29/83

IN THE PRIVY COUNCIL No. 12 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

THE HONOURABLE PETER THOMAS MAHON
Appellant

-and-

AIR NEW ZEALAND LIMITED
First Respondent

-and-

MORRISON RITCHIE DAVIS
Second Respondent

-and-

IAN HARDING GEMMELL
Third Respondent

-and-

HER MAJESTY'S ATTORNEY-GENERAL
FOR NEW ZEALAND
Fourth Respondent

CASE FOR THE APPELLANT

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Record
Part I

1. This is an Appeal by the above-named Appellant, The Honourable Peter Thomas Mahon, from the decision and Order of the Court of Appeal of New Zealand (Woodhouse P., Cooke, Richardson, McMullin and Somers JJ.) made on 22nd December 1981 quashing an order made by the Appellant in his capacity as a Royal Commissioner that the First Respondent, Air New Zealand Limited (hereinafter referred to as "Air New Zealand"), should pay to the Department of Justice the sum of $150,000 by way of contribution to the public cost of the Inquiry of the Royal Commission into the crash on Mount Erebus, Antarctica, of a DC10 aircraft operated by Air New Zealand. The Appeal is brought by Special Leave of Her Majesty in Council granted on 22nd December, 1982 pursuant to a Report from the Judicial Committee of the Privy Council dated 2nd December 1982. The Second and Third Respondents to this appeal are employees of Air New Zealand who joined with it in applying for judicial review of certain parts of the Report made by the Appellant in his capacity as Royal Commissioner as more fully described below. The Second Respondent (Mr M.R. Davis) was at the material time the Chief Executive of Air New Zealand and the Third Respondent (Captain I.H. Gemmell) was its Flight Manager (Technical). Her Majesty's Attorney-General for New Zealand was joined as the Sixth Respondent in the Court below to represent the public interest and is the Fourth Respondent on this Appeal.

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C p.618ff

Doc. 6
p.40-41

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A. THE ROYAL COMMISSION

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2. On 28th November 1979 a DC10 Series 30 aircraft ZK-NZP operated by Air New Zealand flew in broad daylight straight into the northern slopes of Mount Erebus on Ross Island in McMurdo Sound, Antarctica, in the course of a sightseeing flight, TE 901. Mount Erebus is an active volcano whose summit is approximately 12,450 feet above sea level. The aircraft collided with Mount Erebus at a point approximately 1,500 feet above sea level. The crash resulted in the total loss of the aircraft and in the death of all 257 persons on board. It was at the time the world's fourth worst air disaster. Its scale was unprecedented in New Zealand aviation history.

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3. Following the accident, the Chief Inspector of Air Accidents (Mr. R. Chippindale) filed a Statutory Report pursuant to the Civil Aviation (Accident Investigation) Regulations 1978. In his report, the

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Chief Inspector attributed the cause of the accident to error on the part of the flight crew, a conclusion which attracted world-wide publicity. In particular, the Chief Inspector found that

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A p.43

> "The initiating factor in this accident was the captain's decision to make a VMC [Visual Meteorological Conditions] descent below the specified minimum safety height while north of McMurdo" (para 2.1).

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The Chief Inspector concluded that the probable cause of the accident was

A p.53

> "... the decision of the captain to continue the flight at low level toward an area of poor surface and horizon definition when the crew was not certain of their position and the subsequent inability to detect the rising terrain which intercepted the aircraft's flight path"(para 3.37).

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4. On 11th June 1980 (the day prior to publication of the said report of the Chief Inspector of Air Accidents) the Appellant, then a Judge of the High Court of New Zealand, was appointed, by presents issued under the authority of the Letters Patent of His Late Majesty King George the Fifth dated 11th May 1917 and under the authority of, and subject to, the Commissions of Inquiry Act 1908 and with the advice and consent of the Executive Council of New Zealand, to be a Royal Commissioner to inquire into and to report to His Excellency the Governor-General upon:

B pp.vi,
vii and
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(a) The time at which the aircraft crashed:

(b) The cause or causes of the crash and the circumstances in which it happened:

(c) Whether the aircraft and its equipment were suitable for Flight TE 901?

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(d) Whether the aircraft and its equipment were properly maintained and serviced?

(e) Whether the crew of the aircraft held the appropriate licences and ratings and had adequate experience to make Flight TE 901?

(f) Whether, in the course of Flight TE 901, the aircraft was operated, flown, navigated, or manoeuvred in a manner that was unsafe or in circumstances that were unsafe?

(g) Whether the crash of the aircraft or the death of the passengers and crew was caused or contributed to by any person (whether or not that person was on board the aircraft) by an act or omission in respect of any function in relation to the operation, maintenance, servicing, flying, navigation, manoeuvring, or air traffic control of the aircraft, being a function which that person had a duty to perform or which good aviation practice required that person to perform?

(h) Whether the practice and actions of the Civil Aviation Division of the Ministry of Transport in respect of Flight TE 901 were such as might reasonably be regarded as necessary to ensure the safe operation of aircraft on flights such as TE 901?

(i) The working and adequacy of the existing law and procedures relating to:-

(i) The investigation of air accidents; and

(ii) In particular, the making available to interested persons of information obtained during the investigation of air accidents.

(j) And other facts or matters arising out of the crash that, in the interests of public safety, should be known to the authorities charged with the administration of civil aviation in order that appropriate measures may be taken for the safety of persons engaged in aviation or carried as passengers in aircraft.

5. Between 7th July 1980 and 3rd February 1981 the Royal Commission held public sessions in Auckland over a period of 75 days and heard evidence on oath and submissions. The parties represented before the Commission and their Counsel are recorded in the Royal Commissioner's Report.

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B p.xiii

Record
Part II

The major participation was by:-

(a) Counsel assisting the Commission.

(b) Air New Zealand, which is the state-owned national airline of New Zealand.

(c) A consortium of next-of-kin of deceased passengers.

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(d) The estate of the deceased co-pilot First Officer Cassin (who occupied the right pilot's seat immediately prior to the crash).

(e) The New Zealand Airline Pilots Association Incorporated (ALPA) and the estate of Captain Collins (who occupied the left pilot's seat immediately prior to crash).

(f) The Civil Aviation Division of the Ministry of Transport. 20

The participants referred to at (b) to (f) above were either cited as parties pursuant to Section 4 of the Commissions of Inquiry Act 1908 or authorised to appear pursuant to Section 4A of that Act.

6. As is recorded in the Minutes of a Board Meeting of Air New Zealand held on 1st July 1980 (copies of which were disclosed on discovery during the course of the proceedings before the Court of Appeal), Air New Zealand's case before the Royal Commissioner was to be developed around the two conclusions of the Chief Inspector set out in paragraph 3 above.

Doc.9 pp.81-82 — 30

7. The evidence of each prospective witness was briefed by the party proposing to call the witness and a prepared brief was tabled and read when the witness was sworn and called. The witness was then cross-examined by Counsel for other parties, then by Counsel assisting, and then re-examined by the party calling the witness. Because of its particular interest in the proceedings, Air New Zealand was permitted to cross-examine all witnesses not called by it after all other parties and immediately before Counsel assisting. Certain witnesses not called by a party were called by one of Counsel assisting and, where necessary, following cross-examination by the parties, were cross-examined by the other Counsel

Doc.3 — 40

Record Part II

assisting. All cross-examination and re-examination was recorded on a word processor, with copies of evidence being furnished to Counsel twice daily. Out of the 3,083 pages of evidence, there were over 2,000 pages of cross-examination.

Doc.1

8. In the course, and as part, of his investigations of the crash the Royal Commissioner also visited the United States of America, Canada, the United Kingdom and
10 Antarctica and furnished reports of his visits to the parties to the Inquiry.

9. Following completion of Counsels' Submissions, the Royal Commissioner prepared a Report and on 16th April 1981 submitted it to His Excellency the Governor-General of New Zealand.

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Part I In pocket B

10. On the cause of the crash the Royal Commissioner reached a different conclusion from the Chief Inspector.
20 The Royal Commissioner concluded in his Report:

> "393. In my opinion therefore, the single dominant and effective cause of the disaster was the mistake made by those airline officials who programmed the aircraft to fly directly at Mt. Erebus and omitted to tell the aircrew. That mistake is directly attributable, not so much to the persons who made it, but to the incompetent administrative airline procedures which made the
> 30 mistake possible.

B p.159

> 394. In my opinion, neither Captain Collins nor First Officer Cassin nor the flight engineers made any error which contributed to the disaster, and were not responsible for its occurrence."

11. The significant factors on which the Royal Commissioner's conclusion was based were in summary
40 as follows:

(1) For the first two Antarctic flights of 1977 the navigation track contained in Air New Zealand's ground computer followed a line from Cape Hallett across Mount Erebus to a waypoint with a longitude of 166° 48' east. Prior to the commencement of the 1978 series of Antarctic flights a longitude of 164° 48' east was entered

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into the ground computer with the consequence that the navigation track was altered so as to follow a line to the west of Ross Island passing over the sea ice of McMurdo Sound. (This new route can conveniently be seen by looking at Figure 3 of the Report. It is the dotted line marked "False Track"). Whether the change in the waypoint was intentional or the result of an error, because of its operational utility and logic the altered waypoint was thereafter maintained by the Navigation Section of Air New Zealand as an approved position.

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(2) The management of Air New Zealand and its Flight Operations Division were aware from November 1977 onwards that airline pilots on Antarctic flights were flying at levels varying from 1,500 feet to 3,000 feet above sea level, that is to say substantially below the minimum safe altitude stipulated by the Department of Civil Aviation, and that some flights travelled down McMurdo Sound in a generally southerly direction at such altitudes.

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(3) When the aircraft flight crew were briefed on 9th November 1979, as on previous flights in 1978 and 1979, the navigation track from Cape Hallett contained in the computer followed the line over the flat expanse of McMurdo Sound to 164° 48' east (i.e. the "False Track" shown in Figure 3 referred to above). There was not supplied to Captain Collins either at the briefing or on the morning of the flight any topographical map upon which had been drawn the track along which the computer systems would navigate the aircraft. However, from the information supplied to him at the briefing, Captain Collins had himself plotted the navigation track on the night before the flight on a map or maps and on an atlas as extending down McMurdo Sound to 164° 48' east.

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(4) Neither Captain Collins nor First Officer Cassin nor the Briefing Officer, Captain Wilson, had previously visited the McMurdo area. The flight crew had received no account of the "whiteout" phenomenon which has the effect that pilots

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flying over white surfaces under cloud can in certain conditions believe that they are seeing clear air ahead when through distortion of light they are actually approaching an obstacle or rising ground. (In fact the Royal Commissioner found that neither Air New Zealand nor the Civil Aviation Division knew anything about this phenomenon and never prior to the crash understood the term "whiteout" to mean anything else than a snowstorm which obscured visibility.)

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B pp.60-61
(para.165)

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(5) In the early morning of 28th November 1979, about 6 hours before the fatal flight departed, the navigation track to be programmed into the aircraft's computer for the last leg of the flight was switched to a line across Mount Erebus on Ross Island with a longitude of 166° 58' east. (This is the line marked "Real Track" in Figure 3 of the Report). Neither Captain Collins nor any member of his crew was told of the alteration which had been made to the computer track.

B p.14

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(6) When he descended to 1,500 feet as authorised by the U.S. Ground Controller (in accordance with his instructions at the briefing), Captain Collins believed that the aircraft was flying over McMurdo Sound whereas, in fact, unknown to him, the aircraft had been programmed to fly directly towards Mount Erebus.

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(7) The flight crew (as also Mr Peter Mulgrew, an experienced Antarctic explorer who was the official commentator for the flight) failed to see the slopes of Mount Erebus directly ahead of them by reason of the "whiteout" phenomenon which had the effect that the snow-covered rising terrain in front of the aircraft appeared to them as a flat surface.

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12. The Report was subsequently presented to the House of Representatives by Command of the Governor-General and later printed for public sale.

13. The Report contained strong criticisms of the evidence which had been adduced by Air New Zealand and of the Company's stance before the inquiry. At paragraph

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376 of the Report, the Royal Commissioner noted that there were aspects of Air New Zealand's evidence which he had been obliged totally to reject and singled out five such aspects of the evidence in which the case advanced by Air New Zealand on the vital issues of low flying and the switch of the McMurdo waypoint had been found to be false. These were:-

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B p.150

> "... the assertion by the executive pilots that they had no specific knowledge of antarctic flights operating under the minimum safe altitude specified by the Civil Aviation Division, and this was also asserted by the Chief Executive - the allegation by Captain Johnson that he believed Captain Simpson had told him that the McMurdo waypoint was incorrectly situated - allegations by Navigation Section witnesses that they believed that the alteration to the co-ordinates only amounted to 2 miles - the explanation by a highly skilled navigational expert that he drew an arrow on a meridian of longitude so as to remind himself that the meridian pointed north - the allegation by Navigation Section witnesses that the misleading flight plan radioed to McMurdo on the morning of the fatal flight was not deliberate but the result of yet another computer mistake".

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At paragraph 377 of the Report the Royal Commissioner concluded that

B p.150

> "... the palpably false sections of evidence which I heard could not have been the result of mistake, or faulty recollection. They originated, I am compelled to say, in a pre-determined plan of deception. They were very clearly part of an attempt to conceal a series of disastrous administrative blunders and so, in regard to the particular items of evidence to which I have referred, I am forced reluctantly to say that I had to listen to an orchestrated litany of lies".

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B pp.166-67

14. In an Appendix to the Report the Royal Commissioner considered separately the question of the costs of the Inquiry which, by Section 11 of the Commissions of Inquiry Act 1908, he was empowered to order to be paid in whole or in part by any of the parties to the Inquiry and in respect of which he had invited submissions from the parties, including Air New Zealand.

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	Record Part II
15. In response to such invitation, Air New Zealand put in separate submissions in which it was argued that the Company's conduct at the inquiry both in providing and disclosing information either documentary or through production of witnesses "could not be considered as unreasonable or responsible for unnecessary delay, trouble or expense to the Commission or any of the other parties."	Doc.6 Vol.1 pp.108-12 p.110
16. Notwithstanding this submission the Royal Commissioner concluded that the conduct of Air New Zealand had "materially and unnecessarily extended the duration of the hearing" and that on this ground the airline should be required to make a contribution towards the public cost of the Inquiry. The Royal Commissioner cited five examples where material elements of information had not originally been disclosed by Air New Zealand and had successively come to light at different stages of the inquiry when the hearing had been going on for weeks and in some cases for months. These were:-	Part I In pocket B p.166

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(1) the fact that the flight path from Hallett to McMurdo was not binding on pilots;

(2) the fact that Captain Wilson briefed pilots to maintain whatever altitudes were authorised by McMurdo Air Traffic Control;

(3) the fact that after the crash documents were ordered by the Chief Executive to be destroyed;

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(4) the fact that an investigation committee had been set up by the airline in respect of which a file was held;

(5) the fact that one million copies of the Brizendine article (which described an approach down the centre of McMurdo Sound at an altitude of 3,000 feet) had been printed on behalf of the airline, a fact never revealed by the airline at all.

