In the Privy Council

No. 12 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE HONOURABLE PETER THOMAS MAHON — *Apellant* (FIRST RESPONDENT)

AND

AIR NEW ZEALAND LIMITED — *First Respondent* (FIRST APPLICANT)

AND

MORRISON RITCHIE DAVIS — *Second Respondent* (SECOND APPLICANT)

AND

IAN HARDING GEMMELL — *Third Respondent* (THIRD APPLICANT)

AND

HER MAJESTY'S ATTORNEY-GENERAL FOR NEW ZEALAND — *Fourth Respondent* (SIXTH RESPONDENT)

FIRST, SECOND AND THIRD

Case for the Respondents

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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
(First Respondent)

- and -

AIR NEW ZEALAND LIMITED

First Respondent
(First Applicant)

- and -

MORRISON RITCHIE DAVIS

Second Respondent
(Second Applicant)

- and -

IAN HARDING GEMMELL

Third Respondent
(Third Applicant)

- and -

HER MAJESTY'S ATTORNEY-GENERAL FOR NEW ZEALAND

Fourth Respondent
(Sixth Respondent)

CASE FOR THE FIRST TO THIRD RESPONDENTS

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The Issues

1. This appeal raises issues of great importance within New Zealand and for its law. The issues are:-

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(A) The ability of the Courts to review statements in a Report of a Royal Commission on the grounds that the Commission exceeded its terms of reference or failed adequately to comply with the rules of natural justice.

(B) Whether the statement in the Report of the Pt I, doc B. Erebus Royal Commission ("the Report") to the effect that there was a conspiracy by numerous employees of Air New Zealand ("ANZ") to commit perjury (see paragraph 377) was beyond the terms of reference of the Royal Commission.

(C) Whether certain statements in the Report concluding in the allegation of conspiracy were made in breach of the rules of natural justice and without evidentiary support.

There is a further issue as to the scale upon which costs can be awarded.

Introduction

2. It is now a matter of history that on 28 November 1979 a DC10 aircraft operated by ANZ crashed on the northern slopes of Mount Erebus on Ross Island in McMurdo Sound, Antarctica, in the course of a sight-seeing flight, TE901. The crash resulted in the death of all 257 persons on board. It was a major disaster for New Zealand and for its national carrier ANZ. All inquiries into it were bound to attract the utmost publicity.

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3. Following the accident, the Chief Inspector of Air Accidents filed on 31 May 1980 a statutory report pursuant to the Civil Aviation (Accident Investigation) Regulations 1978. In his report, the Chief Inspector attributed the probable cause of the accident to error on the part of the flight crew. Pt I, doc A.

4. On 11 June 1980 the Appellant was appointed to be a Royal Commissioner to inquire into and report upon the disaster. There followed an Inquiry, the procedure at which, including the mechanism for disclosure of documents and the order of calling of witnesses, was essentially under the control of the Commissioner and Counsel Assisting. ANZ was amongst those who were formally cited as parties pursuant to section 4 of the Commissions of Inquiry Act 1908.

5. In the Report, which was duly published on 27 April 1981, the Commissioner reached a different conclusion from the Chief Inspector (see paragraph 3 above) and found that "the dominant cause of the disaster was the act of the airline in changing the computer track of the aircraft without telling the aircrew." (Report, para. 392). The Commissioner further concluded that this mistake was "directly attributable not so much to the persons who made it, but to the incompetent administrative airline procedures which made the mistake possible." (Report, para. 393). Pt I, doc B.

The Commissioner found that this cause would not have resulted in the fatal crash but for the co-existence of the other factors enumerated at

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paragraph 387 of the Report, one of which was the presence of the "whiteout" phenomenon, which meant that the snow-covered rising terrain in front of the aircraft appeared to the aircrew as a flat surface. The Report exonerated the crew from any error contributing to the disaster. These conclusions represented the most substantial part of the Report of the Royal Commission and were not, as was stressed in and by the Court of Appeal, in any way challenged in the subsequent Court proceedings.

6. In addition, however, the Report contained trenchant criticisms of the quality and honesty of the evidence adduced by ANZ and the company's stance before the Royal Commission. The Commissioner included in his Report a separate section headed "The Stance Adopted by the Airline before the Commission of Inquiry" (paragraphs 373 to 377).

In paragraph 373 he stated that:-

> "There is no doubt that the chief executive, shortly after the occurrence of the disaster, adopted the fixed opinion that the flight crew was alone to blame, and that the administrative and operational systems of the airline were nowhere at fault. I have been forced to the opinion that such an attitude, emanating from this very able but evidently autocratic chief executive, controlled the ultimate course adopted by the witnesses called on behalf of the airline."

In paragraph 377 he stated unequivocally that he had heard palpably false sections of evidence from the airline witnesses which could not have

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been the result of mistaken 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".

Subsequently, the Commissioner expressed the view that the conduct of ANZ at the hearing, as described at page 167 of the Report, had materially and unnecessarily extended the duration of the hearing and, on this ground, in purported exercise of power conferred by Section 11 of the Commissions of Inquiry Act 1908 ordered, inter alia, that ANZ pay to the Department of Justice the sum of $150,000 by way of contribution to the public cost of the Inquiry.

7. The findings summarised in paragraph 6 are of the gravest import. It was acknowledged in the Court of Appeal by Counsel for the Attorney-General, who was the same Counsel who had been assisting the Commission, that these words conveyed that there had been a conspiracy to commit perjury and that Mr Davis had been one of the conspirators. He also acknowledged that these words could be interpreted to mean that Mr Davis was the architect of the conspiracy. The disaster and the causes as found in the Report inevitably damaged the reputation of ANZ, an airline small by international standards but with a hitherto impeccable international safety record. Recovery from such damage is a slow,

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painstaking and difficult process. A finding that the airline's senior employees had conspired to commit perjury to conceal what in the Commissioner's opinion was the true cause of the crash was, if anything, an even more devastating blow. The criticism was expressed in terms which were pungent, eloquent and memorable and they inevitably received worldwide publicity on an enormous scale. It was a devastating indictment of the integrity of the airline and its senior management. It involved, as was accepted at the subsequent hearing and will be expanded subsequently, no less than ten employees including the Chief Executive, Mr Davis. It savaged their reputation - inside and outside the industry - affecting their job prospects and job security and the general regard in which they might be held for the rest of their lives. In its wake Mr Davis retired and the nine other employees implicated in the "conspiracy" were suspended during the inevitable police investigation which followed. The airline considered that there was no substance to these findings and therefore commenced the present action. In the event the Police inquiries did not lead to any prosecution (indeed, it was not even necessary for the Police to interview Mr Davis) but this only minimally lessened the damage to the individuals concerned.

8. The proceedings before the Court of Appeal involved the filing of affidavit evidence and a consideration by the Court of extensive sections of the record of the Royal Commission hearings. They also involved substantial argument as to

the relevant principles of law. ANZ was opposed by the N.Z. Airline Pilots' Association and the Attorney-General, who was added to represent the public interest. He advanced through Counsel all arguments against the case for ANZ thus ensuring that all the issues were fully ventilated. Knowing that this course was being adopted, and having heard all the arguments in opening for ANZ and the main arguments advanced in support of his conclusions by Counsel for the Attorney-General, the present Appellant indicated through Counsel that he would abide the decision of the Court of Appeal. After the decision of the Court of Appeal the Attorney-General determined that he would not seek leave to appeal to the Privy Council. The unusual situation arises where it is the Royal Commissioner himself who now adopts an adversarial role in defence of the challenged findings in his Report and seeks to disturb the conclusions of the Court of Appeal. This aspect of the case is summarised not in order to raise any argument as to the locus standi of the Appellant, but to indicate that it will be rare for a Royal Commissioner to become an active protagonist in proceedings for review.

9. These Respondents recognise that the task of a Royal Commission investigating a disaster is responsible and difficult. They will not submit that it should be made harder by regular intervention of the Courts. A Royal Commissioner is often a High Court Judge who by training, temperament and experience will normally guard against exceeding his terms of reference or breaching the rules of natural

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justice or fairness. Moreover, he has the benefit of the procedure prescribed by the Commissions of Inquiry Act 1908 as amended and the help of Counsel Assisting. It will accordingly be rare that there will be any legitimate ground of challenge to his conduct. If, however, such occasion should regrettably exist, it is vital that the Courts should intervene, for otherwise situations may arise where, with the full weight, prominence and authority of his position, a Royal Commissioner may do grievous injustice to individuals. If, as these Respondents submit, this happened in the present case, then this injustice must be redressed and the decision of the Court of Appeal be upheld, however daunting this may be for a Judge who undertook such a difficult task.

10. In the course of argument on the Petition for leave to appeal, Counsel for the Appellant referred to the fact that after the decision of the Court of Appeal the Second Respondent publicly called for the resignation of the Appellant. The Respondents briefly set this in context. From the time of the publication of the Report the Appellant made numerous public statements commenting on various aspects of the matter. Such comments continued after these proceedings had been commenced. By contrast, Mr Davis made a brief statement on his retirement and, apart from publicly expressing satisfaction when the Police announced there would be no prosecution, he made no other statements until the day of the Court of Appeal decision. Then, in the course of a statement to the media he called for the resignation of the Appellant. On

the same date the Appellant took part in a broadcast in which he stated that he had never said Mr Davis was a party to an organised plan of deception. This was contrary to the impression formed throughout New Zealand, which had seen the Report as pillorying Mr Davis. Mr Davis thereupon made the point that, if this was the true view of the Judge, it should have been stated much earlier to dispel public impression to the contrary. Whether or not it was wise for Mr Davis to make the statement calling for the resignation of the Judge it should be pointed out that the Appellant thereafter (both before and after his resignation) spoke and gave lengthy interviews to television, radio, newspapers and magazines on numerous occasions reiterating the charges made in his Report - including once more the allegations against Mr Davis. Moreover, the Appellant sought in these statements to denigrate the judgment of the Court of Appeal and thereby the extent to which their total vindication had partially rehabilitated the reputation of the Respondents by accusing the Court of Appeal of "departing from the principles of natural justice" by not giving him a chance to speak at the Appeal.

