaining mindful of the importance of preserving the substance of the privilege of Parliament as much as possible."

The request was supported by extensive argument.

1.6.73 By letter of 6 May 1991, the President of the Legislative Council, in a very courteous and reasoned reply, concluded that he was unable to accept that the suggested resolution would have legal effect and provide the Commissioners with the powers sought. His letter continued:

> "Despite the difficulties that may be encountered in the course of taking evidence as a result of the view I have taken, I am bound to restate, as the Commissioners have said already, that the Commission is an arm of the Executive Government and I would be very slow, for that reason alone, to concede that art 9's application to the Commission's proceedings may be removed, no matter how pressing the public interest may be."

1.6.74 Then on 8 May 1991, the two presiding officers addressed a joint letter to the Chairman of the Commission, reading as follows:

> "In the course of a phone conversation between you and the President, you asked whether we, as the Presiding Officers, would seek counsel's opinion on the lawfulness and effectiveness of a purported waiver of article 9 privileges and immunities by resolution of both Houses.
>
> The intent of the waiver would be to remove any impediment that might otherwise arise by operation of article 9 to the use of parliamentary evidence relevant to the proceedings of the Royal Commission.
>
> We have considered your request very carefully but have concluded that even should a contrary opinion be available, it would not persuade us to change

> our stated view of the matter. In this type of situation, we feel obliged to take account of the precedents and opinions expressed in other Parliaments, particularly the House of Commons and those in Australia.
>
> We are satisfied that our view coincides with those in the other Parliaments referred to, and for that reason, must decline your request with regret."

1.6.75 The Commission made a final attempt to resolve the problem by writing to the Premier, the Hon Carmen Lawrence MLA, on 10 May 1991, with a suggestion that the Bill then before the Parliament to amend the *Royal Commissions Act 1968* be revised so as to vary the operation of the privilege "to the very limited extent and for the limited purpose proposed". In that way, "a serious obstacle to the Commission's work would be overcome". No reply was received to that letter but the futility of the Commission's efforts readily became apparent.

1.6.76 On 15 May 1991, the Leader of the National Party of Australia (WA), the Hon Hendy Cowan MLA, advised the Commission that his Party endorsed the views expressed by the presiding officers in their letter of 8 May and further that the Party would not support any amendment to the Act.

1.6.77 On 6 June 1991, the Leader of the Opposition, the Hon Barry MacKinnon MLA, wrote to the Commission. He stated that whilst he was "supportive in general terms of the stance taken by the Speaker and the President", he was mindful of the need for the Commission "to do its work and to use the information available in the Parliament to assist it with that work". Mr MacKinnon offered any assistance the Commission felt that he could provide in "achieving that result". The Commission appreciated Mr MacKinnon's offer, but given the obvious closing of the ranks and complete party unanimity in support of the stand taken by the presiding officers, there was no point in taking it up.

1.6.78 The Commission has set out the history of the exchange between the Parliament and the Commission because of its importance. As we have said, in its origins, the privilege was asserted in defence of the common people against the arbitrary power of the Executive. Its assertion in the present circumstances has been to inhibit the Commission in its search for the truth. The Commission will address the question of the review of this 300 year old law in Part II of its report.

1.6.79 Before leaving the subject, one should observe the irony, with hindsight, of the President's description in his letter of 6 May 1991 of the Commission as "an arm of the Executive Government" with the consequence that "I would be very slow, for that reason alone, to concede that art 9's application to the Commission's proceedings may be removed, *no matter how pressing the public interest may be*" [our emphasis]. By the *Royal Commission Into Commercial Activities of Government Act 1992*, the Parliament of Western Australia enacted, in section 4, that "The Commissioners shall inquire and report as required by the terms of reference of the Commission ...". Thenceforth, the Commission was no longer only an arm of the Executive, but a body directed by the Parliament to inquire and report, yet, by the will of that same Parliament, to do so, as it were, with one arm tied behind its back!

1.7 Tributes

1.7.1 The Commission is greatly indebted to the excellent and dedicated assistance it has received from all those persons who formed part of the team. When the Premier announced on 19 November 1990 her intention to have an inquiry, she appointed the Chief Executive of the Department of Premier and Cabinet, Mr Gordon Pearce, as the Commission's Chief Executive. Mr Pearce`s role was to provide the administrative support that Commissioners and Counsel Assisting would need. To this end, he seconded seven senior public servants experienced in finance and budgeting, human resources, accommodation and security, information technology, media liaison, records management and court services. This group provided the nucleus of the Commission's support staff.

1.7.2 The group met shortly before Christmas 1990 and began organising legal and secretarial staff for the Commissioners and Counsel Assisting, though the appointment of Counsel Assisting had not at that time been announced. By 8 January 1991, when His Excellency Sir Francis Burt appointed the Commission and the Attorney General had announced the names of Counsel Assisting, legal secretaries had been chosen. Over the next two months, police officers, investigators and records staff were progressively assigned, contracted or seconded. When the Commission's first public hearing was held on 12 March 1991, 73 staff members had been engaged. Numbers rose to over 100 by early December 1991 when the Commission's three hearing rooms were operating. As the terms of reference were being concluded, staff

numbers began to fall so that by the end of June 1992, numbers were back to around those of the early public hearing days. Further reductions of staff took place as reporting time drew closer. A list of all persons who worked as part of the Commission team is annexed as Appendix 5.

1.7.3 The Commission wishes to pay tribute to the untiring efforts of each and every member of the team. Without their devoted service, the quality of the investigation and of the hearings would have fallen far below the standard which the Commission believes was in fact achieved. Certainly the Commission would not have been able to report by the time set by the final extension.

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