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The Royal Commissioner accordingly directed, inter alia, that Air New Zealand pay to the Department of Justice the sum of $150,000 by way of contribution to the public cost of the Inquiry.	B p.167

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B. PROCEEDINGS FOR REVIEW

17. By application for judicial review filed pursuant to the Judicature Amendment Act 1972 (as amended by the Judicature Amendment Act 1977) Air New Zealand applied to the High Court for an order, inter alia, setting aside the "findings" of the Royal Commissioner contained in paragraph 377 and certain other paragraphs of the Report, namely, paragraphs 45 and 54 (destruction of documents); 255(e) (introduction of "McMurdo" into the Air Traffic Control flight plan) and (f) ("a concocted story"); 348 (discussion between Captain Eden and First Officer Rhodes); 352 (evidence about ring-binder notebook); 353, 354, and 359 (evidence about two flight bags). In the alternative, Air New Zealand sought declarations that such "findings" were contrary to law, unauthorised or otherwise invalid and/or were made in excess of jurisdiction and/or in circumstances involving unfairness and breaches of the rules of natural justice. In addition, in a separate claim for relief, Air New Zealand sought an order quashing the direction of the Royal Commissioner that Air New Zealand should pay the sum of $150,000 by way of contribution to the public cost of the Inquiry. The Second and Third Respondents, to whom as employees of Air New Zealand specific reference was made in certain of the impugned paragraphs of the Report, were subsequently joined as Applicants in the proceedings.

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18. The Respondents to the application for review were the Royal Commissioner as First Respondent, Her Majesty's Attorney-General for New Zealand representing the Ministry of Transport as Fourth Respondent, the New Zealand Airline Pilots Association Incorporated (ALPA) as Fifth Respondent, and Her Majesty's Attorney-General representing the public interest as Sixth Respondent.

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The estates of Captain Collins and First Officer Cassin were originally joined as Second and Third Respondents but were later discharged from the proceedings. On the substantive hearing of the application for review the Attorney General as Fourth Respondent representing the Ministry of Transport was granted leave to withdraw.

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C p.614
lines
19-22

19. Concurrently with the application for review the Applicants applied pursuant to Section 64 of the Judicature Act 1908 for removal of the proceedings from the High Court into the Court of Appeal. The application

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was granted by Mr. Justice Speight only in respect of certain defined questions of law but on 5th August, 1981, the Court of Appeal allowed the Applicants' appeal and ordered the removal of the entire proceedings into the Court of Appeal.	C p.614 lines 22-25 C p.617 Lines 43-45

20. The application for judicial review was heard by the Court of Appeal (Woodhouse P., Cooke, Richardson, McMullin and Somers JJ.) from 5th October to 12th October
10 1981. On 22nd December 1981 the Court of Appeal, in reserved judgments, made an order quashing the Royal Commissioner's $150,000 costs order ([1981] 1 NZLR 618); the Court of Appeal did not grant any other relief which Air New Zealand or the other Applicants had sought. Two separate judgments were delivered, one by the President and McMullin J. (hereinafter referred to as "the President's judgment") and the other by Cooke, Richardson and Somers JJ. (hereinafter referred to as "Mr. Justice Cooke's judgment"). — C pp.618ff; C pp.620-52; C pp.652-67

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21. <u>The President</u> and <u>McMullin J.</u> were of the opinion that the Report of the Royal Commissioner was reviewable and stated that they were willing to go further than the remaining members of the Court of Appeal in the orders they were prepared to make but that reputation could be vindicated and the interests of justice met by an order quashing the order for costs. In the President's judgment it was held that:- — C p.620 lines 48-55 and p.652 lines 40-46

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(i) irrespective of the order for costs, the Court had jurisdiction to review the findings in the challenged paragraphs on grounds related to jurisdiction and natural justice; — C p.624 lines 47-50

(ii) the applicants, on establishing that the findings of the Royal Commissioner were outside the Commissioner's terms of reference, could be granted a declaration to that effect at common law; — C p.626 lines 45-48

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(iii) such findings could additionally be set aside under Section 4(2) of the Judicature Amendment Act 1972 (as amended) as being made in the exercise of a statutory power of decision, in that the findings were decisions "affecting the right" to reputation of the persons whose conduct was criticised in the Report. — C p.626 line 48 - p.627 line 37

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C p.651
Lines 17-21

(iv) the findings contained in each of paragraphs 348 and 377 of the Report were collateral assessments of conduct made outside of, and were not needed to answer, any part of the terms of reference and such findings were accordingly made by the Royal Commissioner in excess of his jurisdiction;

C p.651
lines 30-48

(v) the findings contained in paragraphs 348 and 377, as well as the findings contained in the other impugned paragraphs of the Report, were additionally made in breach of natural justice on the grounds that the affected officers were deprived of the opportunity of answering unformulated charges made in the paragraphs and, in the case of certain paragraphs, on the grounds that the findings were unsupported by any evidence of probative value; 10

C p.652
lines 7-32

(vi) the order for costs of $150,000 was on its natural reading closely associated with the findings contained in paragraph 377 of the Report which were invalid for excess of jurisdiction and breach of natural justice and was in fact, if not in name, a punishment; accordingly the order should be set aside. 20

In the course of reaching their conclusions in (v) above, the President and McMullin J. carried out an extensive review of the opinions expressed, and assessments of evidence made, by the Commissioner in several paragraphs of the Report, including, but not limited to, the paragraphs impugned by Air New Zealand. 30

C p.664
lines 24-29

C p.665
lines 22-52

22. Cooke, Richardson and Somers JJ. expressed reservations as to whether the Royal Commission had statutory authority for its inquiry as well as prerogative authority and whether accordingly the Royal Commissioner was exercising a statutory power for the purposes of the Judicature Amendment Act 1972 and as to whether the findings in the body of the report amounted to "decisions" entitling the Court to set aside the impugned findings under Section 4(2) of the 1972 Act. It was held, however, that in making a costs order, the Royal Commission was undoubtedly exercising "a statutory power of decision", with the consequence that the costs order was reviewable, and that the costs order was not realistically severable from the impugned paragraph 40

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377 of the Report. In Mr Justice Cooke's judgment it was held that:-

(i) the Royal Commissioner had no powers, implied as being reasonably incidental to his legitimate functions of enquiry, to make assertions amounting to charges of conspiracy to perjure at the inquiry itself and that the Commissioner exceeded his jurisdiction in paragraph 377 of the Report; — In pocket C p.666 lines 1-27

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(ii) if the Commission did have jurisdiction to make such findings, natural justice would have required that the allegations in paragraph 377 be stated plainly and put plainly to those accused, which was not done; — C p.666 lines 28-32

(iii) the costs order, not being realistically severable from paragraph 377 of the Report, should be quashed on this ground as well as on the ground that it was invalid as to amount; — C p.665 lines 33-52 C p.666 lines 33-42

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(iv) as to the remaining paragraphs of the Report which were impugned by the Applicants, even if the Court had jurisdiction to quash particular passages in the Report or to grant declarations concerning them, such a jurisdiction was discretionary and the Court would have to be satisfied that grounds so strong as to require it to act in that unusual way had been made out; the Applicants had not made out a sufficiently strong case to justify the Court in interfering, assuming that there was jurisdiction to do so. — C p.667 Lines 11-33

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23. In the aftermath of the publication of the decision of the Court of Appeal, the Appellant resigned from his position as a Judge of the High Court and the Government of New Zealand agreed to meet the costs of this appeal by him.

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C. THE ISSUES

24. The following are the principal issues raised in the Appeal:

(1) Whether the Court of Appeal were justified in reviewing and setting aside the order for costs made by the

Royal Commissioner by linking the order with the impugned "findings" in paragraph 377 of the Report.

(2) Whether and, if so, on what grounds the opinions expressed in paragraph 377 of the Report of the Royal Commissioner were liable to be reviewed by the Court independently of the order for costs and, in particular, whether such paragraph was liable to be set aside by the Court or was capable of forming the subject of declarations pursuant to the Judicature Amendment Act 1972 (as amended). 10

(3) Whether the Royal Commissioner acted in excess of jurisdiction in expressing the opinion in 377 of his Report that witnesses had combined to give false evidence.

(4) Whether the Royal Commissioner acted in breach of the rules of natural justice in expressing the opinions in paragraph 377 of the Report. 20

(5) Whether, as the Court of Appeal held, the jurisdiction of the Royal Commissioner to order the costs of the enquiry to be paid by a party was in any event limited by the Rules prescribing a Scale of Costs 1903 (1904 New Zealand Gazette 491) to an award of a maximum amount of $600.

Doc.2
p.24
lines 42-43
p.25
lines 1-4

25. As appears from paragraph 17 above, the Applicants in the proceedings for judicial review challenged paragraphs of the Report other than paragraph 377 both on grounds of excess of jurisdiction (paragraph 348) and on grounds of breach of natural justice (paragraphs 45, 54, 255(e) and (f), 348, 352, 354 and 359). In respect of their challenge to these paragraphs of the Report the Applicants failed, the majority of the Court (Cooke, Richardson and Somers JJ.) holding that the Applicants had not made out a sufficient case on any of the other impugned paragraphs to justify the Court in interfering, assuming there existed any jurisdiction to grant the relief sought. The Applicants (i.e. the First, Second and Third Respondents to this appeal) have not appealed against this decision and accordingly no issue arises in the present appeal in relation to the quashing or the grant of any declarations in respect of the other impugned paragraphs of the Report. 30 40

In pocket
C p.667
Lines 30-33

26. In a letter dated 2nd March 1983, the Solicitors to Air New Zealand stated that the Applicants did not seek any relief in relation to the other impugned paragraphs of the Report but intended to rely on the comments and arguments advanced in the Court of Appeal in relation to such paragraphs in support of their contention that the Court of Appeal was correct in its conclusions on paragraph 377. In the submission of the Appellant, Air New Zealand's contention that the conclusions in paragraph 377 were based on the conclusions in the other impugned paragraphs (a contention which was not advanced in the Court of Appeal) is without foundation. As is apparent from the terms of paragraph 377 itself, the conclusion expressed in the paragraph was based on the Royal Commissioner's view that false evidence had been given on five important matters which were set out in paragraph 376 of this Report: paragraph 376 was not itself the subject of challenge by the Applicants and with the exception of paragraphs 255(e) and (f) none of the matters discussed in the other individual paragraphs challenged by the Applicants was referred to in paragraph 376.

(1) Linking of paragraph 377 with the costs order

27. The application for judicial review in the present proceedings was made pursuant to the Judicature Amendment Act 1972, as amended by the Judicature Amendment Act 1977. The 1972 Act as amended is hereinafter referred to as "the Act". Section 4 of the Act provides so far is is material as follows:

"4. Applications for review -
(1) On an application by motion which may be called an application for review, the Supreme Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject matter of the application, by order grant, in relation to the exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.
(2) Where on an application for review the applicant is entitled to an order declaring that a decision made in the exercise of a statutory power

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of decision is unauthorised or otherwise invalid, the Court may, instead of making such a declaration, set aside the decision."

"Statutory power" and "statutory power of decision" are defined in Section 3 of the Act.

"Statutory power" is defined as meaning (so far as is material):

"... a power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules or bylaws of any body corporate:- 10

(a) ...
(b) To exercise a statutory power of decision;
(c) ...
(d) ... or
(e) To make any investigation or inquiry into the rights, powers, privileges, immunities duties or liabilities of any person."

"Statutory power of decision" is defined as meaning (so far as is material): 20

"... a power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules or bylaws of any body corporate, to make a decision deciding or prescribing or affecting:-

(a) The rights, powers, privileges, immunities, duties or liabilities of any person; or
(b) ...

"Decision" is defined as including "a determination or order."

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28. In the proceedings for judicial review, the Applicants contended that, in expressing the views, opinions and conclusions in each of the impugned paragraphs of the Report (designated by them as "the findings"), the Royal Commissioner was exercising both a "statutory power" and a "statutory power of decision" for the purposes, and within the meaning, of Section 3 of the Act: it was alleged that such "findings" constituted decisions deciding, prescribing or affecting the rights or liabilities of the employee concerned and Air New Zealand and that, accordingly, 40 each of the impugned paragraphs was liable to be set aside pursuant to Section 4(2) of the Act.

In pocket
C p.664
lines 26-27

29. The Applicants' submissions were not accepted by the majority of the Court of Appeal who expressed reservations as to whether the "findings" in the body of the Report amounted to "decisions" at all for the purposes

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C p.667 Lines 11-21
C p.667 Lines 22-55
Part I p.24, Line 33-p.25, Line 18

of the Act and as to whether the Court had jurisdiction to quash, or grant declarations in relation to, particular paragraphs in the Report. The only clear exercise of a statutory power of decision which Cooke, Richardson and Somers JJ. could agree in identifying was the making of the costs order by the Royal Commissioner under Section 11 of the Commissions of Inquiry Act 1908. However, the costs order was not directly impugned by the Applicants in their Amended Statement of Claim, the Applicants
10 merely asking that the order should be set aside by way of consequential relief: the Amended Statement of Claim contained no challenge to the reasons given by the Royal Commissioner in support of the award of costs; nor was it alleged in the Amended Statement of Claim that the reasons given were not in themselves reasons which would justify the making of the order; nor was it at any stage in the proceedings suggested that the requirements of natural justice had not been fully satisfied in relation to the making of the costs order.

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30. In their written Opening Submissions to the Court of Appeal (a copy of which was supplied to the other parties to the proceedings), Air New Zealand for the first time challenged the award of costs on the ground that the Royal Commissioner's conclusion that Air New Zealand had materially and unnecessarily extended the duration of the hearing was not justified. In their submissions in reply (after the other parties had concluded their arguments) Air New Zealand changed their ground of
30 complaint and alleged for the first time that the order for costs was properly to be read as based on and linked to the impugned "findings" in paragraph 377 of the Report.

31. In their judgment, the majority of the Court of Appeal made no reference to the Applicants' substantive attack on the grounds expressly relied on by the Royal Commissioner for making the costs order, but instead exercised their jurisdiction to set aside the costs order by linking the order with paragraph 377 of the Report:
40 thus, in Mr. Justice Cooke's judgment, the thesis was advanced that the costs order "reflect[ed] the same thinking as" paragraph 377 of the Report (page 654, lines 11-12), was "not realistically severable from that part of the report" (page 665, line 51), would be understood by reasonable readers of the Report to be "linked with and consequential upon the adverse conclusions stated by the Commissioner in the section of the report headed by him 'The Stance adopted by the Airline before the Commission of Inquiry'" (page 665, lines 40-42)

In Pocket C

Record
Part I
In pocket
C p.665
Lines 46-48
B pp.149-50
C p.624
Lines 9-47;
p.652
Lines 21-37

and was a "reversion to the theme of the 'Stance' section, with its exceedingly strong allegations in para 377 of a 'pre-determined plan of deception' and 'an orchestrated litany of lies'." (The reference to the 'Stance' section is in fact a reference to paragraphs 373 to 377 inclusive of the Report; the first four paragraphs of the section were not challenged anywhere in the Amended Statement of Claim). The President's judgment contained similar passages seeking to link the costs order with the "challenged findings" in the Report. 10

32. It is submitted that this approach was quite unjustified and that it was wrong for their Honours to reject the express reasons given by the Royal Commissioner for his costs order or to gloss the reasons by holding that they might be understood as being linked with or related to the conclusions expressed in paragraph 377 of the Report. The Court of Appeal were plainly suggesting that the reasons given on p.167 of the Report were not the true or at any rate not the full reasons for the 20 costs order. The Appendix to the Report relating to the costs of the Inquiry is entirely self-contained and does not depend for its reasoning on any earlier sections or passages of the Report. The grounds for making the costs order were that Air New Zealand had materially and unnecessarily extended the duration of the hearing by the adoption of an adversarial stance and by the belated disclosure of information which should have been revealed at the outset of the inquiry (of which five supporting examples were cited). Where, as in the present case, a 30 tribunal or Commission of Inquiry gives reasons for its decision which are on their face unambiguous and exhaustive there exists no basis for seeking to add to or gloss the reasons given in the absence of clear and compelling evidence that the reasons given are not the true or the only reasons. No such evidence existed and no such allegation had been made in the present case and, in the absence of such evidence, it was in the submission of the Appellant, unjustified and improper to impugn the genuineness of the reasons actually given by seeking to 40 impute to the Royal Commissioner additional and different reasons or by seeking to forge a link, not made by the Royal Commissioner himself, between unrelated parts of the Report. In the submission of the Appellant, the making of the costs order cannot properly be used (as it was used by the majority of the Court of Appeal) to justify an attack on other paragraphs of the Report which would otherwise be unreviewable.