11. The arguments for these Respondents will be developed under the three headings anticipated in paragraph 1 hereof. These arguments do however interact with each other. In the present case it was acknowledged by Counsel for the Attorney-General in the Court of Appeal that a Commissioner must act within his terms of reference. It was also accepted that the Commissioner must comply with the law: in

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particular, it was specifically accepted that the Commissioner had to comply with the duties imposed upon him by section 4A of the 1908 Act as amended. Yet it was, and apparently still is, argued that a person affected by a finding or conclusion in the Report of a Royal Commissioner has no remedy even if there has been an excess of terms of reference or breach of the duties owed by the Commissioner. In short, the Appellant argues that the Royal Commissioner must comply with the law but there is no accountability or redress for breach which emerges in his Report.

The Judgments

Pt I, doc C. 12. In the Court of Appeal two separate judgments were delivered the first (hereinafter referred to as "the President's judgment") being given by the President and McMullin J. They were of the opinion that the challenged paragraphs in the Report were directly 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 (p.620, lines 48-55; p.652, lines 40-46). In the President's judgment it was held that:-

(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

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natural justice (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 (p.626, lines 45-53);

(iii) such findings could be the subject of a declaration under section 4(1) of the Judicature Amendment Act 1972 (as amended in 1977) as being a statutory power of investigation or inquiry into the rights, powers, privileges, immunities, duties or liabilities of any person; (p.623, lines 13-19 and p.627, lines 2-5);

(iv) such findings could additionally be set aside under Section 4(2) of the said Act as being decisions 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 (p.626, line 47, p.627, line 37);

(v) 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 parts of the terms of reference and such findings were accordingly made by the Royal Commissioner in excess of his jurisdiction (p.651, lines 17-21);

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(vi) 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 not given an 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 (p.651, lines 30-48);

(vii) 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 (p.624, lines 18-47; p.652, lines 7-32).

Pt I, doc C. 13. The second judgment given by Cooke, Richardson and Somers JJ. (hereinafter referred to as "Mr Justice Cooke's judgment") expressed reservations as to whether the Commission had statutory authority for its inquiry as well as prerogative authority and whether accordingly the 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

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Act (p.664, lines 24-31). 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 paragraphs 377 of the Report (p.665, lines 22-50). 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 (p.666, lines 1-27);

(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 (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 (p.665, lines 33-52; p.666, lines 33-42);

(iv) as to the remaining paragraphs of the Report which were impugned by the applicant, if the Court had jurisdiction

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to quash particular passages in the Report it must be discretionary, and the applicants had not made out a sufficiently strong case to justify the Court in interfering (p.667, lines 11-33).

A. REVIEWABILITY OF THE IMPUGNED PASSAGES IN THE REPORT

14. The principal submission of these Respondents was, and remains, that the challenged paragraphs (and more particularly paragraph 377) are directly reviewable by the Courts to determine if they were outside the terms of reference of the Commission, were in breach of natural justice, or unsupported by evidence. It has been accepted by the Appellant (as foreshadowed in paragraph 18(1) of his Petition for leave to appeal) that this argument may be advanced without a cross-appeal. The argument advanced for the Appellant to the contrary is that they are not susceptible to review under the Judicature Amendment Act 1972, as amended in 1977. We shall therefore have to consider the wording of this legislation but at the outset make immediate comment upon its purpose. The legislation was concerned with the relief which could be granted to an applicant for review and was intended to improve the procedure by which that relief could be obtained; see Daemar v. Gilliand [1981] 1 N.Z.L.R. 61; Re Royal Commission on Thomas Case [1980] 1 N.Z.L.R. 602 (Full Court of High Court), at p. 615:

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> "It is clear that the Judicature Amendment Act 1972 did not repeal the existing law as to the prerogative writs. It did, however, provide a simpler procedure; and it widened substantially the nature of the relief that the Court could grant once the applicant established his grounds."
>
> And, at p.616:
>
> "The intention of the 1972 legislation was not to widen the grounds on which the Court could grant relief, but to extend the nature of the relief that could be granted once those grounds were established, and then to improve the procedure by which that relief could be obtained."

A similar view is expressed in paragraph 19 of the Fifth Report of the New Zealand Public and Administrative Law Reform Committee (1972), at p.7.

15. Thus the legislation was in no way intended to inhibit the grounds upon which relief could be granted. To interpret the legislation as providing a substantive bar to relief would thus be inconsistent with the intention of Parliament and would have an effect directly opposite to that intended: it would hinder rather than facilitate the review of administrative action. The Respondents refer to the decision of the Court of Appeal in Webster v. Auckland Harbour Board (as yet unreported) per Cooke and Jeffries JJ., at p.11 of their joint judgment. It is therefore necessary to consider both upon principle and in the light of the legislative history whether judicial review is available.

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Pt I, doc B, p. vii.

16. The Commissioner was appointed by presents issued under the following words of authority:

> ". . . under the authority of the Letters Patent of His Late Majesty King George the Fifth, dated the 11th day of 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."

Thus the powers of the Commissioner exist both pursuant to the prerogative and to statute. The Respondents refer subsequently to the decision of the Court of Appeal in Re Royal Commission on Thomas Case [1982] 1 N.Z.L.R. 252 to this effect. The 1908 Act, as amended, provides for the questions which may be inquired into and reported upon by a statutory inquiry and contains provisions entitling persons with an interest in the inquiry apart from any interest in common with the public or whose interests might be adversely affected to be heard: see section 4A which has been steadily expanded so as to increase the safeguards for those affected. It was accordingly contemplated that no person should suffer in his interests without an opportunity to be heard, and it is an essential corollary of this protection that he should know of any allegation made against him. The section indicates the concern of the legislature to ensure compliance with fairness during such inquiries, which is no doubt a proper recognition of the serious consequences which because of their authority and prominence reports could have upon the interests, including reputation, of those affected by adverse conclusions. No doubt the concern for such

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safeguards is enhanced by the extensive and steadily expanded powers to compel the attendance of witnesses and the production of evidence : See Sections 4B, 4C and 4D and 9. In the light of these provisions it would be difficult to contend that a Commission should not act within its terms of reference and comply with natural justice; yet it is apparently suggested that the statements in the Report complained of are unreviewable even for a clear failure so to do. The contrary is the true position; as Mr Justice Cooke's judgment said at p. 653, lines 33-40:

> "In themselves they do not alter the legal rights of the persons to whom they refer. Nevertheless they may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our judgment these are the major reasons why in appropriate proceedings the Courts must be ready if necessary, in relation to Commissions of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice." (Emphasis added)

17. The 1908 Act expressly contemplated that matters of law within the terms of reference of a Royal Commission could be determined by the Court: see Section 10. This indicates an intention of the legislature that Royal Commissions should not be immune from judicial review. Prior to the 1972 Act the Courts had intervened to prevent excesses of power or abuse of procedure by Royal Commissions. Thus in Cock & Others v. Attorney-General (1909) 28 N.Z.L.R. 405 the Court of Appeal intervened to prevent

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the holding of an Inquiry whose main object was to investigate the possible commission of a crime on the grounds that an Inquiry with such a purpose was outside the powers conferred either by the prerogative or the 1908 Act. It is a fortiori that the courts may control excesses of jurisdiction by the Commission itself. Thus in Re the Royal Commission on Licensing [1945] N.Z.L.R. 665 the Court of Appeal held that questions proposed to be asked of witnesses were outside the scope of a Royal Commission's powers and consequently impermissible. In Re the Royal Commission to Inquire into and Report upon State Services in New Zealand [1962] N.Z.L.R. 96 the Court of Appeal held that the then current section 4A of the 1908 Act entitled anyone to whom it applied to a fair opportunity to correct or controvert a relevant statement made to his prejudice: see in particular, Cleary J. at p.116, lines 20-46 and the authorities cited by him. These two latter cases were both brought during the course of the Inquiry by case stated under section 10 of the 1908 Act. But the conclusion demonstrates the view of the Courts that Commissions must act within their terms of reference and comply with natural justice. There is a summary of the position at common law in Re Royal Commission on Thomas Case [1982] 1 N.Z.L.R. 252, at p. 258. In the Court of Appeal the correctness of these decisions was acknowledged by Counsel for the Attorney-General but it was contended that no remedy was available if the excess of terms of reference or breach of natural justice only emerged in the Report itself. It was contended that in such a

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case the Commissioner was functus officio. The Respondents contend that there is no such limitation upon the power to review. On the contrary, it would be wholly artificial if the Courts could not give effect to acknowledged principles of law merely because departures from such principles only became apparent from the Report.

18. This submission of the Respondents is supported by the availability of the remedy of declaration at common law. The President's judgment was clearly to this effect: see p.623, lines 26-49 and p.626, lines 45-53. Mr Justice Cooke's judgment inclined in the same direction although recognising the discretionary element involved in the grant of declarations: see p.667 lines 14-22. It is recognised that the investigatory nature of the functions of the Royal Commission would not preclude the right to review: this is inherent in the decisions in Re the Royal Commission on Licensing [1945] N.Z.L.R. 665, Re the Royal Commission to Inquire into and Report upon State Services in New Zealand [1962] N.Z.L.R. 96. Reviewability is in no way confined to judicial or quasi-judicial decisions but can include administrative decisions; Ridge v. Baldwin [1964] A.C. 40. The tenor of that decision is against categorisation by function of the situations in which review is obtainable and the principles apply also to investigatory processes where outcomes may affect the rights of individuals e.g. Bushell v. Secretary of State for the Environment [1981] A.C. 75 (Departmental Inspectors' report prior to planning decision of Minister); in Re

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Pergamon Press Limited [1971] 1 Ch. 388 (conduct of Department of Trade and Industry Inspectors), cited with approval by the Full Court of the High Court in Re Royal Commission on Thomas Case, supra, at pp. 613 to 615.

In relation specifically to Royal Commissions, the availability of a remedy by declaration is further emphasised in Landreville v. The Queen (No.1) (1973) 41 D.L.R. (3d) 574, and A.G. for Commonwealth of Australia v. The Colonial Sugar Refining Company Limited [1914] A.C. 237 (P.C.); and see also the recognition of this by Myers, C.J., in Re the Royal Commission on Licensing, supra, at p.679. This approach is also consonant with the view of the courts as to the effect of excesses of jurisdiction or breach of natural justice stated in Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147 (H.L.), per Lord Reid at p.171.

19. Thus, on principle and authority it is clearly appropriate that damaging conclusions reached outside the terms of reference of an Inquiry or in breach of natural justice or unsupported by evidence should be, and are, susceptible of intervention by the Courts. As already stated, the Judicature Amendment Act 1972, as further amended in 1977, was designed not in any way to limit or circumscribe grounds of relief but to provide a convenient procedural machinery for parties to obtain relief in the areas previously covered by the prerogative writs and to extend the type of relief available. We now turn to analyse its terms.

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20. Section 4(1) of the Judicature Amendment Act grants a right of review in the following terms:

> "4. Application for Review
>
> (1) On an application which may be called an application for review, the High 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, refusal to 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."

21. In the present case the claim related to the exercise of a "statutory power". The definition of "statutory power" was contained in section 3, but was amended by the Judicature Amendment Act 1977. It is cited below in its relevant present form with the 1977 amendments underlined. The 1977 amendments followed the decision of the Court of Appeal in Thames Jockey Club Inc. v. N.Z. Racing Authority [1974] 2 N.Z.L.R 609 to the effect that an authority with a power to recommend was not exercising a "statutory power of decision", and the subsequent Eighth Report of the New Zealand Public and Administrative Law Reform Committee (1975), paragraph 26 and the Explanatory Note to

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the draft Bill. The amendments to the definitions recommended by the Committee in its draft Bill were enacted without alteration. The section now reads as follows:

> "Statutory power" means 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.
>
> (a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or
> (b) To exercise a statutory power of decision; or
> (c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or
> (d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person; or
> (e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties or liabilities of any person."

22. It was conceded in the Court of Appeal that the order for costs made by the Commission was reviewable under the Act. This further indicates that an argument that the Report is unreviewable because the Commissioner was functus officio is unsustainable. More particularly for the present stage of the argument, this concession highlights that the issue is not whether the Act applies to the Royal Commissioner but whether the statements complained of can be properly described as involving an exercise of "statutory power".

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23. The first submission is that the Commission was exercising a statutory power of investigation or inquiry into the duties or liabilities of any person. This was accepted in the President's judgment: see page 623, lines 14-17 and page 627, lines 1-5. This involves three elements: the statutory power, the investigation and inquiry, and that this is into duties and liabilties.

(i) The Statutory Power

The Commission's powers arose pursuant to statutory authority, namely, the Commissions of Inquiry Act 1908; see in particular sections 2 and 15 thereof; see also the instrument appointing the Appellant. There was a dual source of authority - the Letters Patent and the Statute - as recognised by the Court of Appeal in Re Royal Commission on Thomas Case [1982] 1 N.Z.L.R. 252, at p. 261, where it was stated:

"An Order in Council is the normal way of exercising statutory powers conferred on the Crown but is also used in respect of matters within its prerogative: 8 Halsbury, 4th Ed., para.1088; and see too the form of warrant in Cock v. Attorney-General set out at (1909) 11 G.L.R. 543, 544-5. The mode adopted in this case is an appropriate and practical way of lawfully invoking both sources of power. The form of the commission in In re The Royal Commission on Licensing [1945] N.Z.L.R. 665 contained a declaration as to authority similar to that in the instant case and Myers C.J. in referring to it seems to have accepted

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that there was a dual source of power (see p.678). That was also the view of the Full Court in the case of this Commission: Re Royal Commission on Thomas Case.

We are of opinion that the instant commission was constituted both in exercise of the powers conferred on the Governor-General by the Letters Patent and under the powers contained in s.2 of the Commissions of Inquiry Act 1908.

As the appointment invokes the plenitude of the Governor-General's powers under the Letters Patent and those in s.2 of the Commissions of Inquiry Act 1908 it is not necessary to consider the difficult question as to how far, if at all, the prerogative power is abridged or put into abeyance by the enactment . . ."

It is to be noted that the language of the commissions in this case and the Thomas case were, insofar as they relate to the Letters Patent and the Commissions of Inquiry Act 1908, identical.

(ii) Investigation or Inquiry

In the same case at first instance it had been recognised at page 615 that the statutory power involved was one of "investigation or inquiry". The Full Court in Re Royal Commission on Thomas Case, supra, stated at p.615 that:- "We are satisfied that the Commission, in performing its functions, is making an "investigation or inquiry" in terms of the Act . . ."

If the words "investigation or inquiry" are given their ordinary or natural

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meaning, it is submitted that a Commission which is required "to inquire into and report upon" the matters set out in the terms of reference falls squarely within the scope of those words. Moreover, the instrument establishing the Commission expressly states: "And for the better enabling you to carry these presents into effect you are hereby authorised and empowered to make and conduct any inquiry or investigation under these presents in such manner and at such time and place as you think expedient . . ." (emphasis added).

(iii) Duties or liabilities

The terms of reference for such investigation and inquiry included:

"(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?" (emphasis added)

Thus, the Commissioner was empowered to inquire into the existence of duties and responsibilities owed by any person whether under aviation law and regulations or at common law, and into the question of

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whether they had been breached or whether they had been complied with. By so doing he was necessarily inquiring into the liabilities of any such person. This is exemplified by his conclusions under term of reference (g) at p.162 of the Report: see also page 151, paragraph 381(a) - Conclusion. A Canadian authority upon a review statute in similar terms confirms this approach: Gloucester Properties Ltd and another v. R. in the Right of British Columbia [1980] 6 W.W.R. 30, at pp. 32-33.

24. The second and alternative submission as to the direct reviewability of the passages complained of is that the "statutory power" being exercised in the relevant paragraphs, and especially paragraph 377, was one of "decision . . . affecting the rights, duties or liabilities of any person". The 1972 Act as amended (again with the 1977 amendments shown by deletion and underlined as appropriate) now reads:

" 'Statutory power of decision' means a power or right conferred by or under any Act ~~to make a decision deciding or prescribing~~ 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) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not."

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The term "decision" is separately stated to include a determination or order. The Respondents adopt the reasoning of the President at p. 627; lines 11-17:

> "We think it would be very difficult to justify an argument that findings likely to affect individuals in their personal civil rights or to expose them to prosecution under the criminal law are not decisions 'affecting' their rights within the meaning of the Act. In the present case, for example, it was virtually certain that the findings of the Erebus Commission would be published by the Government. The effect on the reputation of persons found guilty of the misconduct described in the Report was likely to be devastating."

The President continued by stating that "at common law every citizen has a right not to be defamed without justification." This was not intended in context to impose upon a Commission an obligation to justify defamatory remarks. It was simply designed to point to the existence of a "right" to reputation which was affected by the statements complained of. Such right undoubtedly exists and it is protected (subject to proper defences) by the law of defamation. Its existence indicates not that a Royal Commission report must prove the truth of a libel as in court proceedings, but illustrates the fact that a finding on this area affects a right. The Respondents also adopt the remainder of the reasoning of the President at p. 627, including the comments at lines 34-37:

> "In interpreting the 1977 legislation we think that a narrow conception of rights and of what affects rights would not be in

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> accord with the general purposes of the Act. A broad, realistic and somewhat flexible approach would enable the Act to work most effectively as an aid to achieving justice in the modern community."

25. The approach of the President to the construction of the 1972 Act as amended is consistent with that applied on different facts in Daemar v. Gilliand [1981] 1 N.Z.L.R. 61 (C.A.), at p. 63. More directly pertinent is the similar view expressed by the Full Court of the High Court in Re Royal Commission on Thomas Case (cited previously in part at paragraph 23) which reads in full:

> "We are satisfied that the Commission, in performing its functions, is making an "investigation or inquiry" in terms of the Act, and that, both by its public rulings and pronouncements during the course of its investigation and by its reporting, it will exercise "statutory powers of decision" in the extended meaning of that phrase . . ." (p.615, lines 43-47).

It was unnecessary for the Court of Appeal to consider this point in Re Royal Commission on Thomas Case since the Court determined that jurisdiction existed at common law: see [1982] 1 N.Z.L.R. 252, at p. 258, lines 43-52. This approach also gives effect to the addition in the 1977 Act of the word "affecting". The Legislature clearly intended that this should be wider in meaning than the words "deciding or prescribing", and thus it should be interpreted in the sense of having a practical effect or impact upon legal incidents. If this is the right approach to the word "affecting", then it illuminates the construction of "decisions" and

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> requires a broad construction so as to be capable of applying to situations where legal rights are affected as opposed to decided or prescribed.