B pp.166-67

Record
Part I

(2) Reviewability apart from costs orders

33. In contrast to the majority of the Court of Appeal, the President and McMullin J. held that the "findings" in each of the impugned paragraphs involved the exercise both of a "statutory power" and of a "statutory power of decision" and that accordingly such "findings" were capable of being set aside under Section 4(2) of the Act. In the result, however, the President and McMullin J. did not set aside such "findings", holding that "reputation can be vindicated and the interests of justice met" by allying themselves with the other members of the Court in quashing the order for costs against Air New Zealand.

In pocket
C p.620
Line 52

34. In holding that the inquiry of the Royal Commissioner involved the exercise of a "statutory power" the President and McMullin J. held that "An inquiry into whether any person caused or contributed to the crash by an act or omission in respect of his duties is an inquiry into liabilities". In addition it was held in the President's judgment that the "findings" contained in each of the impugned paragraphs involved the exercise of a "statutory power of decision", since such "findings", which were likely to affect individuals in their personal civil rights or to expose them to prosecution under the criminal law, constituted decisions "affecting" their rights within the meaning of the Act, namely the "right not to be defamed without justification". In effect the right held to be affected was the "right to reputation".

C p.627
Lines 4-5

C p.627
Lines
11-18,24

35. This conclusion, if correct, has the most far-reaching consequences since it follows that any statement which is defamatory or damaging to the reputation of an individual and which is made by a Royal Commissioner in the course of preparing his Report will expose the relevant "finding" to potential attack by way of judicial review and is liable to be set aside under the 1972 Act.

36. It is submitted that this approach is fundamentally unsound and that the President and McMullin J. were wrong in their conclusion that the "findings" of the Royal Commissioner were properly to be regarded as "decisions" for the purposes of Section 4(2) and in their conclusion that such "findings" "affected" the "rights" of the individuals within the meaning of Section 4(2) of the Act. The suggestion that the individual has a legal right not to be defamed without justification in the

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Part I

Report of a Royal Commissioner ignores the reality of the legal position which is that a Judge when appointed as Royal Commissioner is protected by the same absolute privilege and immunity which a Judge enjoys when giving a judgment and criticising the conduct of parties or witnesses (see Commissioners of Inquiry Act, 1908, Section 13(1)). The fallacy of the approach is further underlined by the introduction of the qualifying words "without justification", which are plainly a reference to the defence of justification available in a civil action for defamation. According to the President's formulation the truth or falsity of any "finding" which was defamatory of an individual would require to be investigated before it could be determined whether this finding "affected" the "rights" of the individual concerned and was thus capable of being reviewed. Yet in relation to a Royal Commissioner's Report, such an investigation is plainly impermissible.

In pocket
C p.627
line 18

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37. In the submission of the Appellant the opinions or "findings" expressed in paragraph 377 of the Report were not reviewable by the Court and the Court of Appeal erred in purporting to review such "findings" on the following grounds:

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(i) A Royal Commission does not in reporting its opinions and the reasons for such opinions exercise a "statutory power of decision" within the meaning of Section 3 of this Act in that it does not make "a decision deciding or prescribing or affecting ....the rights or powers of any person": See Daemar v Gilliand [1981] I NZLR 61 at 63-64. In the exercise of its functions of inquiring and reporting, a Royal Commission makes no relevant "decisions", still less decisions "deciding or prescribing or affecting... the rights... of any person": the "findings" of a Royal Commission are and remain expressions of opinion which do not alter or determine the legal rights of the persons to whom they refer. It is respectfully submitted that the statement in the judgment of the Full Court in Re Royal Commission on Thomas Case [1980] I NZLR 602, 615 lines 44-448 to the effect that a Royal Commission "both by its public rulings and pronouncements during the course of its investigations and by its reporting" exercises "statutory powers of decision" in the extended meaning of that phrase in Section 3 of the Act, is erroneous. In the submission of the Appellant, contrary to the opinion expressed in the President's judgment, the "findings" of a

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C p.626
Lines 48-53

Royal Commissioner are not liable to be set aside pursuant to Section 4(2) of the Act.

(ii) Likewise in the present case the Royal Commissioner did not, in reporting his opinions and the reasons for such opinions, exercise a "statutory power" within the meaning of Section 3 of the Act since, despite being invested with powers of inquiry pursuant to Section 15 of the Commissions of Inquiry Act 1908, such inquiry was not "an investigation
10 or inquiry into the rights, powers, privileges, immunities duties or liabilities of any person." It is respectfully submitted that the President and McMullin J. erred in holding that "an inquiry into whether any person caused or contributed to the crash by an act or omission in respect of his duties is an inquiry into liabilities" for the purposes of Section 3 of the Act. Likewise, for the reasons given in (i) above, the statute did not confer a power or right "to exercise a statutory power of decision" within sub-paragraph (b) of the definition of "statutory
20 power" in Section 3 of this Act.

In pocket
C p.627
Lines 4-5

(iii) Even if, in reporting his opinions and the reasons for such opinions, the Royal Commissioner exercised a "statutory power" within the meaning of Section 3 of the Act, no relief is available by way of review pursuant to Section 4(1) which would not have been available in proceedings for a writ or order of or in the nature of mandamus, prohibition or certiorari, or a declaration or injunction, had the statute not been enacted:
30 Daemar v Gilliand (supra) at p.63, line 53 p.54, line 7; Mr. Justice Cooke's judgment. It is submitted that no such relief would have been available in proceedings to challenge the validity of the Report of a Royal Commissioner, or of individual "findings", expressions of opinion or conclusions contained in such a Report.

C p.664
Lines 14-19

38. Although, as was recognised in the President's judgment, the proceedings of a Royal Commission are largely free from judicial control, it is apparent that in certain
40 circumstances such proceedings prior to the preparation and submission of the Report, may be liable to judicial review by way of the prerogative writs and orders or by means of a declaration or injunction. The limits of such judicial control of the proceedings of a Royal Commission are unclear. However it seems that such relief may be available:

C p.626
Lines 2-3

(i) to restrain an inquiry where the subject matter of the inquiry is not within the scope of the statute under which the Commission was appointed (Re Sedlmayr (1978) 82 DLR (3d) 161);

(ii) to restrain a Royal Commission from exceeding its jurisdiction by inquiring into matters falling outside its terms of reference (Re Sedlmayr (supra)) or by posing questions to witnesses on matters unrelated to the proper subject matter of the inquiry (Re Royal Commission on Licensing [1945] NZLR 665); 10

(iii) to secure compliance by the Royal Commission with statutory procedural obligations including, in particular, the obligation to permit parties affected by the inquiry to attend and be heard (Re Royal Commission on State Services [1962] NZLR 96; Landreville v. The Queen (No. 2) (1977) 75 DLR 3d. 380). 20

39. It is, however, submitted that the power of judicial review does not extend to quashing or declaring invalid the Report of a Royal Commissioner or individual "findings", conclusions or expressions of opinion contained in such Report. The Report of a Royal Commissioner is exclusively informative in nature (here it was required to be made to His Excellency the Governor-General and to no other person) and the conclusions reached in the Report neither directly determine, nor of their own 30 force affect, the rights of any person. Nor does the Report of a Royal Commissioner form the basis of any decision to be made by a higher authority or satisfy some condition precedent to the exercise of powers which will in turn affect rights or otherwise give rise to legal consequences: "......the nature of the Commission's Report neither directly affects nor in any way subjects to a new hazard the rights of the applicant......" (R.v. Collins (1976) 8 A.L.R. 691, 699). In consequence, no relief by way of certiorari would lie to quash the Report 40 as a whole or to quash particular "findings" or conclusions expressed in the Report (R.v. Collins (supra); Landreville v. The Queen (1973) 41 DLR (3d) 574). It is further submitted that in the case of a Report of a Royal Commissioner which neither produces, nor could directly produce, any legal consequences and which is exclusively informative and advisory in nature, no relief lies by way

of a declaration as to the validity of the Report or parts of the Report or as to the fairness of the conclusions reached or "findings" expressed in the Report (Maxwell v. Department of Trade [1974] 1 Q.B. 523).

40. The submissions which follow are made without prejudice to the Appellant's contention that the Court of Appeal erred in purporting to review the impugned paragraphs of the Report pursuant to the terms of the Act.

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(3) Alleged Excess of Jurisdiction by Royal Commission

41. The Court of Appeal held that, in making the "findings" contained in paragraph 377 of the Report, the Royal Commissioner exceeded his jurisdiction, in that the "findings" were "collateral assessments of conduct made outside of and were not needed to answer any part of the terms of reference" (the President's judgment) and were not made in the exercise of powers "implied as being reasonably incidental to his legitimate functions of inquiry into the causes and circumstances of the crash" (Mr. Justice Cooke's judgment).

In pocket
C p.651
Lines 18-19

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C p.666
Lines 14-16

42. The Court of Appeal's decision raises a point of general importance, namely, the extent to which a Royal Commission is to be restricted in its power to report freely upon the processes of its inquiry and to record its assessment of the credibility of witnesses appearing before it or the quality of the evidence advanced by a party to the enquiry. It is submitted that the decision of the Court of Appeal places an unwarranted fetter on the power of a Royal Commissioner to inquire and report to the Governor-General on the processes of his inquiry, the conclusions reached as a result of his inquiry, and the reasons for such conclusions. It is further submitted that, even on the assumption that the jurisdiction of a Royal Commissioner is to be regarded as defined by the terms of reference so that any departure from the terms of reference is liable to judicial review on grounds of excess of jurisdiction, the present Royal Commissioner did not exceed his jurisdiction in reaching or expressing the conclusions in paragraph 377 of the Report.

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43. Under his warrant the Royal Commissioner was appointed to inquire into and report upon a number of issues including the following:

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"(g) Whether the crash of the aircraft or the death of the passengers was caused or contributed to by any person...... by an act or omission in respect of any function in relation to the operation .... of the aircraft, being a function which that person had a duty to perform or which good aviation practice required that person to perform?........

In pocket
B p.vi-vii

(j) And other facts or matters arising out of the crash that, in the interests of public safety, should be known to the authorities charged with the administration of civil aviation in order that appropriate measures may be taken for the safety of persons engaged in aviation or carried as passengers in aircraft....."

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B p.vii

In order to enable him to carry out his appointed functions the Royal Commissioner was further authorised and empowered by his Warrant

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"..... to make and conduct any inquiry or investigation under these presents in such manner, and at such time and place as you think expedient......"

B p.vii

and

".......to report your proceedings and findings...... from time to time if you shall judge it expedient to do so......"

B p.vii

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The Royal Commissioner was in conclusion required by his Warrant

"......to report to His Excellency the Governor-General in writing under your hands.......your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof......"

B p.vii

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44. It is apparent from the terms of the Warrant that, provided his inquiry was directed to determining the issues defined in the terms of reference or to matters reasonably incidental to such terms of reference, he was to be free to conduct his inquiry or investigation in such manner as he saw fit and to report fully and freely both on the results of his inquiry and on the process of

his examination and his opinions of the quality of the evidence adduced before him. More specifically, it is submitted that, provided the examination of witnesses was confined to matters reasonably incidental to the terms of reference, the Royal Commissioner was entitled and required under the terms of his Warrant to report his assessment of the truthfulness of the evidence received and, if his view was that evidence was false, to state his opinion whether the falsity was the result of honest error of
10 recollection or a deliberate attempt to deceive. Likewise, if the Royal Commissioner formed the opinion, from the fact that a number of witnesses had over an extended period of time given false evidence of a similar nature, that the evidence had originated in a plan of deception and that the witnesses had combined to deceive the inquiry, he was entitled to report that fact as well as the conclusions which he had reached on the basis of the evidence adduced. The Commission was at liberty, having rejected the evidence referred to in paragraph 376 (being
20 evidence on matters undeniably within, and central to issues raised by, his terms of reference) and having formed the view that the witnesses in question had combined to give false evidence on issues which were central to the cause of the crash, to report on this fact. Indeed the opinions expressed by the Royal Commissioner in the section entitled "Stance" (which included paragraph 377) were directly relevant to what he had to say about the causation of the disaster, for they explained how it came about that he was rejecting outright significant parts of
30 the evidence tendered to him by Air New Zealand. The Governor-General could fairly expect an explanation of this rejection of evidence and the Royal Commissioner was entitled to give it.

In pocket
B p.150

B pp.149-50

45. The decision of the Court of Appeal as to jurisdiction acknowledges that a Royal Commission may form and express the opinion that a series of witnesses called by a party to the inquiry had each given false evidence, and, apparently, that the false evidence of
40 each witness was to the same effect. (See Mr. Justice Cooke's judgment, p662, lines 47-49; p666, lines 5-8; the President's judgment p650, lines 44ff). However the decision prohibits a Royal Commission from forming or expressing the opinion that the series of individual instances of false evidence was other than coincidental. If the decision is correct, it substantially limits the power of a Royal Commission as well as other tribunals with fact-finding functions to form and report fully and freely their

C pp.618ff

opinions on the credibility of witnesses and on the quality of evidence adduced.

46. In reaching its conclusion that the Royal Commissioner had exceeded his jurisdiction in expressing the views in paragraph 377 of his Report, the Court of Appeal placed reliance on the decisions of the Courts of New Zealand in Cock v. Attorney-General (1909) 28 NZLR 405 and Re Royal Commission on Licensing [1945] NZLR 665.

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It is respectfully submitted that neither decision restricted or otherwise affected the entitlement of the Royal Commissioner to express the opinions in paragraph 377 of the Report. In expressing the view that the evidence adduced before him on issues which were central to his terms of reference was not only false but had originated in a plan of deception, the Royal Commissioner cannot be said to have been conducting or purporting to conduct an investigation into an alleged crime in any sense relevant to the decision in the Cock Case. Moreover, the judgments in the Court of Appeal provided no satisfactory basis for distinguishing between the expression of an opinion that a witness or several witnesses had been guilty of the crime of perjury (which is accepted by the Court of Appeal as falling legitimately within the jurisdiction of a Commission - see the President's judgment, p650, lines 52-54; Mr. Justice Cooke's judgment, p666, lines 6-8) and the expression of the opinion that such witnesses gave perjured evidence in concert (which is treated by the Court of Appeal as falling in all cases outside the jurisdiction of a Commission). As to the case of Re Royal Commission on Licensing, in contrast to that case the Royal Commissioner did not, in expressing such views, purport to inquire into matters falling outside the ambit of the inquiry as defined by the terms of the instrument of appointment: the scope of the inquiry conducted by the Royal Commissioner was at all times confined to matters within the terms of reference and the evidence of the witnesses, on which comment was made in the impugned paragraphs, was at all times directed to those matters alone.

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In Pocket
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47. Even if it were true to say that the "findings" in paragraph 377 were "not needed to answer any part of the terms of reference" (the President's judgment, p651, line 18), this would not, in the submission of the Appellant, be material to the question whether the Royal Commissioner acted within his jurisdiction. A Royal Commissioner does not exceed

C p.651

his jurisdiction by recording conclusions which are not essential to answer any part of his terms of reference. There are inevitably many matters arising out of an inquiry on which a Commission or Tribunal of Inquiry deems it desirable to report which are not strictly "needed" to answer any part of the terms of reference but which nevertheless serve to explain or cast light on the conclusions or on the course of its inquiry. If the approach of the Court of Appeal is
10 correct it would follow that it is open to a Court to go sentence by sentence through a Royal Commissioner's Report and to reject as going outside the Commission's jurisdiction anything which the Court thinks is not "needed" to answer the terms of reference. It is respectfully submitted that the whole approach is erroneous. It is for the Royal Commissioner to write his Report in his own way and it is clear that he must have a wide discretion as to what to include. The Appellant would respectfully pray in aid the Report of
20 the Tribunal appointed to inquire into the Disaster at Aberfan on October 21st, 1966. Lord Justice Edmund Davies (as he then was) was the Chairman of the Tribunal. The Aberfan Report contained at paragraphs 189-206 a section entitled "The Attitude of the National Coal Board" which was highly critical of the way in which the case had been run on behalf of the Coal Board especially concerning matters central to the cause of the disaster and the examination and cross-examination of witnesses. Even if, which is open to doubt, a test of necessity
30 were capable of practical application, such a test would impose an unwarranted restriction on the right and duty of a Royal Commissioner to inquire and report fully and freely in accordance with the terms of his Warrant.