26. We submit that this interpretation accords with the importance of ensuring fairness to individuals. This importance does not merely exist where a Report or other "decision" has an immediate or direct effect upon legal rights: see In Re Pergamon Press Ltd, supra. That case illustrates that there can be review where the statement made is but one step in a process which may affect generally the rights of persons to whom the statement relates. Although R v. Criminal Injuries Compensation Board, ex parte Lain [1967] 2 Q.B. 864 was concerned with the determination of a tribunal, the following approach in the judgment of Diplock, L.J., is relevant. He concluded that the supervisory jurisdiction of the court may be invoked where a determination is "one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates." (p.884, side note 6). If ANZ had set up an internal inquiry into whether any person had been culpable in relation to the Erebus disaster, the Court would have considered a claim for a declaration that the conclusions of such an inquiry were made in breach of natural justice. This would have been a "decision" in the sense just indicated and the same must be true of unequivocal statements in a Royal Commission Report.

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27. In the preceding analysis we have emphasised New Zealand case law, in particular because of the submission of the Appellant that the wording of the Judicature Amendment Act does not permit the challenge raised to the Report. We have submitted that it was clearly contemplated in New Zealand that the courts could intervene to prevent a Commission exceeding its terms of reference or breaching natural justice, or acting without evidence. This is an exercise of the traditional function of the courts; as Woodhouse P. said at p. 626, lines 25-29:

> "A vital part of the constitutional role of the courts is to ensure that all public authorities, whether they derive their powers from statute or the perogative, act within the limits of those powers."

The Judicature Amendment Act 1972 was intended, as the subsequent amendment indicates, to preserve all the grounds and situations in which relief could be obtained at common law. We further submit that the New Zealand Courts' view of their function in reviewing Reports of Royal Commissions is sufficiently in accordance with general principles of law in the Commonwealth as to be upheld. The application of such principles to Royal Commissions is of great importance to New Zealand. Since 1864 there have been 123 Royal Commissions in New Zealand and 79 since 1908: see Robertson and Hughes, A Checklist of New Zealand Royal Commissions 1864 - 1981 (1982). The great majority of these 79 Commissions have held hearings open to the public at which counsel represented the major

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parties. Such Commissions are not confined to disasters or possible scandals, but often range widely into other matters of general public importance which also affect individuals. The approach adopted in New Zealand to review of the activities of Royal Commissions is in accord with that in other Commonwealth countries, see, for Canada, Landreville (No.1), supra, Re Sedlmayr, Gardiner and Demay and the Royal Commission into the Activities of Royal American Shows Inc. (1978) 82 D.L.R. (3d) 161 and Re Anderson and Royal Commission into the Activities of Royal American Shows Inc. (1978) 82 D.L.R. (3d) 706; and for Australia, McGuinness v. Attorney-General of Victoria (1940) 63 C.L.R. 73 and Attorney-General for Commonwealth of Australia v. The Colonial Sugar Refining Company Limited [1914] A.C. 237, at 249 - 250. See also Ross and Another v. Costigan (1982) 41 A.L.R. 319 and Huston v. Costigan, (as yet unreported).

28. A further alternative submission of the Respondents is that, even if the challenged paragraphs are not directly reviewable, the costs order under section 11 of the 1908 Act constituted a "decision" and could form the basis of review since it reflected the impugned passages. This was always a subsidiary argument for the Respondents whose preference was, and is, for direct reviewability. It seems more appropriate that there should be direct reviewability than that the issue should turn on whether an order for costs could be said to be linked to the challenged passages. However, in case the Respondents are wrong hitherto the argument must be developed because it is

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paramount in the interests of justice that there should be some reviewability.

Pt I, doc 2, p. 25.

29. In the Amended Statement of Claim the First Respondent sought an order that the decision that it should pay the Department of Justice the sum of $150,000.00 by way of contribution to costs be set aside. In the Court of Appeal, after some discussion as to the scope of the pleadings, the issue as to the extent to which the costs order was linked with the criticised paragraphs and could accordingly be quashed was fully argued between the parties. The Court of Appeal was unanimous in the view that the costs order reflected the view of the Commissioner summarised in paragraph 377. The Appellant argues that this conclusion was wrong, on the ground that the order was expressed to be based on the delay caused to the hearings by the conduct of ANZ and, it is said, this does not relate to the different allegation of conspiracy to commit perjury.

30. The Respondents submit that the view taken by the Court of Appeal was fully justified. The President's judgment (at p. 624, lines 27-29) correctly states that the language in which the order was made would "naturally be understood by a reasonable reader to refer back to the matters more fully developed in the section of the Report..." from paragraphs 373 to 377. Mr Justice Cooke's judgment (at p. 654, lines 10-12) considered that the costs order reflected the same thinking as paragraph 377 and (at p. 665, lines 51-53) was "not realistically severable from that part of the report" and had

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"no doubt that reasonable readers of the report would understand that this order is linked with and consequential upon the adverse conclusions" (lines 38-42) stated in paragraphs 373 to 377. The Respondents contend:

(1) The judges in New Zealand were peculiarly well placed to determine whether within that country and prevailing local conditions the costs order would be understood as being linked with paragraph 377. All five of them were in no doubt whatsoever, and their views should be given very great weight.

(2) The Commissioner considered that a power to order costs should be exercised "whenever the conduct of that party at the hearing has materially and unnecessarily extended the duration of the hearing." (Report, Appendix, p.166) The airline has always accepted this principle while strongly denying its applicability on the facts. It could not legitimately have been criticised for drawing out the inquiry process to the extent justifying an order that it pay more than one half of the costs of the Department ($150,000.00 of a total of $275,000.00). The cause of the disaster was uncertain and it has already been noted that the Commissioner himself differed after prolonged inquiry from the view expressed by the Inspector of Air Accidents. The airline was entitled to propound its legitimate view on the matters raised by the terms of reference,

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and views as to probability were bound to shift as the Inquiry developed and the evidence as a whole emerged. The manner of the hearings was that Counsel Assisting the Commission made an opening speech, but no other counsel was invited to make an opening statement and none did so. Counsel Assisting the Commission exercised extensive and indeed primary control over the order in which witnesses were called or recalled and the topics to be covered. There was initially no requirement for formal discovery but on 1st October 1980 subpoenas were issued to certain cited parties including ANZ. Counsel Assisting stated at the time that ANZ was not being singled out in this respect. ANZ duly complied with the subpoena. Thus, given the procedure adopted, the airline did not delay presentation of its case. Woodhouse P. (at p. 647 to 649) amplifies the reasons for the rejection of these criticisms. It is only if that case is determined to be deliberately and extensively false that criticisms can be justified; this shows that the conclusion in paragraph 377 was the real reason for this very sizeable order for costs which the President's judgment (at p. 624, lines 35-36) and Mr Justice Cooke's judgment (at p. 665, lines 37-38) respectively describe as being seen as "a punishment" and "in fact though not in name a punishment".

Pt II, doc 6, vol 1, p. 76.

Pt II, doc 7, vol 1, pp. 62-63.

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(3) There is a direct linkage with the "conspiracy" theory in the following passage on page 167 of the Report:

> "The management of the airline instructed its counsel to deny every allegation of fault, and to counter-attack by ascribing total culpability to the air crew, against whom there was alleged no less than thirteen separate varieties of pilot error. All those allegations, in my opinion, were without foundation."

Woodhouse P. did not agree that this was the way in which the airline or its counsel had approached the Inquiry and contrasted (at p. 648) extracts from Counsel's final speech. However, this statement by the Commissioner further imports his view that there was a determination to conceal administrative blunders as stated in paragraphs 373 to 377 and suggests that the order was linked to the conclusion in paragraph 377.

(4) The Commissioner next refers to factors such as the destruction of documents which necessarily relate to the conspiracy theory and goes on to suggest that "the cards were produced reluctantly, and at long intervals, and I have little doubt that there are one or two which still lie hidden in the pack." The documents were in fact produced in accordance with the agreed procedures. The eloquent metaphor from a game of cards suggests a deliberate non-production of documents despite an order for discovery. This would be the

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kind of conduct to be expected of an airline which has conspired to keep the Inquiry from the truth.

B. EXCESS OF JURISDICTION

31. The Report of the Commission contained allegations of misconduct which were not only serious but imputed criminality against Air New Zealand and certain of its employees. It was stated in paragraph 255(f) of the Report that members of the Navigation Section were involved in concocting evidence, and in paragraph 377 the Commissioner found that ANZ witnesses had conspired to commit perjury. ANZ considered that this pointed the finger at no less than 10 employees. This was conceded by the opposing parties in the Court of Appeal. The 10 employees were Mr Davis, the former Chief Executive, the executive pilots, namely Captain Eden, the Director of the Flight Operations Division within the airline, Captains Gemmell, Grundy, Hawkins and Johnson of the Flight Operations Division; and the members of the navigation section, namely Messrs Amies, Brown, Hewitt and Lawton. The reasons why the allegations implicated all of them will be summarised when dealing with breaches of natural justice. The conduct charged is criminal as being perjury, conspiracy to commit perjury and attempts to defeat and obstruct justice; see sections 108, 116, 117(d) and 310 of the Crimes Act. The relevant conclusion related, as the heading to paragraphs 373 to 377 stated, to the conduct of ANZ at and in connection with the Inquiry. The issue is whether it was within the

Pt I, doc 3, pp. 27-28, para 8 and Pt II, doc 8, vol 3, p. 319.

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terms of reference of the Commission to reach these conclusions.

32. In New Zealand a Commission is, in the absence of express statutory authorisation, precluded from conducting an inquiry whose real object is to ascertain whether a crime or crimes have been committed:see Cock & Others v. Attorney-General, supra; Re Marginal Lands Board Commission of Inquiry into Fitzgerald Loan [1980] 2 N.Z.L.R. 395; and compare for Australia, R. v. Collins (1976) 8 A.L.R. 691. The New Zealand cases recognise that there may be an Inquiry under a statutory power of an authorised nature as prescribed in section 2 of the 1908 Act to which any criminal activity is incidental. Thus, in Cock & Others v. Attorney-General, supra, the court said at p. 424:

> "If the question of guilt or innocence of an individual arises in the course of a legitimate inquiry and is necessary in order to answer that inquiry, a Commissioner might well be justified in considering the question of guilt or innocence in order to enable him to report."

This was echoed by Davison C.J. in Re Marginal Lands Board Commission, supra. Furthermore, in the Thomas case, supra, the Court of Appeal held that section 2(f) of the 1908 Act (as amended in 1970) could warrant the investigation of a crime provided that the question arose out of or was concerned with a matter of public importance: see [1982] 1 N.Z.L.R. 252, at p.267. Thus the issue of whether the Commission exceeded its

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terms of reference in accusing the ten employees of having committed crimes has to be looked at against the background that in New Zealand a crime cannot without statutory authority be the true object of an inquiry although investigations of impropriety may in certain cases be permissible as incidental to the real object. The President accurately stated the law (at p. 625) when, having observed that the Commission was not set up to inquire into allegations of crime, he accepted that an alleged crime might be investigated if it was "merely incidental to a legitimate inquiry and necessary for the purpose of that inquiry". Equally this background illustrates the reluctance of the New Zealand courts to permit charges of crimes to be inquired into and pronounced upon otherwise than after due process in the courts. This reluctance was emphasised by the Court of Appeal in the Thomas case which stressed both the need for natural justice and the care with which a court would view a report dealing with such an issue where it is justiciable. See in particular [1982] 1 N.Z.L.R. 252, at p. 267, lines 1-6.

33. In the present case the Inquiry was not set up under section 2(f) of the 1908 Act. The terms of reference were established under section 2(e) which provides for inquiry into:

> "(e) Any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury."

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The terms of reference all related, as would be expected and would follow from the use of section 2(e) to investigation of the disaster itself. It was not argued for the Attorney-General in the Court of Appeal that any of the terms of reference had as their object the inquiry into the conduct of persons at the hearing before the Commission. This is obviously correct as to terms of reference (a) to (i). Nor can (j) be relied upon by the Appellant to justify the inclusion of the conduct of the hearing as an object of the Inquiry. This additional term does not extend the scope of the Commission's authority so as to add to its earlier defined tasks another task of a fundamentally different character. It empowers the Commissioner to inquire into topics which are incidental but related to the specific tasks and precludes argument about the existence of the right to do so; see Re The Royal Commission on Licensing, supra, at p.682. Such words do not, even where actually wider than in the present case, as was the wording in Re Licensing, supra, have the effect of making the conduct at the Inquiry itself an object of the investigation.

Pt I, doc B, pp. vi-vii.

34. Indeed, in the Court of Appeal it was not contended against the Respondents that the criminality of conduct at the Inquiry was an object of the terms of reference. It was suggested, however, that it was incidental thereto in the terms formulated in the decisions cited in paragraph 32. The argument is

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summarised in the judgment of Woodhouse P. at p. 650, lines 18 to 43. It is fully accepted by the Respondents that it may be properly incidental to the terms of reference for a Commission to give reasons, often related to probabilities, for rejecting evidence. It is also accepted that where there is a conflict of evidence a Commissioner is entitled to prefer the view of one witness to another, and if it be the case, to give as the reason that he does not believe one or more of the witnesses. It is suggested, however, that this is a far different proposition from the conclusions expressed in paragraph 377. The phraseology is, as Woodhouse P. said, not normally associated with a mere assessment of credibility of the witnesses. The passages in paragraphs 373 to 377 were not necessary to the Report. They constituted an allegation of an entirely different order of magnitude. They did not relate to the circumstances giving rise to the disaster or arising out of the crash. They raised, as the separate heading made plain, a distinct and different issue. They constituted accusations of crime in relation to the hearing and as such were outside the terms of reference. Their very seriousness indicates that it would have been proper for them to be raised, if at all, only as part of the object of an inquiry validly authorised by statute to investigate crimes. The Respondents adopt in this respect the judgment of Cooke J. at p. 666, lines 17-25 namely:

> "In considering that issue the importance of not unreasonably shackling a Commission

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> of Inquiry has to be weighed. It is also material, however, that such a charge is calculated to attract the widest publicity, both national and international. It is scarcely distinguishable in the public mind from condemnation by a Court of law. Yet it is completely without the safeguards of rights to trial by jury and appeal. In other words, by mere implication any Commission of Inquiry, whatever its membership, would have authority publicly to condemn a group of citizens of a major crime without the safeguards that invariably go with expressed powers of condemnation."

This passage is a reminder that arguments about terms of reference are not technical, for it is those terms which indicate the areas in which a party or witness may be at risk. If they are exceeded, then that party is denied the prior requisite protection of approval of the terms by the Executive Council and may be unaware of, and therefore unable to protect himself against, the findings which damage him. The less obviously those findings arise from the terms of reference, the less will have been the anticipation of them and the opportunity to defend against them. This will be even more the case if the charges are not clearly and timeously put to the person affected.

35. In evaluating this submission it can be borne in mind that a Royal Commissioner who forms a view of the kind expressed in paragraph 377 is not debarred from ensuring that the issue is further pursued. He is entitled to express any appropriate general reservations on the quality of the evidence, assuming that natural justice has been done, and whilst carefully

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refraining from determining that perjury has been committed refer the entire file to the police for further inquiry and any prosecution which should properly follow.

C. NATURAL JUSTICE AND ABSENCE OF EVIDENCE

(i) The Law

36. In the Court of Appeal it was argued against the Respondents that there was no obligation on the Commissioner to give warning of a potential conclusion to the effect contained in paragraph 377. It was suggested that the duty to "give notice" was limited to an indication of the areas which were regarded as being in dispute in relation to the cause of the disaster and the giving of an opportunity to give evidence as to such matters. Thus the serious charge of conspiracy to commit perjury, whatever damage it wreaked, could be made without warning and with its victims unheard. Whilst this is what happened, it is contrary to law that it should happen. The recognition that there existed some duty to be fair should have extended to all matters where a person could have his interests materially affected. Once those interests are in issue and the effect may be serious, there can be no distinction in principle requiring some points to be clearly alleged but permitting others to emerge without warning in the Report.

37. The Respondents submit not only that the Commissioner had a duty to act in accordance with natural justice or fairness, but also that

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careful standards and full safeguards must be applied. This is not said in derogation of the fact that the Commission is in many respects the master of its own procedure, but is rather an application to bodies as important as a Royal Commission of the flexibility of natural justice stressed in Russell v. Duke of Norfolk [1949] 1 All E.R. 109, at p.118 (C.A.). See also University of Ceylon v. Fernando [1960] 1 W.L.R. 223. It is clear that on all occasions natural justice demands what has been described as the "irreducible minimum" of notice of a charge and opportunity to make answer; John v. Rees [1970] 1 Ch. 345, citing (at p.399) Fountaine v. Chesterton (unreported); see also Re Pergamon Press Limited [1971] 1 Ch. 388. The extent to which the requirements may be greater varies according to the situation, and there are a number of factors indicating that a high and careful standard is expected of a Royal Commission:-

(1) An Inquiry by a Royal Commission is of great importance and prominence, and the report is potentially authoritative. Its proceedings and its conclusions gain weight where it is presided over by a judge of whom the public expect fair treatment and responsible pronouncements.

(2) Section 4A of the 1908 Act, as introduced in 1958 and amended in 1980, demonstrates clearly that there has been a long-standing but ever increasing concern for those who may be affected to be heard and have the opportunity of skilled

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presentation of their case. Cleary J. emphasised in Re the Royal Commission to Inquire into and Report upon State Services in New Zealand, supra, at p. 117 that persons interested (that is apart from any interest in common with the public) must be afforded a fair opportunity of presenting their representations, adducing evidence and meeting prejudicial matter. In other words it is essential if section 4A is to fulfil its purpose for charges to be fairly put and for there to be a fair opportunity to answer: see Kanda v. Government of Malaysia [1962] A.C. 322 per Lord Denning at p.337. The passage from the judgment of Cleary J. was approved by the Court of Appeal in the Thomas case see [1982] 1 N.Z.L.R. 252, at p.270.

(3) Where an inquiry relates to a disaster and parties are cited, the right conferred by section 4A should be regarded as more extensive than where there are no parties and a Commission is simply investigating a general area of administration: see Re Royal Commission on States Services, per North J. at p.111.

(4) In England the Salmon Report (Cmnd 3121) suggested a procedure which has to the best of the knowledge of the Respondents been followed since, namely, that it was a cardinal principle that any person who is involved in an Inquiry and who is called as a witness should be informed of any

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allegations which are made against him and the substance of the evidence in support of them. He should be informed of the allegations before giving evidence. See in particular, paragraphs 32 and 50-51.Without suggesting that failure to adhere to this procedure would necessarily give rise to a breach of natural justice, the Respondents submit that this procedure is one form of recognition of the need to put charges to a witness and give an adequate opportunity to answer the allegations and call evidence. The precise procedure is not necessarily vital, but adherence to the principle is. A witness should not be left to speculate as to what is passing through the mind of the Commissioner: see Sheldon v. Bromfield Justices [1964] 2 Q.B. 573.