48. It is accordingly respectfully submitted that the Court of Appeal was in error in holding that in expressing the views in paragraph 377 of his Report the Royal Commissioner exceeded his jurisdiction.

40 (4) Alleged breach of natural justice

49. In both judgments of the Court of Appeal it was held that the findings of the Royal Commissioner in paragraph 377 of the Report were made in breach of the rules of natural justice, in that the Commissioner failed to put the allegations contained in the paragraph plainly to those accused and thereby denied them an opportunity

In pocket
C p.620
Lines 44-67
p.666
Lines 28-35

of providing effective answers to the allegations. In the President's judgment a similar finding was made in relation to each of the other impugned paragraphs of the Report, namely paragraphs 45, 54, 255 (e) (f), 348, 352, 353, 354, and 359. In addition it was held in the President's judgment that the rules of natural justice had not been complied with in relation to the "findings" in paragraphs 45, 54, 352, 353, 354, 359 and 377 on the further ground that the "findings" were "unsupported by any evidence of probative value". For the purposes of reaching this determination, the President and McMullin J. conducted a wide ranging review of the evidence before the Commissioner and made several references to the affidavit evidence adduced by Air New Zealand which it was alleged cast doubt on the "findings" made in each of the impugned paragraphs. In contrast, in Mr. Justice Cooke's judgment (which was the judgment of the majority of the Court of Appeal):

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(i) it was held that, in relation to all of the impugned paragraphs with the exception of paragraph 377, the Applicants had failed to make out a sufficiently strong case to justify the Court in interfering, assuming that there was jurisdiction to do so.

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In pocket
C p.667
Lines 30-33

(ii) it was stated that the majority of the Court of Appeal had reservations on the questions "whether the complete absence of evidence is relevant in considering natural justice or can be redressed in proceedings of this kind". However, it was also stated that if it had been necessary to decide the question whether there was any evidence which could warrant the finding in paragraph 377 of the Report "we would find it at least difficult to see in the transcript any evidence of that kind".

C p.664
Lines 24-30

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C p.663
Lines 3-4

50. No appeal against the decision of the Court of Appeal referred to in paragraph 49 (i) has been lodged by the Applicants and no substantive relief in being sought by the Applicants in relation to such other paragraphs - see paragraph 26 above. Accordingly it is proposed to examine the two aspects of natural justice relied on by the members of the Court of Appeal only in relation to the conclusions expressed in paragraph 377 of the Report.

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Record
Part I

(a) Absence of probative evidence

51. In their judgment the President and McMullin J. appear to have held that the rules of natural justice required that the "findings" and views expressed in the Royal Commissioner's Report should be based not merely on evidence of probative value but on evidence which was substantial in character:

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> "If a party seeks to show not only that he did not have an adequate hearing but also that the evidence on which he was condemned was insubstantial, the Court is not compelled to shut its eyes to the state of the evidence in deciding whether, looking at the whole case in perspective, he has been treated fairly."

In pocket
C p.629
Lines 42-46

52. It is apparent from the survey of the evidence in the President's judgment and from the use made in the judgment of the affidavit evidence placed before the Court by Air New Zealand, that the finding by the President and McMullin J. of a breach of natural justice in this respect was based not on the absence of probative evidence to support the "findings" in the impugned paragraphs but on the fact that evidence to the opposite effect was available, or might have been made available, to the Royal Commission.

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53. It is submitted that the President and McMullin J. erred:

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(i) in holding that the rules of natural justice require that "findings", opinions or conclusions expressed in the Report of a Royal Commission should be based on material having probative value;

(ii) in holding that such "findings", opinions or conclusions of a Royal Commissioner whose function it is to inquire and report and not to decide, are subject to judicial review (on the basis of a breach of natural justice or otherwise) on grounds that the evidence in support of such "findings", opinions or conclusions is insubstantial;

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(iii) in purporting to review the opinions or conclusions expressed by the Royal Commissioner in the light of the evidence adduced before him and in the light of additional evidence not made available to him.

Record
Part I

54. If, contrary to the contention of the Appellant, the "findings", opinions or conclusions expressed in the Report of the Royal Commission were capable of being reviewed in the manner adopted in the President's judgment, it is alternatively submitted that there existed ample probative evidence to justify the opinion or conclusion expressed in paragraph 377 of the Report that witnesses had combined to give false evidence.

55. There were five specific items of evidence summarised in paragraph 376 which the Royal Commissioner found himself "obliged totally to reject". These five items which he identified again in paragraph 377 (lines 10-11) with the words ".... in regard to the particular items of evidence to which I have referred...", were: 10

In pocket
B p.150

(a) "the assertion by the executive pilots that they had no specific knowledge of antarctic flights operating under the minimum safe altitude specified by the Civil Aviation Division, and this was also asserted by the chief executive" (para.376, lines 3-6); 20

(b) "the allegation by Captain Johnson that he believed Captain Simpson had told him that the McMurdo waypoint was incorrectly situated" (ibid, lines 6-8);

(c) "allegations by Navigation Section witnesses that they believed that the alteration to the co-ordinates only amounted to 2 miles" (ibid, lines 8-10); 30

(d) "the explanation by a highly skilled navigational expert that he drew an arrow on a meridian of longitude so as to remind himself that the meridian pointed north" (ibid. lines 10-12);

(e) "the allegation by Navigation Section witnesses that the misleading flight plan radioed to McMurdo on the morning of the fatal flight was not deliberate but the result of yet another computer mistake" (ibid. lines 12-15); 40

56. Of these five findings of false evidence made by the Royal Commissioner, which formed the basis of the conclusion expressed in paragraph 377, not one was challenged by any of the Applicants in the Amended Statement of Claim on the grounds that the finding was unsupported by any probative evidence. It is the contention of the Appellant

that there was ample material of a probative character to support the view of the Royal Commissioner not only that the evidence of the witnesses on these crucial points directly related to the cause of the crash was false and should be rejected, but that the falsity of the evidence was not and could not be coincidental but was the result of a plan of deception.

In the Annex to this Case is set out a summary of 10 the salient evidence in support of the conclusion reached by the Royal Commissioner in respect of each of the matters set out in paragraphs 376.

(b) Failure to put allegations to witnesses

57. The case raises the question whether the rules of natural justice, insofar as they are applicable to an inquiry such as a Royal Commission whose functions are exclusively to investigate and report, require more than 20 that parties cited and persons interested should be afforded a fair opportunity of making their representations, adducing their evidence and meeting prejudicial matter arising in evidence in the course of the inquiry.

58. It is the primary contention of the Appellant that the rules of natural justice (insofar as they were applicable) were fully complied with in the Inquiry of the Royal Commission in that:-

30 (i) the matters referred to in paragraph 376 of the Report which formed the basis of the conclusion expressed in paragraph 377 were plainly in issue before the Royal Commission;

(ii) Air New Zealand were given full freedom to call, recall and brief such witnesses as it and its legal advisers wished to tender on any matters relevant to the terms of reference;

40 (iii) witnesses called on behalf of Air New Zealand were given a full opportunity to present their evidence and to deal with material which was inconsistent with or tended to cast doubt on the accuracy or truthfulness of their evidence;

(iv) the evidence of such witnesses on the important issues (particularly those relating to the

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Company's knowledge of low flying, to the adoption by the Company of the western waypoint and to the last-minute unannounced alteration of the route onto the disaster track) was subject to searching cross-examination by Counsel assisting the Commission and by Counsel for the other parties to the Inquiry and was further tested by questioning from the Royal Commissioner himself;

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(v) the witnesses were fully aware from the nature of the examination and cross-examination that their evidence might be rejected as false by the Royal Commissioner;

(vi) Air New Zealand, through their Counsel who had briefed the evidence of the witnesses and who attended throughout the hearing before the Royal Commissioner, had ample opportunity to become aware from the nature of the cross- examination of its witnesses and from the answers given (particularly in relation to the central issues of the knowledge of low-flying, the adoption of the western waypoint and the last-minute change of track) that the Royal Commission might form the view not merely that the evidence was false but that the similarity of the false evidence was such that it could not have been coincidental and could only have resulted from a plan of deception;

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(vii) Air New Zealand was given full opportunity in its final submissions to the Royal Commissioner to comment on the evidence adduced at the inquiry and, by the terms of its submissions, clearly recognised that the evidence of its witnesses concerning the issue of knowledge of low-flying, the adoption of the western waypoint and the last-minute change of track might be rejected as false by the Royal Commissioner.

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The manner in which each of the five matters referred to in paragraph 376 of the Report was put to witnesses called by Air New Zealand and was dealt with by the witnesses and by Air New Zealand in its final submissions, is summarised in the Annex to this Case.

59. In the circumstances described in paragraph 58 above, it is submitted that the Royal Commissioner was not obliged to put expressly to a witness that his credibility was suspect, whether individually or jointly with others. Nor was he bound, when he drafted his Report or formed a tentative assessment of the evidence, to reconvene the Commission or to recall witnesses to explore the opinion as to credibility which he was proposing to express.

10 60. The Canadian decision in Landreville v. The Queen (No. 2) (1977) 75 DLR (3d) 380, on which reliance was placed in the President's judgment is distinguishable since the credibility of the plaintiff in that case was a substantive issue (see the judgment in that case at pp. 401, lines 17-20 and 402, line 4) and since Section 13 of the Inquiries Act 1952 (Canada) made express statutory provision for the giving of notice in such circumstances (ibid.). Likewise the observations in Re Royal Commission on State Services [1962] NZLR 96, on which reliance was placed

20 both in the President's judgment and in Mr Justice Cooke's judgment required merely that matters in issue before a Commission should be put plainly and not assessments of the credibility of a witness.

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C p.629
Lines 5ff

C p.628
Lines 33ff
C pp.664-65

61. In the Court of Appeal, Air New Zealand's case was based on two propositions, first, that the witnesses did not know that they were at risk of "findings" being made of the kind contained in paragraph 377 of the Report and, secondly, that if they had been aware of the risk,

30 further evidence could have been adduced to answer the allegations.

62. It is submitted that, in concluding on the first issue that the witnesses were not expressly put on notice that they were at risk that their evidence would be disbelieved and found to be fabricated, the Court of Appeal failed to pay any or any sufficient regard to the facts which were apparent from the record:

40 (i) that the importance in the Inquiry of the issues of the Executive Pilots' knowledge of low flying, of the adoption of the western waypoint and the last-minute change of track was fully apparent to the witnesses themselves and to Counsel for Air New Zealand who called the witnesses and who represented their interests throughout the Inquiry;

(ii) that ample opportunity was given to the witnesses to deal with the matters in issue and to deal with prejudicial matter which cast doubt on their account;

(iii) that the evidence of the witnesses was subjected to searching cross-examination by Counsel for the other parties to the Inquiry;

(iv) that, in their Final Submissions, Counsel for Air New Zealand expressly recognised, and sought to deal with, the fact that the evidence of certain of the witnesses had been and was regarded with suspicion. 10

63. In relation to the second issue, namely, whether, and if so what, further evidence could have been adduced, it is submitted that the Court of Appeal likewise failed to pay sufficient regard to the questions:

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(i) whether such further evidence, if adduced, could have constituted an answer to the conclusions expressed in paragraph 376 which formed the basis of the conclusions in paragraph 377 of the Report;

(ii) whether any reason existed why such evidence could not have been, and was not, adduced before the Royal Commissioner.

64. It is accordingly submitted that, in expressing the views and reaching the conclusions in paragraph 377 of the Report, the Royal Commissioner did not act in breach of the rules of natural justice and that the Court of Appeal erred in so holding. 30

(5) Limitation on costs

In pocket
C p.652
Lines 33-35
C p.664
Lines 5-7

65. The Court of Appeal considered and accepted the subsidiary argument of Air New Zealand that the order of costs made against the Company by the Royal Commissioner in any event exceeded the maximum amount ($600) permitted by Rule III of the Rules prescribing a Scale of Costs made in 1903 (1904 New Zealand Gazette 491) pursuant to Section 12 of the Commissioners Act 1903 (now replaced by Section 14 of the Commissions of Inquiry Act 1908). 40

66. It is submitted that the Court of Appeal erred in so holding. It is the Appellant's contention that, on the true construction of the 1908 Act, the Scale of Costs contained in the Rules does not and was not intended to limit the express power conferred on a Royal Commission by Section 11 of the 1903 Act (now Section 11 of the 1908 Act) to "so order that the whole or any portion of the costs of the inquiry .... shall be paid by any of the parties to the inquiry, or by all or any of the persons who have procured the inquiry to be held ...." If, contrary to this primary contention, the Rules did purport to limit the express powers conferred by Section 11 of the 1903 Act, it is submitted that Rule 3 of the Rules was ultra vires, being repugnant to the express power conferred by Section 11 on a Commissioner to order the payment by a party of the whole of the costs of an inquiry.

D. CONCLUSION

67. In the premises, the Appellant respectfully submits that the Judgments and Orders of the Court of Appeal were wrong and ought to be reversed and that this Appeal ought to be allowed with costs, for the following among other

REASONS

(1) BECAUSE there existed no basis for linking the order made by the Royal Commissioner that Air New Zealand should contribute to the costs of the Inquiry with paragraph 377 of the Report of the Royal Commission or for setting aside the order for costs;

(2) BECAUSE there was no jurisdiction under the Judicature Amendment Act 1972 (as amended by the Judicature Amendment Act 1977) to review or to grant any of the relief sought by the Applicants in relation to paragraph 377 of the Report of the Royal Commission;

(3) BECAUSE the Royal Commissioner did not in any event exceed his jurisdiction in reaching or expressing the conclusions in paragraph 377 of the Report;

(4) BECAUSE the said conclusions in paragraph 377 were not in any event reached or expressed in breach of the rules of natural justice;

(5) BECAUSE the order for costs made by the Royal Commissioner did not exceed the maximum amount permitted by law and the power to order the payment of the costs of the Inquiry was not limited to the sum of $600.

Record
Part I

(6) BECAUSE the judgments in the Court of Appeal erred in setting aside the costs order made by the Royal Commissioner.

F.P. NEILL Q.C.
W.D. BARAGWANATH
N. BRATZA
R.S. CHAMBERS

Record
Part I

ANNEX

This Annex contains in summarised form an account of the treatment of the five important issues identified in paragraph 376 of the Report on which the evidence of Air New Zealand's witnesses was rejected as false by the Royal Commissioner and which formed the basis of his conclusion in paragraph 377 of the Report that the falsity was not coincidental but was part of a plan of deception. The purpose of this Annex (which is not intended to be an exhaustive summary of the evidence) is to demonstrate both:

In pocket
B p.150

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(a) that there was ample probative material to justify the Royal Commissioner in rejecting the aforesaid evidence and in concluding that the falsity of such evidence was not coincidental

and (b) that on these important issues Air New Zealand were afforded an ample opportunity of making their representations, adducing their evidence and meeting prejudicial matters and that there was no breach of the rules of natural justice on the part of the Royal Commissioner in reaching and expressing the opinion stated in paragraph 377 of the Report.

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A. LOW FLYING

1. "...the assertion by the executive pilots that they had no specific knowledge of antarctic flights operating under the minimum safe altitude specified by the Civil Aviation Division ..."(Report, para 376, lines 3-6)

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B p.150

(1) The issue of the knowledge of the Air New Zealand executive pilots of low flying was of cardinal importance in assessing the cause of, and responsibility for, the crash. The evidence before the Royal Commission, including in particular that of the airline pilots called on behalf of ALPA, made clear ".....that all Antarctica flights from and including 18th October 1977 involved a let-down in the McMurdo area to altitudes considerably less than 6000 feet, and that in the main the flights down McMurdo Sound and across the Ross Ice Shelf to the south of Mt. Erebus were conducted at altitudes ranging from 1500 feet to 3000 feet." (Report, para. 205).

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B p.75

(2) The substance of Air New Zealand's case before

Record

Supra p.4

the Royal Commission, which was developed around the conclusions expressed in paragraph 3.18 of the Chief Inspector's Report (see Case for the Appellant, para. 6), was to the effect that:

(i) the pilots were briefed on the basis that the route from Cape Hallett south overflew Mount Erebus - a mountain nearly 13,000 feet in height - and that it was in consequence imperative to keep above flight level 160 (16,000 feet); there was no discretion to deviate vertically; and any pilot who elected to depart from these instructions did so at his own peril; 10

(ii) the executive pilots had no reason to believe that any flight crews were in fact flying below flight level 160 before reaching the "D zone" (an arc with a radius of 20 miles situated immediately to the South of Scott Base within which a descent to 6,000 feet would be authorised in visual meteorological conditions (VMC)); if low flying had come to the attention of Air New Zealand, appropriate disciplinary action would have been taken; 20

(iii) the fact that Air New Zealand did not brief pilots on the "whiteout" phenomenon or require Antarctic pilots to have any previous experience of flying over snow below the minimum safe altitude was not material in the light of the fact that flight level 160 was laid down as an absolute minimum outside the D zone. 30

Part II Doc.5 Vol.1 p.32 (para 8) p.34 (para 15) & (para 19ff)

The significance of determining whether low-flying had taken place on previous flights to the knowledge of Air New Zealand executive pilots was apparent at the outset of the inquiry and was referred to in the Opening Submissions of Counsel assisting the Commission.

(3) There was a substantial body of evidence adduced before the Royal Commission (both oral evidence of Air New Zealand pilots and external evidence) to suggest that the management of Air New Zealand and its Flight Operations Division were aware from November 1977 onwards 40

that airline pilots on Antarctic flights were flying at levels varying from 1,500 feet to 3,000 feet, and that some flights travelled down McMurdo Sound in the direction of true south at such altitudes. This included the following:

(i) Exhibit 83 - the exhibit was a copy of the "Auckland Star" of 22nd October 1977 containing an article written by one Graeme Kennedy describing the progress of an Air New Zealand Antarctic flight on 18th October 1977. The article contained a reference to the aircraft flying over Scott Base and McMurdo Station "at less than 2,000m." and to the aircraft being brought down "to 200m. over Scott and McMurdo Bases" (Mr. Kennedy subsequently corrected this reference to 200m. indicating that it should have read 400 metres, that is, approximately 1,300 feet).

(ii) Exhibit 148A - the exhibit was a copy of a newsletter entitled "Air New Zealand News" distributed to all members of the airline staff containing an article dated 30th November 1978 which described a flight to the Antarctic on 7th November 1978. The opening two paragraphs of the article read as follows:

> "The flight deck crew of TE 901 took the boss flying with them on November 7.
>
> And as the DC10 cruised at 2,000 feet past the antarctic's Mt. Erebus and over the great ice plateau Captain Doug Keesing, Flight Operations Director International, was as interested in sightseeing as the other 230-odd passengers aboard".

(iii) Brizendine article - Mr. John Brizendine, President of the McDonnell-Douglas Corporation of the U.S.A. travelled on the Air New Zealand Antarctic flight of 17th November 1977. Following the flight he wrote to the Chief Executive of Air New Zealand enclosing a copy of an article which he had written containing the passage

> "As we neared the Ross Ice Shelf, Captain Vette began a gradual descent which would bring us to approximately 3000 feet above the ice...

Record
Part II

At 2.20p.m. New Zealand time, we were abeam of Ross Island, dominated by Mt. Erebus, flying over the Ross Ice Shelf at relatively low altitude. Surface features could be seen distinctly".

(iv) Exhibit 84 - the Brizendine article was reproduced in a publication entitled "Travelling Times" which Air New Zealand had itself arranged to distribute throughout New Zealand as part of a publicity campaign. There was evidence that nearly 1 million copies of the publication were distributed, the object of the airline having been to ensure, so far as possible, that a copy of the the publication reached every home in New Zealand. 10

(v) Exhibits 85 and 86 - The former exhibit consisted of a page from an Auckland suburban newspaper containing an article by one Graham McGregor referring to a flight of 7th November 1978 (which was commanded by Captain McWilliams) and describing the spectacular views obtained at 2000 feet over Scott Base. The same article was printed in another Auckland suburban newspaper of which an extract was produced as Exhibit 86. 20

(vi) Captain White who commanded the Antarctic flight on 21st November 1979, gave evidence that he attended a briefing on 2nd November 1979 at which Captain Wilson was the Briefing Officer and which was also attended by Captain Johnson. Captain White stated that at this briefing the question of the 6,000ft. altitude was raised and mention was made that earlier flights had descended below that level. He further stated that Captain Wilson and Captain Johnson were present during that discussion and that no mention was made by them that flying below 6,000ft was prohibited 30

Doc.3
Vol.3
P.547,
para 8

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(vii) Captain Dalziel who attended the same briefing, likewise gave evidence that the issue of the 6,000 ft. altitude mentioned in the briefing notes was raised and that there was a discussion led by Captain Johnson on the topic of passengers viewing during which mention was made of previous flights descending below 6,000ft. Captain Dalziel stated that it was suggested

Vol.4
p.574
para 6

that pilots did not descend too low because the scenery would flash past too quickly for the passengers to get a good view. He further stated that there was no criticism made by the Briefing Officers of the earlier flights descending below 6,000ft. and that they were not told that they were prohibited from descending below 6,000ft. on their flight.

Doc.3 Vol.4 p.574 para 6

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(4) Despite the widespread publicity given to the actual flight levels being conducted in Antarctica and the evidence of the two line Captains referred to above, the executive pilots in the Flight Operations Division of Air New Zealand steadfastly denied that any such information ever became known to them. The evidence of the witnesses called by Air New Zealand on this aspect may be summarised as follows.

(a) Captain Grundy

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Captain Grundy was one of the two officers who had been initially to Antarctica and one of the two officers who had in 1977 received a briefing from the American authorities known as Operation Deep Freeze which included a discussion of "whiteout" conditions - see Report, para. 128. He also had responsibility for the over-sight of the Route Clearance Unit (RCU) operated at one stage by Captain Lawson and later by Captain Wilson. In November 1979, Captain Grundy was promoted to the position of Flight Operations Manager DC10/DC8. Asked in cross examination to what extent at the time of the second Antarctic flight in 1977, which he had commanded, a captain had discretion to fly below flight level 160, Captain Grundy replied that there was no discretion to descend below this height.

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Doc.1 Vol.2 p.432D41

Captain Grundy further gave evidence that on 22nd November 1979, he had received a telephone call from Captain Omundsen of the Civil Aviation Division who had said, inter alia, that he had received reports of civilian aircraft flying below 6,000 feet. In cross-examination, Captain Grundy stated that he believed the reports might have related to Air New Zealand aircraft but was not sure and that, if they did, it meant that

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Doc.3 Vol.1 p.51 para 1

Doc.1 Vol.2 pp.436B-C

Record
Part II

Air New Zealand aircraft were flying below the permitted altitude. Captain Grundy accepted that, although he claimed to be concerned that some of Air New Zealand's Captains may have been disobeying instructions concerning altitudes, he took no steps to ascertain whether any Air New Zealand pilots had been flying below 6,000 feet.

Doc.1
Vol.2
pp.432/51
436D

Captain Grundy further stated (and repeated) in cross-examination that, prior to 22nd November 1979, he had never been advised, and had no knowledge, that any Air New Zealand pilots had flown below 6,000 feet. 10

pp.436D-F

pp.436F-G

p.436G

pp.436G-H, K-L

Captain Grundy denied that the newspaper article in Exhibit 83 had ever come to his attention and stated that, if it had, it would have caused him concern and he would have taken action. He similarly denied having previously seen the Brizendine article reproduced in "Travelling Times" (Exhibit 84) and asserted that no-one had mentioned to him reading an article indicating that Captain Vette had descended below 6,000 feet. He further denied having seen the article in Exhibit 85. However Captain Grundy went on to admit that he recalled hearing a rumour that in 1977 an aircraft had descended to 2,000 ft but that at that stage it did not cause him concern and that, although he would not have condoned low flying, he did not regard it as being sufficiently important to follow up. 20 30

p.436I

Captain Grundy went on to deny that the briefing material provided to air crew could be interpreted as allowing a descent to below 6,000 feet under radar control.

p.436M

Asked whether, if Captain Keesing (at that time Director of Flight Operations) had known that the flight in which he was travelling on 7th November 1978 (see Exhibit 148A) had flown at 2,000 feet, he would have expected him to have raised the matter, he said that he would have expected it but that to his knowledge Captain Keesing had not raised the matter with him or with any other person within Air New Zealand. 40

Record Part II

In response to further questions concerning the "rumour" of low flying in 1977, Captain Grundy stated that he did not believe that he was justified at that time in pursuing the matter further and repeated that, so far as Air New Zealand was concerned, briefing of air crews on "whiteout" conditions was unnecessary since 6,000 feet was the minimum to which pilots were authorised to descend. — Doc.1 Vol.2 pp.439-40

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(b) Captain Gemmell

In August 1975, Captain Gemmell became Chief Pilot and, as such, was responsible to the Manager, Flight Operations for overall supervision of Air New Zealand flight operations including non-scheduled services such as Antarctic flights. In February 1977, Captain Gemmell together with Captain Grundy attended the "Deep Freeze" Antarctic briefing. From July 1978, Captain Gemmell had held the position of Flight Manager, Technical in Air New Zealand.

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In cross-examination Captain Gemmell maintained that the "whiteout" phenomenon was not of significance if aircrews strictly maintained the altitude limits laid down and further maintained that there could be no mistake about Air New Zealand's altitude requirements. Captain Gemmell suggested that it would have been "ridiculous" to have gone into detail on the "whiteout" phenomenon since this would have been tantamount to an invitation to pilots to descend below the minimum prescribed altitude and confirmed that the reason that the topic of "whiteout" was not discussed with flight crews was because of stipulated minimum altitudes. Captain Gemmell was cross-examined on Exhibits 83, 84 and 85 and accepted that the latter two exhibits indicated that there had been flying below 6,000 feet. He maintained, however, that no incident of low-flying had ever been reported to him before the date of the accident and that the rumour of low flying to which Captain Grundy had referred had never come to his attention. — p.455; pp.501-3; pp.503-4

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Record
Part II

Captain Gemmell was subsequently recalled (see (f) below).

(c) Captain Lawson

From April 1977 until January 1978, Captain Lawson had been Route Clearance Unit (RCU) Supervisor. In January 1978 he was succeeded in this post by Captain Wilson. The function of the RCU was to conduct flight briefings of air crew by means of audio-visual presentation. Cross-examined concerning Exhibit 83 (which related to the flight of 18th October 1977 on which Captain Lawson had flown as co-pilot with Captain Hawkins) Captain Lawson stated that he was not aware of the level to which the flight had descended but that he thought he would have recalled if it had descended below the stipulated altitude. It was his belief that the flight had not descended below 6,000 feet.

Doc.1 Vol.3 pp.816-8

Asked to comment on Captain Vette's assertion that he had come away from a briefing by Captain Lawson with the clear understanding that descent below 6,000 feet was not prohibited in visual meteorological conditions, Captain Lawson claimed that there was no doubt in his mind that the minimum altitude for the flight was 6,000 feet.

pp.827-8

Captain Lawson stated that he recalled "media comment" on flights descending below 6,000 feet before the accident but that, since he was at the material time a line captain, he did not feel it to be his responsibility to bring it to the attention of the relevant authorities in Air New Zealand. He accepted that there was however "ample evidence" available to those in authority, including, as he recalled, an article in staff news (Exhibit 148A) and a television news item, to take such action as they thought fit. He agreed that Air New Zealand News (Exhibit 148A) was a publication widely circulated throughout the Company and would have been available to everyone. Questioned further about Exhibit 148A, Captain Lawson said

pp.830-1

that he would expect every member of the executive of Air New Zealand to have received the document. Further cross-examined on the following day concerning Exhibit 148A, Captain Lawson stated that the reference in the article to the aircraft having "cruised at 2,000 feet past the Antarctic's Mount Erebus" would convey to him "... that the aircraft passed over Mount Erebus at 2,000 feet, which would give one no great cause for alarm, given the situation of visual conditions". He further explained that the reference to "passing Mount Erebus" would have been interpreted by him as being a reference to "vertical separation", that is, as indicating that the aircraft had cruised at 16,000 feet above Mount Erebus. He claimed that he must have interpreted the passage that way because it drew no undue concern from him. However on further cross-examination Captain Lawson agreed that he had in fact realised there was low flying below 6,000 feet, but that since he was a line captain at the time it did not concern him and that those who were in a position to deal with it would have known full well what was going on. When asked to whom he was referring, Captain Lawson said the executive officers within the Flight Operations Division.

Doc.1 Vol.3 p.836

pp.842-44

p.845

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(d) Captain Wilson

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In December 1977, Captain Wilson succeeded Captain Lawson as Route Clearance Unit Supervisor, a position which he held at the time of the accident. His principal duties were to give the RCU briefings to Air New Zealand pilots, to complete the introduction of briefing packages for all Air New Zealand routes and to update and amend the briefing packages from time to time as required. As RCU Supervisor, Captain Wilson was responsible for briefing Captain Collins and First Officer Cassin on 9th November 1979.

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In an addition to the end of his brief of evidence, Captain Wilson stated that in 1978 he had "become aware of overhearing comments that certain flights had gone below 6,000

Record
Part II

feet" and that he might also have read the Air New Zealand News article concerning Captain Keesing's flight cruising at 2,000 feet (Exhibit 148).

Doc.3
Vol.2
pp.386-7

Captain Wilson stated that these reports did not concern him since he assumed that the descents must have taken place in the McMurdo area with the consent of the McMurdo authorities. Captain Wilson went on to reveal that at briefings in 1978 and 1979 he remembered "remarking in passing" that he was aware that some flights had been below 6,000 feet and that such comment was not made in any tone of criticism since it was his belief that the McMurdo authorities retained the ability to give consent to descend below 6,000 feet and that any descent below this height had occurred with their prior consent. 10

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Doc.1
Vol.4
p.1233

In cross-examination on the point, Captain Wilson stated that in his briefings he had told the air crews that the minimum height was 6,000 feet and that "it was left there" but that it was his understanding that pilots would negotiate further clearances with the McMurdo authorities.

pp.1234-5

Captain Wilson further stated that with the approval of the McMurdo authorities and provided the conditions were CAVU (Clear And Visibility Unlimited) there would have been no problems about letting down below 16,000 feet from 50 miles out from McMurdo. 30

Captain Wilson accepted that he had not informed the Chief Inspector of Accidents that he had discussed with other crews descents below 6,000 feet and had not criticised such action. He further failed to inform the Chief Inspector of Accidents of his understanding that on Antarctic flights crews could negotiate descents below 6,000 feet. 40

(e) Captain Johnson

Captain Johnson held the position of Flight Manager Line Operations DC10/DC8 from September 1978. As such he was responsible for, inter

Record Part II

alia, planning and supervising the operational aspects of special company flights and off-line charters. He was accordingly responsible for the overall supervision of Antarctic flights in and from September 1978.