(5) In the present case Counsel Assisting the Commission appeared at some stages to recognise that this standard was appropriate. He stated in a Memorandum to the Commission:

Pt II, doc 8, vol 5, p. 692, para 3.

> "In terms of Lord Salmon's Report it seems appropriate to put directly to the party whose conduct is in question the relevant allegations."

The Respondents agree. At the end of evidence Counsel Assisting drew up a list of areas considered to be of relevance for the purpose of Counsel's final submissions. It related exclusively to the cause of the disaster and ancilliary

Pt II, doc 6, vol 1, pp. 93-106.

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matters arising from the accident. Moreover, none of the Counsel representing other parties at the Inquiry, which included senior and experienced counsel, or Counsel Assisting made in their closing addresses any submissions or suggestions to the effect that ANZ witnesses had engaged in any form of conspiracy or "predetermined plan of deception".

38. In addition to the importance of the Inquiry, the seriousness of the allegation emphasised the need for there to be a fair inquiry into them. This is even more so if they arise, contrary to the earlier argument of the Respondents, from the terms of reference but do not obviously do so. We know that they led to the suspension of the affected employees and a police investigation and no-one would dispute the damage to their reputations both inside and outside the airline industry. These consequences were wholly predictable, stemming as they did from an accusation of criminal conduct, and emphasise that great care should be taken to put the complaints and give an opportunity for answer. This is particularly so where, as previously submitted, the Courts have shown a reluctance to permit a Commission to inquire into a crime and a concern that, if it does take place, there should be proper safeguards. See the Court of Appeal decision in the Thomas case: [1982] 1 N.Z.L.R. 252, at pp. 266-267.

e.g. Pt II, doc 8, vol 1, p. 131, para 13.

39. In this context the need not only for fairness, but also for a proper examination of

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all the evidence before inferences are drawn is stressed indirectly by a passage in the Report itself. The Commissioner outlined (paragraph 74) the approach he adopted to the evidence:

> "74. In my own review of all the circumstances of the disaster as disclosed by the evidence, I am entitled to take into account not only specific facts but inferences fairly to be taken from the establishment of specific facts. Further, I am not required to insist that some particular conclusion, whether founded on direct evidence or inference, shall be established beyond reasonable doubt. I am entitled, as part of my investigatory function, to reach conclusions based upon the balance of probabilities. This is the course which I have adopted. And in regard to allegations in respect of which the evidence seems to me to be in even balance, or not sufficiently tilted one way or the other, then I have held the truth of any such allegation, likely though it may be, to have been not established."

This would mean that a reasonable reader would consider that any serious charge had only been found proved upon evidence of sufficient probative value. This must involve an opportunity for the party affected to be heard and call contrary evidence. Moreover, this passage lends weight to the finding of the Commissioner in suggesting that all charges are backed by evidence: to the extent that this was untrue, the injustice to individuals was compounded. Further, serious findings should only be based upon evidence of probative value: see Woodhouse P., at p. 629, lines 40-46, and the argument developed subsequently. This

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requirement interlaces with the principle underlying natural justice: a person must not be unfairly condemned.

40. Whatever are the appropriate standards of natural justice, it is necessary to consider the way in which a charge should be put and the opportunity given to answer. This can be done, as suggested in paragraph 50 of the Salmon Report, by written allegation. This course was not adopted in the present case. The problem must be viewed in the context of the nature of the Inquiry. At Commissions of this kind there are numerous and divergent interests represented. Many possibilities, some of them mutually inconsistent, are canvassed during the course of questioning. Some are followed up, whilst others are not. The present Inquiry record contains numerous illustrations. The mere raising of a possibility cannot of itself make plain to a witness that a serious charge is being pursued. Nor does a challenge to a piece of evidence, unless the charge of which that challenge forms part clearly emerges. It is only if it is made plain that an issue is being investigated as a serious matter against a witness or party that he can know there is an allegation to answer. Equally, he must know the nature of the allegation: it cannot be left vague or ill-defined. A not dissimilar test was adopted in Browne v. Dunn (1893) 6 R. 67 (HL), per Lord Herschell at pp.70-71 as approved in Cross on Evidence (3rd N.Z. ed., 1979) at p.239, and in various Commonwealth authorities. Thus it must principally be the duty of the Commission, with the help of Counsel Assisting, to make plain what suggestions are being taken

Pt II, doc 8, vol 3, p. 343.

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seriously in time to give a witness the opportunity to deal with the issue through his own or any supporting evidence. There are no pleadings at such inquiries, and it is only if the point is raised in this way that the party or witness can know which points the Commission regards seriously.

41. It has already been mentioned that the conclusion in paragraph 377 affected 10 employees who have been identified. They fall into the following categories:

Mr Davis: Chief Executive and the most severely criticised

Captain Eden: Director of Flight Operations - an Executive Captain

Captain Gemmell	)	
	)	
Captain Grundy	)	
	)	Flight Operations
Captain Hawkins	)	Executive Captains
	)	
Captain Johnson	)	
Mr Amies	)	
	)	
Mr Brown	)	Navigation Section
	)	
Mr Hewitt	)	
	)	
Mr Lawton	)	

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The various functions of these affected individuals, in separate areas of company operations, indicates the way in which the conspiracy to perjure is said to have permeated the airline. As stated, all opposing parties in the Court of Appeal accepted that paragraph 377 pointed to each of these employees: See also Mr. Justice Cooke's judgment, at p.662, lines 32-40.

Pt I, doc 3, pp. 27-28, para 8 and Pt II, doc 8, vol 3, p. 319.

42. In the proceedings in the Court of Appeal affidavit evidence was filed on behalf of each of the employees. Each of them testified that the suggestion that they had been taking part in such a "cover-up" had never been put. As ANZ acknowledged in the Court of Appeal, this cannot controvert the record, and is no more than indicative of the understanding of each of them that they were not subject to any allegation even remotely like the charge levelled in paragraph 377. They each further deposed that, if such a suggestion had been made, they could have called further evidence and gave illustrations of the nature of the evidence available. It was agreed before the Court of Appeal that the Respondents would limit their argument on this evidence to its existence and availability and would not invite the Court to determine whether, taking it into account, Commissioner's findings on the underlying factual issues were necessarily wrong. For this and other reasons the Court was able to proceed without cross-examination. It was never submitted against the Respondents that even if the evidence had been called it would have necessarily made no difference to the finding of

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e.g. Pt II, doc 8, vol 1, pp. 103-104, para 7.

e.g. Pt II, doc 8, vol 5, pp. 544-545, para 7.

the Commission. In any event, such a submission would, having regard to the nature of the evidence, have been most unlikely to succeed. This is a fortiori if the reasoning of Megarry J. in John v. Rees, supra, is borne in mind. At page 402 he said:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

See also, Reg. v. Secretary of State for the Environment, Ex parte Brent London Borough Council [1982] Q.B. 593 at p.646. In this case the reality is that, as stated in Mr Justice Cooke's judgment (at p.666, line 32): "they could well have made effective answers."

43. The Respondents also refer to the submissions, anticipated earlier, that findings should be based upon evidence of probative

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value. In Attorney-General v. Ryan [1980] A.C. 718 (P.C.) it was stressed that a decision making authority should not act upon material which is devoid of such value: see likewise, Edwards v. Bairstow [1956] A.C. 15 at p.29 and Cocks v. Thanet District Council [1982] 3 W.L.R. 1121 per Lord Bridge at p.1125. Such a decision is both unreasonable and unfair. In the present case it was said in Mr Justice Cooke's judgment (at p.663, lines 1-4), in relation to paragraph 377, that it was:

> "unnecessary for us to decide whether there was any evidence that could conceivably warrant such an extreme finding. It is only right to say, however, that if forced to decide the question we would find it at least difficult to see in the transcript any evidence of that kind".

In the submission of the Respondents, this will be demonstrated from the factual analysis which follows.

(ii) The Facts

44. At the hearing of the Court of Appeal reference was made by both parties to the record of the Commission and to the affidavits. Such reference was necessarily somewhat extensive as the only way of evaluating the complaint of breach of natural justice. In its conclusions the Court was unanimous that there had been a failure of natural justice and unfairness to the Respondents in various respects. These included, but were not limited to, the conclusion in paragraph 377 but the Court took the view that substantial justice could be done

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to all the criticisms if they confined the remedy to paragraph 377. The Respondents to this appeal submit that it is appropriate to rely upon criticism of each impugned paragraph in support of the argument that the conclusions in paragraph 377 were reached in breach of natural justice. The conclusion was based on cumulative breaches and findings made without evidence. Thus, they contend that the entirety of their criticisms must be appreciated in order to assess the extent to which there was a failure of fairness and the conclusion in paragraph 377 is unsustainable: see, for example, the President's judgment at p.639, lines 42-47. Those other criticisms were and remain paragraphs 45 and 54 (destruction of documents); 255(e) (concealment of change of flight path); 255(f) ("concocted story" concerning change in waypoint); 348 (alleged intimidation of First Officer Rhodes by Captain Eden); 352 (connection of Captain Gemmell with evidence about ringbinder notebook); 353, 354 and 359 (evidence implicating Captain Gemmell in respect of two missing flight bags). The Appellant has acknowledged in correspondence that the Respondents are entitled to advance arguments as to these paragraphs in support of their contentions as to paragraph 377 without cross-appeal. The Respondents are content with this position. These other paragraphs are of considerable importance but ANZ agrees with the Court of Appeal that substantial justice can be done by a determination as to the fairness of paragraph 377.