In his Brief of evidence, Captain Johnson stated that, on the Antarctic flight of 8th November 1977 which he had commanded, he had let down to 6,000 feet in the immediate vicinity of McMurdo Base and had then requested clearance from the McMurdo Air Traffic Controllers to descend to 3,000 feet in the immediate vicinity of Williams Field. He further stated that he was aware that the Company's briefing instructions stipulated 6,000 feet as the minimum permissible altitude but claimed that on the day of the flight, with unlimited visibility and a virtually cloudless sky, he had decided to descend lower with clearance from ATC and that he did not believe his decision had infringed the safety of the operation.

Doc.3 Vol.3 pp.389-90

In cross-examination Captain Johnson stated that if it had been known in 1977 that he had deliberately broken the height limitation, he would have expected the Company to have taken some action against him. He claimed that apart from his own flight he had been unaware of any flight prior to the accident descending below 6,000 feet and that if knowledge of such a breach of instructions had come to his knowledge he would have reinforced the briefing instructions.

Doc.1 Vol.5 pp.1367-8

p.1370

Asked about the Air New Zealand newsletter (Exhibit 148) which was published shortly after he had become Flight Manager, and which referred to Captain Keesing's aircraft flying at 2,000 feet, Captain Johnson stated that he had not been aware of the report. He further stated that he would not have regarded a flight at that height with the Flight Operations Director on board as being a talking point throughout the Flight Operations Section but that, if he had learned of it, he would have been very surprised and would have wanted to know why it had occurred. Further questioned on the

p.1324

pp.1395-6

newsletter by the Royal Commissioner, Captain Johnson said that he read the newsletter on many occasions but did not recall reading the article in question. He said that he assumed from the fact that no action appeared to have been taken, that no-one else in the Flight Operations Section had read the article either.

(f) Captain Gemmell

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Captain Gemmell was recalled to give further evidence. Cross-examined concerning the alleged absence of knowledge by the Flight Supervisor of low flying which had occurred during a period of 14 months, Captain Gemmell replied that he had no personal knowledge of aircraft descending to the levels reported and that he was still unable to believe that it was not spoken of in more general terms. He denied reading the article in the newsletter (Exhibit 148A) and claimed that he seldom read further than the first page of the newsletter.

Doc.1
Vol.6
pp.1812-13

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In re-examination, Captain Gemmell stated that he had been unaware prior to the accident that Captain Wilson had on occasions at briefings mentioned without any criticism the fact that flights had descended below 6,000 feet with the approval of the McMurdo authorities. He said that the first indication which he had of this fact had been when Captain Wilson "gave a sample briefing to Mr Chippindale and myself". He explained that this sample briefing (of which no mention had been made prior to Captain Wilson's evidence in September 1980) was a briefing "similar to the one he gave to the accident crew".

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p.1835

(g) Mr Oldfield

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Mr Oldfield had been employed as Safety Manager by Air New Zealand since April 1978 and, as such, was responsible for industrial, ground and flight safety on domestic and international operations.

In cross-examination, Mr Oldfield stated that he had no knowledge prior to the accident that

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Part II

flights had flown at heights down to about 2,000 feet and that no suggestion of such low flying had come to his notice officially or unofficially. He further stated that, if it had, he would have brought it to the attention of the Flight Operations Section. He stated that he could not recall reading the report in Exhibit 148A. He similarly stated that he could not recall reading the report of flying at 2,000 feet in the circular "Travelling Times" (Exhibit 84).

Doc.1 Vol.6 p.1850

p.1876

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(h) Captain Hawkins

Captain Hawkins was appointed as Flight Manager Training for Air New Zealand on 12th November 1979 and had previously occupied the position of Flight Standards Manager, DC10-DC8. Captain Hawkins had commanded the Company's third Antarctic flight on 18th October 1977.

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In his Brief of evidence, Captain Hawkins stated that on his Antarctic flight he had declined an invitation from the McMurdo Air Traffic Control to descend below 6,000 feet since this was his minimum briefed altitude. He denied the report in Exhibit 83 that he had descended to approximately 200 metres above the ice shelf and asserted that he had a "clear recollection" that he did not descend below 6,000 feet which in his mind was clearly the company's minimum permissible altitude.

Doc.3 Vol.4 p.639

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In cross-examination, Captain Hawkins stated that prior to the accident he had not been aware that two flights in 1977, at least two flights in 1978 and three flights in 1979 had descended below 6,000 feet. He stated that he was not surprised that he had not heard about what appeared to be common practice among pilots since there was no reason why he should have been given the information or made aware of it. He said that it would appear that some of the other captains had placed a different interpretation on the same company instructions. Asked about Exhibit 83, Captain Hawkins denied

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Doc.1 Vol.6 pp.1878-9

that he or Captain Lawson had told the reporter that the aircraft was at 1,200 or 1,300 feet and stated that it was totally incorrect to say that the aircraft was at that height.

(i) Captain Eden

Captain Eden was from January 1979 Director of Flight Operations for Air New Zealand and, as such, administered the Flight Operations Division and was directly responsible to the General Manager Airline Operations. 10

Doc.3 Vol.4 p.654 (para.3.15)

In his Brief of evidence, Captain Eden referred to being informed by Captain Grundy that he had been telephoned by Captain Omundsen of the Civil Aviation Division and told of reports of large civil aircraft operating at low altitudes in the Antarctic. He stated that he was not certain whether these were Air New Zealand aircraft but asked Captain Grundy to investigate the matter. 20

Doc.1 Vol.6 pp.1940-41

In cross-examination, Captain Eden said that he did not believe that the aircraft referred to were Air New Zealand. He further stated that he had not at any time before the accident seen any newspaper reports or company publications indicating flights below 6,000 feet. He accepted that he received the company's newsletter but did not recall the article in November 1978 (Exhibit 148). He further stated that, even if he had recalled seeing it, he would not have been exceedingly surprised to find that pilots had, in ideal conditions, descended below the minimum altitude authorised by the company. He acknowledged, however, that if a Captain had gone below the authorised height he would have expected that fact to be included in a Captain's Report. 30 40

(j) Mr Davis

Doc.3 Vol.4 pp.714-15 (paras.4.2-4.3.)

In his Brief of evidence, Mr Davis, the then Chief Executive of Air New Zealand, confirmed that all members of the Air New Zealand staff (including himself) received Air New Zealand

News but stated that he could not remember reading the article in Exhibit 148: if he had done, he stated that he believed he would have investigated the suggestion of low-flying further. As to the Brizendine article (Exhibit 84) he recalled being sent a copy of the article but did not remember reading it. He stated that he received a large quantity of such material from many people, that he had to be selective and that
10 he read very little indeed of informal or "social" material.

In cross-examination, Mr. Davis stated that a copy of the text of the article which it was proposed to publish had been sent to him personally by Mr. Brizendine together with a personal note of thanks for organising his Antarctic flight. Mr. Davis stated that he would not normally have taken the time to read an article about a flight for which Mr.
20 Brizendine had already thanked him personally and that he was totally unconcerned whether the proposed article contained favourable publicity or not.

Doc.1 Vol.6 p.1959

In further cross-examination, Mr Davis stated that it was not until after the accident that he first learned that at least some of the Antarctic flights had flown below 6,000 feet.

Vol.6 p.1966

Mr Davis further stated that he did not know
30 why the information concerning low-flying had not come to his knowledge.

p.1984

Questioned by the Royal Commissioner concerning the Brizendine article contained in "Travelling Times" Mr Davis said that he was not made aware of the arrangements to distribute the publication throughout New Zealand and could offer no explanation as to why not one Executive Pilot could give evidence that he heard anything
40 about the low-flying notwithstanding that the airline itself was party to a million papers advertising the fact.

pp.1984-5

(5) The issue of the knowledge of the executive of Air New Zealand that low-flying had consistently occurred on Antarctic flights was further dealt with in the Final Submissions of the various parties before the Royal Commission. In particular:-

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Part II

(i) Counsel for the passengers consortium submitted that

Doc.4
Vol.2
p.251

"...it must be accepted that the Company was aware that such limitations were in fact not being observed on any of the earlier flights and indeed as we now know were broken, if indeed they were conditions, by all pilots who descended below 16,000 feet including Captain R.T. Johnson who was to conduct the simulator briefings". 10

(ii) Counsel for the Estate of Captain Collins likewise referred to the issue of the Company's knowledge of low-flying, asserting that it was:-

p.185

"...difficult to accept...the evidence of Captain R.T. Johnson on this topic. He claims that the 6,000 ft level was clearly understood by him to be a minimum despite the fact that he wilfully descended on his flight well below that altitude and despite the evidence of Captains White and Dalziel who have stated that at their briefing on the 2nd of November 1979 Captain R.T. Johnson was present and he led a discussion on the presentation of the scenery to the passengers which involved consideration of altitude and flight below 6,000 ft without ever criticising the action of previous crews in flying below that level". 20

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Counsel for the Estate of Captain Collins further drew attention to the evidence of Captain Lawson:-

p.233-4

"...when it was put to him as to how he knew of these low flights [he] said he recognised the Air New Zealand document [Exhibit 148A] ...and the next day he arrived back in Court and proceeded to give a different analysis of that document." (Interpolation R). 40

(iii) Counsel for ALPA in their Final Submission similarly referred to the issue of the Company's knowledge of low flying, noting that:

Vol.1
p.118

"It is difficult to accept that no one in the Operations Division of the Company had knowledge of flights below 6,000 feet, with the publicity

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that had been given to low-level flights".

(iv) Counsel for Air New Zealand in their Final Submissions maintained the company's position that "whiteout" had particular significance in a landing context and that if the briefing descent instructions had been followed "whiteout" would not have been a danger. On being questioned by the Royal Commissioner concerning the latter point Counsel confirmed that it was the Company's position that the executive personnel concerned had not been aware of the fact that flights were being carried out at low altitudes (Interpolation K).

Doc.4
Vol.3
p.492

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(v) Counsel Assisting the Royal Commission similarly referred to the question of Air New Zealand's knowledge of low-flying in his final submission. He noted that:-

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> "It was claimed by virtually all the executive officers in Air New Zealand, as well as by CAD., that none of them had any knowledge that low-flying was either contemplated or performed except in the small sector within the "D". It will be a matter for consideration by the Commission whether, well publicised as it was, the low-flying was in fact unknown to the personnel responsible for the safety of the operation ....If the low-flying was known to persons aware of its significance and 'in a position to do something about it', this failure must form a significant part of the causation".

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B. SHIFT OF WAYPOINT

(6) The remaining four matters referred to in paragraph 376 on which the Royal Commissioner based his conclusion in paragraph 377 all related to the central issue of the shift in the co-ordinates shortly before the accident flight to a line across Mount Erebus.

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(7) The significance of the issue of the change of the waypoint and the reasons therefor were clear at the outset of the Royal Commission's inquiry and the issue was expressly referred to in the opening submission of Counsel assisting the Commission:

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p.32 para.6

"Sixth, the planning of the route: why it was directed across Mt Erebus rather than across the sea ice within range of the ground radar and in accordance with the military procedures; how different co-ordinates came to be lodged in the computer; when and how these were corrected and what publicity was given to the correction".

(8) It was Air New Zealand's case before the Royal Commission: 10

(i) that the change in the navigation track in 1977 from a line across Mount Erebus (with a longitude of 166° 48' east) to a line to the west of Ross Island coinciding with the military route and passing over the sea ice of McMurdo Sound (with a longitude of 164° 48' east) was the result of an error in entering the co-ordinates in the ground computer;

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(ii) that the error went undetected by the Navigation Section of Air New Zealand and that the incorrect McMurdo waypoint was not adopted by the company as the McMurdo waypoint;

(iii) that the Antarctic flight air crews, including the air crew on the accident flight, had continued to be briefed on the basis of track and distance charts which showed the flight path as being over Mount Erebus; 30

(iv) that the waypoint had been moved back to a point close to its original position following the flight of 14 November 1979 commanded by Captain Simpson and that the change had been made on the instructions of Captain Johnson who gave evidence that Captain Simpson had told him that the McMurdo position was erroneous and should be at 166° 58' longitude east;

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(v) that Captain Johnson had interpreted Captain Simpson as saying that the McMurdo position should be at the TACAN (166° 58' east) rather than at the NDB (166° 48' east), the difference between these two positions being only 10 minutes of longitude, representing 2.1 miles;

(vi) that in view of what was believed by the Navigation Section to be only a minor change in the McMurdo co-ordinates, there was no need to apprise Captain Collins of the change.

(9) In cross-examination of witnesses from the Navigation Section called by Air New Zealand, Counsel representing the other parties and Counsel assisting the Commission challenged the assertion that the original
10 change in the waypoint was the result of a mistake and suggested to the witnesses that the shifting of the McMurdo waypoint was done deliberately so as to conform with the military track. In their Final Submissions to the Commission, Air New Zealand expressly acknowledged that there had been "...an obvious inference during cross-examination of several Company witnesses on this topic (especially by Counsel Assisting) that the 164° longitude co-ordinate was introduced into the flight planning system by design rather than accident..."

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p.362
(para.7.39)

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The Company went on to submit (and to support the submission by reference to the evidence) that there could be

> "..... no question that the introduction of the incorrect longitude co-ordinate was other than by way of an error in transcribing raw data information for the McMurdo waypoint into the flight planning computer".

p.363
(para.7.40)

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(10) The further question was ventilated in the course of cross-examination of the witnesses called by Air New Zealand whether, even if not deliberately selected, the track across McMurdo Sound was consciously adopted by Air New Zealand.

In suggesting the deliberate adoption of the western waypoint, reliance was placed by Counsel for the other parties and Counsel assisting the Commission on a
40 number of matters which were expressly put in cross-examination to the witnesses from the Navigation Section of Air New Zealand. These were as follows:

(i) Exhibit 164 was a track and distance diagram prepared by the Navigation Section which contained a plotted track from Cape Hallett down McMurdo Sound on a path which appeared to be indistinguishable from a flight path running from

Cape Hallett to the altered McMurdo waypoint. In addition the draftsman had run a dotted semi-circular line around the south of Ross Island, and then a straight line had been drawn back to Cape Hallett along 170° meridian of east longitude. On that line had been drawn an arrow pointing towards Cape Hallett. There was evidence that Exhibit 164 had become part of the briefing material to crews on the 1978 flights (and possibly the 1979 flights) 10 and that the Exhibit was included in the flight documents taken by aircraft crews to Antarctica in 1978 and 1979.

(ii) Annex H to the Chief Inspector's Report was a copy of a slide depicting alternate Antarctic routes which was used as part of the audio-visual presentation in the briefing of the 1979 Antarctic crews. The slide showed a route passing down McMurdo Sound to the west 20 of Ross Island.

(iii) Annex G to the Chief Inspector's Report was a copy of a passenger brochure map of the Antarctic regions published by Air New Zealand and prepared on instructions from the Navigation Section, which similarly depicted a route to the west of Ross Island. There was evidence that the map was included in the material issued to the crews at the 1979 briefings. 30

(iv) The western waypoint co-ordinates had been in the computer flight planning system for 14 months without detection or earlier correction.

(v) The evidence of two out of the three 1978 Antarctic pilots who were called as witnesses (Captain McWilliams and Captain Calder) and four out of the five 1979 Antarctic pilots and crew called as witnesses (Captain Simpson, 40 Captain Gabriel, Captain White and First Officer Irvine) was to the effect that, following their briefings, it was their understanding that the route from Cape Hallett was down McMurdo Sound and not direct to McMurdo Station.

(vi) Charts RNC 4 (Exhibit 2) were radio navigation charts prepared by the Civil Aviation Division which it was accepted were included in the documentation supplied to the Antarctic crews. The charts, while not depicting the Air New Zealand route, depicted the military route and the QANTAS route as passing to the west of Ross Island over McMurdo Sound.

(vii) Annex J to the Chief Inspector's Report (which consisted of a track and distance diagram showing the flight path as being over the centre of Ross Island and which the Chief Inspector had been told formed part of the flight documents carried by the crew on the fatal flight) did not in fact form part of the 1979 flight documents and was not on the fatal flight.

(11) In their Final Submissions to the Commission, Air New Zealand expressly acknowledged as one major issue which had been consistently raised throughout the hearing

> ".... the suggestion which was quite apparent during the cross-examination of Mr R. Brown and Mr Amies (during his last appearance) by Counsel Assisting that once the incorrect McMurdo position found its way into the computerised flight planning system it was subsequently adopted by the Company as the McMurdo waypoint".

Doc.4 Vol.3 p.370 para.7.43

Air New Zealand proceeded in their Final Submission to seek to answer at length each of the matters which had been relied on in cross-examination of their witnesses as demonstrating such conscious adoption of the western waypoint. The Company's submission on this point was summarised in para 7.50 as follows:

pp.370-99 paras.7.44 -7.49

> "In summary the Company contends that the incorrect McMurdo position was introduced into the computer flight planning system by accident and it was never subsequently adopted by the Company as the official McMurdo waypoint".

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(12) In their Final Submission, Counsel assisting likewise raised the question of the adoption by Air New Zealand of the western waypoint and submitted that:-

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p.25-26

> "The Commission may find it appropriate to decide whether the "error" described by Mr. Hewitt giving rise to the so-called "false" co-ordinates in fact remained undetected by all those responsible in Air New Zealand personnel during the whole fourteen month period for which it remained in the ground computer; or whether at some stage a conscious decision was made to adopt this more westerly waypoint. The coincidence of Exhibit 164, the subsequent flight plan, the slides displayed at the route qualification briefing and the passenger map prepared on instructions from NAV Section to depict the Antarctic route, all illustrating a route to the west, coupled with the non-appearance after 1977 of even a track and distance map, let alone any other map showing a route overflying Erebus, is startling on the 'continuing mistake' hypothesis" (para.4).

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After examining the evidence, Counsel assisting concluded in their Final Submission that the facts left:

p.32

> ".....fairly open for consideration by the Commission the inference of deliberate decision to adopt the western co-ordinates."

and ".....fairly open to the Commission to reject the 'continuing error' hypothesis."

p.33

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(13) In his Report, the Royal Commissioner after examining the evidence stated that on balance it seemed likely that the transposition of the McMurdo waypoint was deliberate because of the decision reached at approximately the same time to include in the briefing documents and in the flight documents to be carried on each aircraft, the track and distance diagram at Exhibit 164. However the Royal Commissioner refrained from making a positive finding that the alteration of the waypoint was intentional in light of the fact that the alteration had not been accompanied by the realignment of the aircraft's heading so as to join up with the new waypoint, a realignment which would have been normal in the event of an intentional alteration of the waypoint (para 255 (a)).

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B p.91-2

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The Royal Commissioner concluded, nevertheless, that on the evidence there had been an adoption of the western waypoint:

> "I believe, however, that the error made by Mr. Hewitt was ascertained long before Captain Simpson reported the cross-track distance of 27 miles between the TACAN and the McMurdo waypoint, and I am satisfied that because of the operational utility and logic of the altered waypoint it was thereafter maintained by the Navigation Section as an approved position." (para 255 (b)).

In pocket B p.92

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(14) The conclusion of the Royal Commissioner that the Navigation Section of Air New Zealand had consciously adopted the western waypoint was not challenged by Air New Zealand or by any of the other Applicants in the proceedings for judicial review either on the grounds that it was a conclusion unsupported by probative evidence or on the grounds that it was a conclusion reached in breach of the rules of natural justice. Moreover, although in their judgment the President and McMullin J. commented on the Royal Commissioner's conclusions concerning the deliberate selection of the western waypoint, no comment was made concerning the Royal Commissioner's conclusion that the western waypoint had been deliberately selected.

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C p.632-33

(15) The conclusion of the Royal Commissioner concerning the adoption by the Navigation Section of the western waypoint with a longitude of 164° 48' east was of considerable significance in relation to the second and third matters referred to in paragraph 376, in respect of which the Royal Commissioner concluded that false evidence had been given.

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2. "...allegations by Navigation Section witnesses that they believed that the alteration to the co-ordinates only amounted to 2 miles..... "(Report, para. 376, lines 8-10)

B p.150

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(16) It follows from the conclusion that the western waypoint was adopted by the Navigation Section that members of the Navigation Section must have known that a shift of the waypoint to a position over the TACAN with a longitude of 166° 58' entailed an alteration to the co-ordinates far exceeding 2.1 miles. As was noted by the Royal Commissioner:

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"Such an interpretation means that the evidence as to the alleged belief of a displacement of only 2.1 miles is untrue". (para 245(b))

It would similarly have been apparent to the witnesses from the Navigation Section called by Air New Zealand that rejection of their evidence concerning the adoption of the western waypoint would be likely to result in the rejection of their evidence that they believed that the aligning of the waypoint with the TACAN only entailed a correction to the co-ordinate of 10' and a displacement of 2.1 miles. 10

(17) Each member of the Navigation Section called by Air New Zealand claimed that he believed the change to the co-ordinates to be of a minor nature being some 10' of longitude. Air New Zealand relied on the fact that all these witnesses told the same story and they highlighted this aspect in their Final Submissions to the Commission by marshalling the material excerpts from their witnesses' testimony thus (para. 7.55): 20

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p.403-4

' Navigation Section

(i) Mr. Amies: "I was unaware that the error in the computer flight planning programme had been 2°10' until after the accident" - para. 8.24 p.29 of his brief of evidence ....

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(ii) Mr. Hewitt: "I would like to make it quite clear that I did not know that the error in the McMurdo longitude co-ordinate was in fact 2°10' until after the accident" - para 7.8 p.11 of his brief of evidence.

(iii) Mr. Lawton: "It was not until after the accident that I learned that this amendment had in fact resulted in a correction 40 to the McMurdo longitude co-ordinate of 2°10' and not simply 10'" - para. 3.4 p.4 of his brief of evidence.

(iv) Mr. Brown: "Can you tell me how long after the accident it was that you realised

there had been a 2° change in co-ordinates made ..... It wasn't until I saw the actual positions plotted on the chart that I realised the significance in the change.

I was asking you how long after the accident was that ..... The morning of the accident" - cross-examination by Counsel for ALPA p. 1887 Transcript.

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(v) Captain Johnson: "For reasons which again I understand have already been given in evidence this amendment was not made effective within the ground based computer until the night before the accident. In doing so the true error of 2°10' (representing a transposition error of approximately 26 miles) which existed in the system was corrected. I did not know that there was such an error in the system until after the accident". -para 6.4 p.20 Johnson brief.

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(18) In assessing the truthfulness of the account given by the Navigation Section witnesses as to their mistaken belief that the change to the co-ordinate was minor, the Royal Commissioner was also entitled to have regard to the likelihood of such a mistake in the light of the high professional skills of the Navigation Section staff. Evidence had been given by members of the Navigation Section (in particular Mr. Amies and Mr. Brown) of the meticulous care and thoroughness of the staff of the Section. However, according to the evidence of Mr. Lawton and Mr. Hewitt, on receiving Captain Simpson's report, they did not go to the source of Captain Simpson's information (namely, his flight plan) but were instead content to rely on the information contained in the NV90 ground computer, which computer was not the source of the flight plan information but merely a computer used to calculate tracks and distances. A comparison of a current or the actual flight plan with the TACAN co-ordinates (which was described by Mr. Brown as a 'general procedure' in the Section) would have revealed that the displacement far exceeded 2.1. miles.

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The asserted failure of the Navigation Section to carry out such a comparison was described by Mr. Hewitt as "an omission" and was accepted by Mr. Hewitt as being one of 10 separate "errors and omissions" made by members of the staff of the Section. The Royal Commissioner was entitled to conclude that the account given of such a chapter of errors was inherently improbable and that the high professional skills of the Navigation Section precluded the possibility of the particular error alleged. 10

Doc.1
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p.989

p.988-90

3. "...the allegation by Captain Johnson that he believed Captain Simpson had told him that the McMurdo waypoint was incorrectly situated...." (Report, para.376, lines 6-8)

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B p.150

(19) Captain Johnson's first account of the incident appeared in his letter dated 10th December 1979 to the Director of Flight Operations, Captain Eden (Annexure to Exhibit 16). Captain Johnson wrote: 20

"Following his Antarctic flight on 14/11/79 Captain L. Simpson rang me and said that the McMurdo position was in error and should be 166° 58'. I passed this onto Mr. Lawton who reported back to me that the displacement was approximately 2.1 nautical miles and reflected a difference of 10° of longitude from the true position he had checked against on the chart, i.e. 166° 48' E."

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(20) In his Brief of evidence, Captain Johnson gave a different account of his telephone call. He stated:-

"Captain Simpson also asked me to get the Navigation Section to look at the position of the McMurdo way point on the computerised flight plan which he said would be better positioned at the TACAN. I do not recall him specifically saying that he had found the distance between these two points to be in the order of 26 nautical miles. Being aware that the flight plan 40 position had in the past been the NDB, I had in mind that this position may still have been on the flight plan and that Captain Simpson was suggesting that it would be better changed to the co-ordinates of the TACAN. I passed on Captain Simpson's comments to Mr. Lawton and

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para.6.2

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asked him to check the McMurdo position on the flight plan and report back to me."

(21) In his Brief Captain Johnson sought to explain the discrepancy between his two accounts, claiming that by 10th December 1979 when he wrote his letter he knew the extent of the error (2° 10' of longitude) and, being aware of the co-ordinates of the TACAN (i.e. 166° 58'), he inserted them in his letter. He acknowledged that his letter read as though Captain Simpson had reported an error in the McMurdo position and had advised what the longitude co-ordinate should in fact be but confirmed that Captain Simpson "did not tell me that the position was in error on the flight plan"

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p.407-8
para.6.5

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(22) Captain Simpson's account of the conversation differed substantially from that of Captain Johnson and was as follows:-

"During this conversation which was fairly brief and as an entirely secondary matter I told him that I had been surprised at seeing approximately 27 miles across track distance when I was overhead the TACAN area and had carried out an unnecessary updating of our navigation computer. I suggested that it would probably be a good idea to advise all other crews doing Antarctic flights of this distance between the flight plan McMurdo position and the TACAN position so that they would not be surprised as I had been, and would consider carefully their across-track distance before doing a manual update of their computer positions. I did not report this matter to Captain R.T. Johnson as an error in position as I had no reason to believe the McMurdo position on the flight plan was other than a logical place to terminate the southern point of the flight plan track".

p.430
para.34

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Captain Simpson disputed that he had told Captain Johnson that the McMurdo position was in error and should be 166°58'. He further denied that he had at any time "asked Captain Johnson to get the navigation section to look at the position of the McMurdo waypoint on the computerised flight plan" or that he had told Captain Johnson that the McMurdo waypoint " would be better positioned at the TACAN". Captain Simpson further maintained that Captain Johnson's recollection was incorrect on the matter of his mentioning the across-track distance:

p.430
para.35

p.430-31
para.36

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p.431
para 36

"I certainly did mention to him that the across-track distance was approximately 27 miles but in the terms and context of my earlier comment, to ensure that subsequent crews were not unnecessarily surprised at the across-track distance".

(23) Captain Simpson's account of the conversation with Captain Johnson (which was at no time challenged in any respect in cross-examination) was previously put to Captain Johnson in cross-examination. In answer Captain Johnson asserted that 10

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p.1358 (i) he did not recall Captain Simpson referring to any across-track distance and would have been very surprised to have heard that there was an across-track distance of 27 miles;

p.1358 (ii) he did not recall Captain Simpson referring to giving information which would assist crews on subsequent flights; 20

p.1358 (iii) Captain Simpson had said that he considered that the waypoint on the flight plan would be better placed at the TACAN;

p.1358 (iv) he believed Captain Simpson had asked him to refer the matter to the Navigation Section.

(24) There was a further inconsistency between the evidence of Captain Johnson and that of the members of the 30 Navigation Section to whom Captain Johnson passed on the information which he had received from Captain Simpson. According to Captain Johnson, he had told Mr Lawton that Captain Simpson had suggested that the waypoint would be better placed at the TACAN which he (Captain Johnson) knew to be 166°58'. According to Mr Lawton (Doc 3, Vol. 2, p. 307, para.3.1; Doc 1 Vol. 4, p. 1065), Mr Hewitt (Doc 3, Vol. 2, p. 239, para. 7.1), and Mr Amies (Doc 1 Vol. 3, p. 934), Captain Johnson had reported Captain Simpson as 40 saying that there appeared to be something wrong with the McMurdo position - an account which was consistent with Captain Johnson's letter of 10 December 1979 but inconsistent with the revised account given by Captain Johnson in his Brief of evidence and in his oral evidence.

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(25) In their Final Submissions Air New Zealand expressly acknowledged that one of the "three major issues" which had been "consistently raised throughout the hearing" was "... whether the Company either was or should have been aware of the error as a result of Captain Simpson's phone call to Captain R.T. Johnson after the Antarctic flight of 14 November 1979".

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p.370
para.7.43

(26) The Royal Commissioner was entitled on the basis of the evidence before him to find that Captain Simpson had informed Captain Johnson of the across-track distance of 27 miles and had not suggested either that there was an error in the McMurdo waypoint or that the waypoint would be better situated at the TACAN. He was further entitled to conclude that Captain Johnson's evidence to the contrary was not merely the result of a misunderstanding of what he had been told by Captain Simpson or of faulty recollection but was instead false evidence designed to explain away the failure of the Company to inform Captain Collins of the change to the co-ordinates.

(27) The conclusion of the Royal Commissioner in paragraph 376 that Captain Johnson had given such false evidence was not challenged by Air New Zealand in their Amended Statement of Claim either on the grounds of want of probative evidence or on the grounds that the conclusion was arrived at in breach of the rules of natural justice.

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4. "...the explanation by a highly skilled navigational expert that he drew an arrow on a meridian of longitude so as to remind himself that the meridian pointed north ....."(Report, para.376 lines 10-12)

(28) This conclusion of the Royal Commissioner was likewise not challenged by the applicants in their Amended Statement of Claim either on the grounds of breach of natural justice or on the grounds that it was unsupported by probative evidence.

(29) The document referred to was the track and distance diagram (Exhibit 164 referred to at para (10)(i) above) prepared by the Navigation Section which contained headings and distances for the area north of the Auckland Islands down to the two alternate routes available to Antarctic flights. The principal feature of the document (as the Royal Commissioner found)

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was a plotted track from Cape Hallett down McMurdo Sound on a path to the east of Byrd Reporting Point. The flight path, as the Royal Commissioner found, appeared to be indistinguishable from a flight path running from Cape Hallett down to the altered McMurdo waypoint. In addition (so the Royal Commissioner found) the draftsman had run a dotted semi-circular line around the south of Ross Island and then a straight line had been drawn back to Cape Hallett along 170° meridian of east longitude. On that line had been drawn an arrow pointing towards Cape Hallett (Report, para. 238). 10

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B p.85

(30) The navigation expert referred to was Mr Amies who, from March 1977, had held the position of Navigation Services Officer and, from 1964 until 1977, had been a Flight Navigator with Air New Zealand, having qualified as a navigator in 1944.