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45. In the Court of Appeal Counsel for the Attorney-General acknowledged that the essential charge in paragraph 377 had not been put or alleged. It was accepted by him that it had not been suggested to the relevant witnesses either that there was an extended pattern of lies or that these were being told in concert. The case for the Attorney-General was that neither the Commissioner's view that there was lying by individual witnesses nor their concerted behaviour in that respect had to be put to them irrespective of the magnitude and gravity of the charge which later emerged. It was said that no warning was necessary: no opportunity to answer need be given. The written argument was: "[the tribunal] is not bound in terms of the rules of natural justice to give any warning of the possibility that it will reject the evidence"; it was said that: "no natural justice issue arose. Neither Judge nor Royal Commissioner need give warning that he is minded to reject evidence and attribute its falsity to a concocted story". This apparently applied whether or not anyone had challenged the evidence. It was, moreover, applicable even to the principal architect of the conspiracy. We turn to show how far, perhaps not surprisingly in view of this contention, the Commission or Counsel Assisting failed to put the issue or do natural justice in reaching its conclusion.

46. We seek to keep our analysis of the factual criticisms and references to evidence to a necessary minimum. We do not attempt a general summary of the overall facts because these will be sufficiently apparent from the

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Report and Court of Appeal judgment. Before turning to the factors summarised in paragraph 376 which the Commissioner relied on for his conclusion in paragraph 377 we must seek to deal with certain of his earlier comments relating to the conduct of ANZ. These comments must have conditioned his view of the airline which found expression in paragraph 377. They were all made in breach of natural justice for reasons which will be demonstrated:-

(i) In paragraph 45 it is complained that Mr Davis gave an instruction that all documents "not directly relevant" were to be destroyed. In paragraph 54 the Commissioner expressed the view that "this direction on the part of the Chief Executive for the destruction of 'irrelevant documents' was one of the most remarkable executive decisions ever to have been made in the corporate affairs of a large New Zealand company." This conveyed a perjorative impression, which was wrong. The evidence was that Mr Davis instructed that all relevant documents were to be retained, including all annotated copies however slight the annotation, and that only purely surplus copies of any such documents were destroyed: see Oldfield proof of evidence and cross-examination of Mr Davis. There was no destruction of any such surplus documents before they had first been before the internal inquiry whose membership included representatives of the unions including ALPA: see Oldfield cross-examination.

Pt II, doc 1, vol 6, pp. 1960-1962 and Pt II, doc 3, vol 4, p. 628, para 8.

Pt II, doc 1, vol 6, pp. 1855-1856.

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Pt II, doc 1, vol 6, p. 1962.

Rightly or wrongly this was considered the best way of preventing leaks to the media: see Davis, cross-examination.

Pt II, doc 8, vol 1, pp. 105-106, para 10 and Pt II, doc 8, vol 5, pp. 545-546, para 11 and pp. 565-569 (annexure "E") and p. 570 (annexure "F").

If it had been suggested that there was anything sinister about this evidence then further evidence could have been called along the lines of that contained in Mr Davis' affidavits before the Court of Appeal, as to which, see the President's judgment, at p. 639, lines 17-47. This suggestion of the Commissioner was given greater force by his statement in paragraph 45 that Mr Davis determined that "no word of this incredible blunder was to become publicly known". In fact, the evidence was that the information as to the change of co-ordinates was promptly supplied to Mr Chippindale and therefore featured, as was to be expected, in his published Report: see paragraph 2.5 of the Chippindale Report and the President's judgment at p.637. It was also supplied to the ALPA representative, who in turn passed it to the ALPA committee.

Pt II, doc 8, vol 5, p. 570.

(ii) In paragraph 348 it is claimed that when First Officer Rhodes gave evidence about Captain Gemmell, he (Rhodes) had been intimidated by a senior ANZ executive pilot, Captain Eden. The situation was that when Captain Gemmell gave evidence it was suggested that he had taken material from the crash site in a blue plastic envelope and apparently by inference that he had failed to hand the material to the appropriate authorities. In the light of

Pt II, doc 1, vol 6, p. 1784.

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this, First Officer Rhodes gave evidence that from his observations of the crash site he had "no reason to doubt Capt Gemmell in any way shape or form". First Officer Rhodes explained that the Chief Inspector of Air Accidents, Mr Chippindale, had asked Captain Gemmell to take back to New Zealand one or more envelopes containing material for use in the investigation. It was never suggested by First Officer Rhodes that Captain Gemmell had failed to hand over the material. In his earlier evidence Mr Chippindale was never asked about the matter, nor did he lodge any complaint about a missing blue envelope or papers inside it. Nor was Mr Chippindale recalled to make any such suggestion.

Pt II, doc 1, vol 6, p. 1837.

Pt II, doc 1, vol 6, pp. 1837-1838.

The Commissioner, however, put a sinister interpretation on this evidence. He said in paragraph 348 that Captain Eden had sought to intimidate First Officer Rhodes with the effect that the latter was "obliged to give the answer which Captain Eden had either suggested or directed." However, when Captain Eden later gave evidence it was never put to him that he had "got at" First Officer Rhodes so that the evidence he had given about Captain Gemmell was not sincere or genuine. If the allegation had been put, First Officer Rhodes could have been recalled and Captain Eden could have given evidence along the lines of that described in his affidavits before the Court of Appeal.

Pt II, doc 8, vol 2, p. 179, para 7 and vol 4, p. 427, paras 5-8 and pp. 431-432 (annexure "B").

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See the President's judgment at p. 640, line 40 to p.642, line 56 and Mr. Justice Cooke's judgment at p. 660, line 30 to p. 661, line 2. It follows also that this inaccurate and unfair summary reflects adversely on Captain Gemmell.

(iii) In paragraph 352 the Commissioner refers, in such a way as to arouse suspicion about Captain Gemmell's veracity and honesty of purpose, to an explanation which he suggests was given by Captain Gemmell as to why pages might have been removed from Captain Collins' ringbinder notebook. The reference to Captain Gemmell was wholly erroneous as Counsel for the Attorney-General and all other parties admitted in the Court of Appeal. The evidence was in fact given by Captain Crosbie, an Airline Pilots Association representative and visiting Mrs Collins in such capacity. It was not suggested that any missing pages were removed by anyone other than Captain Crosbie. Likewise, (compare the inference in paragraph 52 of the Report) it was Captain Crosbie in his said capacity who collected documents from the Cassin household. His evidence was that he did not remove Antarctic briefing documents although Mrs Cassin gave evidence that some documents were missing from the briefing folder. However, the important point is that the Report does not make plain that it was Captain Crosbie who was involved. He was never linked to the conspiracy and thus this passage

Pt II, doc 8, vol 5, p. 683, and p. 704.

Pt II, doc 1, vol 6, pp. 1769-1770.

Pt II, doc 3, vol 4, p. 578, para 5.

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reflects unfairly on ANZ: see the President's judgment at p. 638, line 37 to p.639, line 16 and at p. 643, lines 9-15.

(iv) The mistake in identification of Captain Gemmell in paragraph 352 was compounded by the subsequent allegations in paragraphs 353, 354 and 359(1). In paragraph 353, the Commissioner refers to inquiries which he requested be made by Counsel Assisting the Commission concerning flight bags which had been located at the crash site. These inquiries were made after or towards the conclusion of the evidence, but before final submissions. The Commissioner never disclosed to ANZ before the Report that the inquiries had been made. No ANZ witness or Counsel had the chance of dealing with them.

Pt II, doc 7, vol 1, pp. 23-24.

The inquiries made were said to disclose that the flight bags had been flown to McMurdo, and placed in store. One of the interviewees stated that "personnel from ANZ had access to the store, as well as the Chief Inspector": see Report, paragraph 354. The Commissioner added in the same paragraph that the Chief Inspector was then further questioned but said "that no flight bags were ever handed to him." At paragraph 359(1) the Commissioner stated that the flight bags had been taken from the store and never seen since. The inference is that they were removed by someone from ANZ, and in view of the repeated references to Captain

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Gemmell in that section of the report and his presence as a representative of ANZ at McMurdo pointed the finger irresistibly at him. Yet unlike the Chief Inspector, Captain Gemmell was not questioned about these new inquiries nor were they revealed to Counsel for ANZ. This should have been done: see Fairmount Investments Ltd v. Secretary of State for the Environment [1976] 1 W.L.R. 1255 (H.L.). Had they been put to Captain Gemmell, he could have called evidence broadly as described in his affidavits. As it was, he and ANZ had no chance of dealing with this slur. It could have been pointed out that there was in any event uncontested evidence that Captain Collins' flight bag was empty when found and that First Officer Cassin's flight bag (if recovered) would have been of limited value since his briefing documents had been left at home. It could further have been observed that those of whom inquiry had been made were uncertain as to whether more than one flight bag was in store, and thus the unequivocal reference to two flight bags in paragraph 359(1) was also unjustified. These arguments were powerful against the sinister inference drawn against ANZ by the Commissioner.

Pt II, doc 8, vol 1, p. 130, para 11 and vol 4, pp. 436-437, paras 9-17.

Pt II, doc 7, vol 1, p. 33.