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Doc.1
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p.975

(31) No reference was made to the diagram by Mr Amies in his original Brief of evidence. After Exhibit 164 had 20 been put to Mr Hewitt in cross-examination Mr Amies submitted a supplementary Statement (Doc 3, Vol. 2, p. 343ff) and was recalled (Doc 1, Vol. 4, p. 1179ff) in relation to Exhibit 164. In his supplementary Brief, Mr Amies stated (inter alia) that:

Doc.3
Vol.2
p.346
para.2.7

(i) the document was a chart that had been used on the original Antarctic route feasibility study and had served as a working document solely in connection with the first route investigated by 30 the Navigation Section which was from Auckland Island to Macquarrie Island to South Magnetic Pole to Ninnis Glacier to Cape Hallett to Campbell Island to Christchurch;

(ii) neither of the two lines drawn on the chart from the Cape Hallett area south to McMurdo represented tracks but were used by Mr Amies to check the reasonableness of the grid directions that had been calculated for the 40 manually produced company flight plans (Exhibit 147): the line drawn to the east of McMurdo constituted an inking-in of the 170°E meridian and the other line represented the direction of grid north from the 170° meridian from a point abeam of Cape Hallett;

p.344
paras.2.1
-2.2

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(iii) the arrowhead on the former line indicated true north which was "a common convention in navigation";	p.344 para.2.1
(iv) it was a coincidence that the other line passed very close to the Byrd reporting point and that, if it originated at the plotted Cape Hallett position, it could be taken for a track from Cape Hallett;	p.344 para.2.1
(v) he did not believe that the chart was ever part of the Antarctic envelope and could offer no explanation as to why it was supplied for use in the 1978 briefing material.	p.347 para.2.10

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(32) In cross-examination, Mr Amies stated that he had probably been responsible for drawing the arrow heads on the line between Christchurch and Auckland Island, the line between Ninnis Glacier and Cape Hallett, the line between Cape Hallett and Christchurch, the line between Auckland Island and Balleny Islands and the line between Balleny Islands and Cape Hallett as well as on the line drawn to the east of McMurdo. He asserted that, out of the six arrow heads, the first five indicated aircraft direction but the sixth was intended merely to indicate true north. He maintained that it was simply a coincidence that the line drawn to the west of McMurdo happened to pass through Byrd reporting point. — Doc.1 Vol.4 p.1179-83

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In answer to questions by the Royal Commissioner, Mr Amies accepted that it was possible to see at a glance that the track from Cape Hallett towards McMurdo Station was going to be within a few degrees of grid north but maintained that it was necessary to remind himself as to where grid north was by drawing a line through the 170° east meridian. — p.1188-92

On further cross-examination, Mr Amies accepted that it would have been unusual in the extreme that a working document, such as Exhibit 164 was claimed to be, should be included in the pilots' briefing material. — p.1193

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Mr Amies' attention was drawn to the curved lines which appeared at the base of the two lines drawn south of Cape Hallett and he accepted that the impression could be formed that there was a semicircular line joining

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the two tracks which had been obliterated in the photocopying process. He denied that he had drawn any curved lines himself and suggested that the curve on the 170° meridian might have been caused by something being under the paper when he was drawing the line in or that the curves might aready have been there when he inked in the line. Mr Amies stated that he could not offer any explanation as to why a document bearing lines drawn by him in 1977 purely for the purpose of a checking exercise appeared some 18-20 months later as a briefing document for the 1978 Antarctic crews. 10

Further examined by Counsel assisting the Commission, Mr Amies accepted that at the time the route from Balleny Islands to Cape Hallett was first being considered, it was intended to continue the route south to McMurdo but that, on his interpretation of the document, no such route south from Cape Hallett was depicted on Exhibit 164: Mr Amies stated that he could 20 offer no explanation as to why the route had been omitted.

pp.1201-02

He accepted that it was a possibility that at some point a route was contemplated from Cape Hallett via Byrd reporting point, around in a semi-circle, and back via Cape Hallett. He also accepted that it was a possibility that, the lines south from Cape Hallett having been drawn by him for the purpose he had described, someone else had used the diagram and drawn the semi-circle so as to complete the route back to Hallett.

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Mr Amies accepted that it was axiomatic that meridians of longitude run true north and stated that, this being so, he could offer no explanation as to why it was necessary to add an arrow head on meridian 170° to remind him of that fact: he stated that he presumed he had done it to differentiate it from the grid north which was in the other direction when he had turned the chart

p.1203

upside down to measure the angle at Cape Hallett. When asked whether it was logically possible that the arrow was intended to indicate track direction like the other 40 arrows Mr Amies accepted that it was possible but said that he did not believe it to be likely, since, if he had done that, he was sure that he would have drawn it pointing to Cape Hallett and not along the 170° meridian.

(33) In his evidence, Captain Johnson accepted that Exhibit 164 formed part of the 1978 briefing material,

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although he claimed that he had not noticed at the time that the track from Cape Hallett to McMurdo and return appeared to proceed southbound via a point approximating to the Byrd reporting point and to return northbound on a track further to the east.

Doc.3 Vol.3 p.394, para.3.8

In oral evidence, Captain Johnson stated that he had obtained Exhibit 164 together with other briefing material for the 1978 crews from the Navigation Section and that he believed the curve at the bottom of the chart would have been put on the document in the Navigation Section. Captain Johnson accepted that the curved line must have been designed to link the two parts of the apparent track, and that it would have been a reasonable assumption that the two lines south of Cape Hallett were defined tracks for the aircraft to follow, and that on the evidence it was a "massive coincidence" that all of the material issued in 1978 led to the conclusion that the route lay to the west of Mount Erebus, if it was in fact still intended that the route should over-fly Mount Erebus. He further accepted that the result produced by linking the two tracks would have been identical to the route displayed diagramatically in Annex H to the Chief Inspector's Report and that it was possible that a pilot receiving Exhibit 164 would think that he was flying along the track diagramatically shown in Annex H circumnavigating Ross Island. Captain Johnson further stated that a similar type of chart to Exhibit 164 was available in 1979 in the Antarctic flight envelope.

Doc.1 Vol.5 pp.1293-95 1380-83,87

(34) Mr Amies was subsequently recalled. In cross-examination Mr Amies stated that the circle or curves south of the Byrd position were not necessarily drawn by the Navigation Section and suggested that, after he had put aside Exhibit 164, the document was picked up by someone else and, with or without the curves, was included in the Antarctic envelope. Mr Amies maintained that at no time had he drawn the lines to the east and west of McMurdo as representing tracks and that the arrow had been inserted as a matter of habit, simply to remind himself that it was true north.

Vol.6 pp.1910-11

pp.1918-20

(35) The nature and purpose of Exhibit 164 was further dealt with in the final submissions of the various parties before the Royal Commission. In particular:

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(i) Counsel for Air New Zealand disputed what was described as the "major argument" in support of the proposition that the western waypoint was adopted, namely "the existence of Exhibit 164 which, on the face of it, appears to indicate a track from Cape Hallett down McMurdo Sound returning to Cape Hallett via the 170° east meridian". The Company submitted (and supported by reference to the evidence - paras. 7.44-7.47) that Exhibit 164 was "entirely consistent with a working document used to check grid headings in the manner described by Mr Amies in his supplementary brief of evidence". 10

Doc.4 Vol.3 p.370 para.7.44

p.370 para.7.44

(ii) Counsel assisting the Commission similarly discussed Exhibit 164 in their final submissions, it being noted that there was a "gap in the explanation as to how and why this track chart came into being, how it could be used for the 1978 briefing and whether it appeared in the Antarctic (pre-despatch) envelope". It was further noted that Mr Amies had been responsible for the arrows "whether they indicated the north meridian as well as the direction or direction alone". It was submitted that "in the end there is no explanation for the curved lines at the foot of Exhibit 164 by either Mr Amies or counsel. Consideration must be given to the submission that the tracks and distances recorded on Exhibit 164 did not match a route to the Dailey Islands; and, of course, the diagram does not -viewed as a route- depict a NAV track running in a straight line from one waypoint to another. Apart from the curved parts, there could be a straight line that Mr Amies' workings have given rise to a line running near the false co-ordinates, even though there is a three degree error on Mr Amies' basis. There is, however, no explanation for why the whole of the route via Balleny and Hallett has been included except for the part running south". 20 30 40

Vol.I p.26

p.28

p.32

(36) The Royal Commissioner was entitled on the basis of the evidence before him, which had been fully put to Mr Amies, to conclude that the lines drawn to the west and east of McMurdo on Exhibit 164 were intended to

Record
Part I

depict an aircraft track and that the arrow pointing in the direction of Cape Hallett (in common with the other five arrows on the diagram) was intended to indicate the direction of aircraft after a presumed circuit of Ross Island. The Royal Commissioner was likewise entitled to reject as false Mr Amies' evidence that the lines were not intended to indicate an aircraft track and that the sixth arrow had been drawn merely to remind himself of the direction of true north when he had been using the
10 diagrams for grid navigation workings.

5. "...the allegation by Navigation Section witnesses that the misleading flight plan radioed to McMurdo on the morning of the fatal flight was not deliberate but the result of yet another computer mistake." (Report, para.376, lines 12-15)

In pocket
B p.150

(37) When writing the TACAN co-ordinates of 166°58' east into the worksheet for the ground computer the
20 operator (Mr Brown) entered a symbol which had the effect of obliterating these figures from the flight plan extract which was sent to the United States Air Traffic Controller at McMurdo and substituting as the destination waypoint the word "McMurdo". The comparison between the Air Traffic Control flight plan received on 21st November 1979 (having the same waypoints as all the Air Traffic Control flight plans transmitted for the previous flights for 1978 and 1979) and the Air Traffic Control flight plan sent in advance of the fatal flight is shown in tabular form in
30 paragraph 249 of the Report. As a consequence of the obliteration of the McMurdo coordinate, the Air Traffic Control authorities would have been unaware that the flight path on the accident flight had been changed.

B p.89

(38) The significance of the entry in the computer of the changed coordinates was emphasised in the opening submission of Counsel assisting the Commission. Counsel noted as relevant issues in the Inquiry:

Part II
Doc.5
Vol.1
p.32
para.6

40 "...how different co-ordinates came to be lodged in the computers; when and how these were corrected and what publicity was given..."

and "Liaison between Air New Zealand, CAD and US authorities concerning the flight of 28 November including whether the flight plan was repeated to McMurdo".

p.34
para.14

(39) The procedure for transmitting the flight plan to the relevant Air Traffic Control authorities was described in the evidence of Mr I.A. Johnson:

> "...in order to get (the) ATC plan transmitted to the relevant ATC authorities it is necessary to perform another computer transaction. This involves accessing another formatted screen on the VDU, entering a unique number and inserting any other relevant detail. This information is then entered into the computer and ultimately the addressees of the ATC plan together with its contents are displayed on the VDU [? computer teleprinter]. These are visually checked to ensure that the correct flight plan has appeared and then a button is pushed and it is automatically released to the addressees through certain telecommunications networks".

Doc.3 Vol.2 p.331 para.5.1

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(40) In his Brief of evidence Mr Hewitt did not suggest that the obliteration of the McMurdo coordinates was the result of a mistake but stated that when the amendment was made to the McMurdo longitude coordinate "a different selection of indicators was used" and that "on this occasion the method adopted resulted in an ATS plan showing the final southbound waypoint as 'McMurdo'". Mr Hewitt accepted that there was "some dispute as to what the term 'McMurdo' would be taken to mean on an ATS flight plan" but refused to accept that "because the first three flights of the 1979 season expressed the McMurdo position in latitude and longitude, subsequent use of the term 'McMurdo' would be taken to mean the same position".

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pp.242-3 paras.8.3, 8.4

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para.8.5

(41) In his oral evidence Mr Hewitt alleged that obliteration of the McMurdo coordinates was the result of a mistake, namely the entry of the figure 5 (which served to trigger the print out of the McMurdo coordinates in the flight plan) in the wrong column of the ALPHA work sheet (Exhibit 16). In consequence of the wrong entry, it was claimed, the word 'McMurdo' alone appeared in the flight plan.

Doc.1 Vol.4 p.972

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Mr Hewitt was questioned by the Royal Commissioner about this further alleged mistake, one of five identified by the Royal Commissioner. He was asked:

Record Part II

"Does that strike you as a remarkable sequence of errors made by perhaps five different persons in respect of the same subject matter? ...... Yes, Sir it is very disquieting."

Doc.1 Vol.4 p.973

The questioning continued as follows:

"Well, the ultimate result was, was it not, that on the flight plan of Captain Collins the Americans would not know that there had been a change in the coordinates, would they, for McMurdo?...... Not in the fuel [final?] flight plan, no, Sir."

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"Because the flight plan of seven days previously had listed the longitude meridian as 164°48', had it not? ...... Yes, Sir."

"And the flight plan transmitted to the Americans for the next flight omitted any coordinates for McMurdo and merely stated the name McMurdo?...... Yes, Sir."

20 p.973

"I know you have explained to me how that happened but someone may suggest to me before the Enquiry is over that the object was not to reveal there had been this longstanding error in the coordinates and that is why the word McMurdo was relayed to them. I take it you would not agree with that?...... Certainly not, Sir."

p.973

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(42) Mr Brown gave evidence after Mr Hewitt. In his Brief of evidence (which was submitted immediately before he was called as a witness), Mr Brown stated that he had mistakenly entered the figure 5 in column 65 instead of column 55 and that by triggering column 65 "the word 'McMurdo' appeared on the ICAO flight plan which was not intended."

Doc.3 Vol.4 p.644 para.2.1

In cross-examination, Mr. Brown stated that he entered the update in the ALPHA table on the instructions of Mr. Hewitt and that Mr. Hewitt had probably dictated the figures to him. He accepted that on making an entry in the ALPHA table it had the effect of altering the flight plan and that it was the normal practice in the Navigation Section to obtain a printout of the flight plan to see that the final entry was correct. Mr. Brown stated that, although the material may have been dictated to him by Mr. Hewitt, he (Mr. Brown) had checked it and entered it and that it was his error in placing the 5 in the wrong column which had the effect of suppressing the co-ordinates on the ICAO flight plan.

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Doc.1 Vol.6 pp.1886-7, 1891,96,98

Record

(43) The Royal Commissioner was entitled on the evidence before him to conclude:

(i) that McMurdo Air Traffic Control would and did consider the word "McMurdo" in the flight plan for the fatal flight as referring to the same McMurdo waypoint which had always existed and that McMurdo Air Traffic Control expected the DC10 of the fatal flight to arrive down McMurdo Sound as with previous flights in 1979 and in 1978; 10

(ii) that the suppression of the McMurdo co-ordinates on the flight plan of the fatal flight was not in fact the consequence of another mistake but was deliberately designed to conceal the change of the flight path from the Air Traffic Control authorities.

He was further entitled to reject the evidence adduced by Air New Zealand to the contrary as false. As is recorded in paragraph 249 of the Report, the Royal Commissioner was invited by Air New Zealand to accept that no fewer than eight separate mistakes had been made by the professionally skilled members of the Navigation Section. He was entitled to conclude that the catalogue of mistakes which was alleged to have occurred exceeded the bounds of credibility and, in the face of a more probable explanation, he was entitled to reject the evidence as false. 20 30

IN THE PRIVY COUNCIL No. 12 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

THE HONOURABLE PETER THOMAS MAHON
Appellant

-and-

AIR NEW ZEALAND LIMITED
First Respondent

-and-

MORRISON RITCHIE DAVIS
Second Respondent

-and-

IAN HARDING GEMMELL
Third Respondent

-and-

HER MAJESTY'S ATTORNEY-GENERAL
FOR NEW ZEALAND
Fourth Respondent

CASE FOR THE APPELLANT

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