47. These indications all demonstrate a willingness of the Commissioner to criticise ANZ unduly and unfairly. These are all examples of criticisms not being put or of evidence not being revealed or non-existent or its effect wholly misrepresented and sometimes these

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factors are present in combination. Moreover, they are cumulatively significant in creating a thoroughly adverse impression of ANZ's ethics and honesty in preparing for and conducting investigations. They all relate to post-disaster conduct.

48. Another illustration of the Commissioner's inclination to suspect ANZ is to be found in a private letter, exhibited in the Court of Appeal, which he wrote to Mr Martin Foley, Counsel for McDonnell Douglas, the manufacturers of the DC10 aircraft. The first part of the letter deals with preparations for an overseas visit and are unexceptional. However, the Commissioner went on to state his views of the Inquiry as developing. We do not comment on the appropriateness of making such disclosures privately in this way, but we make the following points:

Pt II, doc 8, vol 3, pp. 379-384.

(i) Item (i) on page 3 was misconceived. The potential for deviation from the flight plan track had been disclosed by Mr Chippindale in his report published before the Inquiry began. See Chippindale Report p.44, para. 2.5.

Pt II, doc 8, vol 3, p. 381.

(ii) Item (ii) on page 3 was also misconceived. There had been no witnesses until shortly beforehand, in accordance with the Commission's programme for calling witnesses, who had dealt with current Antarctic route qualification briefings.

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(iii) In his comments in relation to documents the Commissioner was even prepared to canvass the possibility of documents being "planted" by the airline.

Pt II, doc 8, vol 3, p. 383.

All this further suggests a suspicious attitude to the conduct of ANZ, and thus emphasises the importance attached to the need to put points directly lest otherwise the suspicion fed upon itself and engendered unjustified conclusions reached unfairly.

49. We now turn specifically to paragraph 377, and do so in the context that in paragraph 373 the Commissioner stated unequivocally that it was Mr Davis' conduct which "controlled the ultimate course adopted by the witnesses called on behalf of the airline." It is thus clear that the thrust of paragraph 377 is that it was Mr Davis who was responsible for the alleged orchestration of the "litany of lies" and was consequently the principal architect of the conspiracy to perjure. We therefore propose to examine first what, if any, warning Mr Davis received that such an allegation was being made against him, what opportunity he was given of making answer, and what evidence (if any) there was to support the allegation.

50. Mr Davis was called as the last witness at the Inquiry. It was in any event the intention of ANZ that he should be called but equally the Commissioner considered that it was desirable for him to be called - see Davis affidavit and Baragwanath letter. In his proof of evidence

Pt II, doc 8, vol 1, p. 103, para 4 and p. 123 (attachment "B").

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Mr Davis included a passage which reads as follows:- Pt II, doc 3, vol 4, p. 721.

> "8.1 The company's policy was and is to place before the Commission all material relevant to its terms of reference irrespective of whether such evidence was favourable to the airline or not. Instructions were given to Counsel accordingly. My attitude from the very outset is that all facts must be ascertained and revealed. Insofar as Exhibit 148 is concerned this was not earlier produced by Air New Zealand since it had not been drawn to the attention of Air New Zealand's Counsel. I trust that all information that the Commission requires has been produced: if not I will personally undertake to have it delivered at the earliest possible date."

There was independent confirmatory evidence of this policy to disclose all relevant information contained in the Minutes of ANZ Board Meeting held on 1st July 1980 shortly before the Commission of Inquiry commenced its hearing. The Chief Executive as well as Counsel for the Company were present at that Board Meeting. Pt II, doc 9, pp. 81-82.

All other parties to the Inquiry, in particular Counsel Assisting the Commission, had the opportunity of cross-examining Mr Davis. It was never suggested to him that this paragraph in his proof was in any way other than accurate or that, if certain evidence on the part of ANZ were ultimately to prove unacceptable, such evidence had been deliberately false or contributed to by his own actions. He was cross-examined to suggest he was or should have been aware that flights were going below the Pt II, doc 1, vol 6, pp. 1959-1960.

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Pt II, doc 1, vol 6, pp. 1960-1962. Pt II, doc 1, vol 6, pp. 1962-1964. Pt II, doc 1, vol 6, p. 1966 et seq.

authorised height of 6,000 feet; as to the steps taken to preserve documents, as to the disclosure to the public of change of the co-ordinates, and as to the adequacy of safety and systems procedures within ANZ. Cross-examination by Counsel Assisting was primarily, if not exclusively, upon this latter point alone. No hint was, however, given of a suggestion that the airline was engaged in a massive series of deceptions, let alone that there was a predetermined plan of deception to this effect which was being implemented through a contrived and consistent pattern of perjury. There was no suggestion that numerous airline witnesses were lying, in particular as to their knowledge of the extent of the change to the co-ordinates, or that Mr Davis was attempting to ensure that they lied or prevent the true facts being revealed. Mr Davis deposed to this in his affidavits before the Court of Appeal and also as to the evidence which could have been called if any such suggestion had been put. A study of the comparatively short cross-examination demonstrates clearly how far the Commissioner or Counsel Assisting came from putting, let alone clearly putting the point upon which the finding was made which prematurely ended Mr Davis' career. Nor was any suggestion of conspiracy made in any final speech on behalf of any party including Counsel Assisting the Commission, and consequently there was no attempt to deal with any such suggestion in the final submissions on behalf of ANZ. This will be reverted to subsequently, but it means that Mr Davis had no chance of being defended against such a charge.

Pt II, doc 8, vol 1, pp. 103-105, paras 7-8 and vol 5, pp. 544-545, paras 6-7.

Pt II, doc 1, vol 6, pp. 1959-1985.

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51. We have already made the basic and essential point that no hint was given of the conclusion in paragraph 377 to any witness. In paragraph 376 however the Commission referred to certain of his findings which he relied upon as justifying his conclusion. It is therefore necessary to look briefly at each of those findings both to see the way in which the case was put to the witness and to assess their significance.

52. The assertion of lack of knowledge of operation below the minimum safe altitude

The flight plan track established in 1977 was over Mt Erebus. For this reason the minimum safe altitude for each Antarctic flight was established at 16,000 feet. There was established after the first two flights a procedure to permit descent to 6,000 feet in certain conditions clear of the Mt Erebus region: see letter of 10 August 1977 set out in paragraph 136 of the Report and approved as stated in paragraph 138. There was evidence that some pilots went below 6,000 feet by interpreting their instructions as entitling them to descend below 6,000 feet if weather conditions, especially visibility permitted this safely to be done - see paragraph 204. Captains Johnson, Vette, McWilliams, Calder, Simpson and White acknowledged that they went below 6,000 feet. The fact that some flights went below 6,000 feet was widely publicised in a newspaper article, an inhouse publication and a travelling magazine mailed extensively throughout New Zealand. Captains Eden, Gemmell, Grundy,

Pt II, doc 3, vol 2, pp. 233-234, paras 2.6 and 2.7.

e.g. Pt II, doc 2, Exh. no. 148.

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Hawkins, Johnson (in respect of all flights other than his own) and Mr Davis denied knowledge that flights went below 6,000 feet. The Commissioner found that the management of the airline and Flight Operations Division (i.e. the executive pilots) knew from November 1977 onwards that flights went well below 6,000 feet (paragraph 223(a)). It is conceded that it was open to him to make this finding. He also found that this would not have involved any breach of safety regulations but that consent of the Civil Aviation Division to fly in accordance with Regulation 38 of the Civil Aviation Regulations 1953 (which enables flight at those lower altitudes) should have been obtained; see paragraphs 223(b) to (e). This evidence and finding was thus also concerned with whether there had been a failure to obtain consents to fly below 6,000 feet. It had, as the Report stated at paragraph 204, "no real relevance to matters which I am asked to investigate" and a challenge to evidence on this point could in no way indicate a suggestion of deliberate concealment of "disastrous administrative blunders" as made in paragraph 377.

53. The statement by Captain Johnson that he believed Captain Simpson had told him the McMurdo waypoint was incorrectly situated

This relates to the knowledge or otherwise of the existence of the "false co-ordinates" 27 miles to the west of McMurdo Station and therefore to knowledge of the extent of the change which Captain Johnson thought was authorised in November 1979. It thus links in

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particular with paragraph 54 below and is a very important element in the alleged conspiracy. The evidence of Captain Simpson was that, in the course of a telephone conversation with Captain Johnson after his own flight to the Antarctic, he drew Captain Johnson's attention to the fact that the difference between the McMurdo flight plan position and the McMurdo TACAN position was in the order of 27 nautical miles and that future crews should be made aware of this situation. Captain Simpson did not suggest that the McMurdo flight plan position was erroneous: simply that future crews should be notified of its location in relation to the TACAN. This evidence is summarised in paragraph 242. Captain Johnson's evidence was that Captain Simpson had reported that the McMurdo position would be better situated at the TACAN and he had no recollection of any specific mention of distance. Captain Johnson then gave instructions to the Navigation Section to check the McMurdo position on the flight plan and he subsequently authorised amendment of the McMurdo position believing that the extent of the change was a distance of 2.1 nautical miles. This evidence was on the basis that he did not know of the "false co-ordinates". His evidence was that at that time he believed the McMurdo waypoint was the NDB: no-one suggested to him in cross-examination that he knew that the waypoint was in fact 27 miles to the west of the NDB in McMurdo Sound. The evidence of the Navigation Section was that Captain Johnson had told them that there was something wrong with the McMurdo position and that they checked (although not with the flight plan but with the input material

Pt II, doc 3, vol 3, p. 430, para 34.

Pt II, doc 3, vol 3, p. 406, para 6.2.

Pt II, doc 3, vol 3, p. 406, para 6.2 and para 6.3.

Pt II, doc 3, vol 3, p. 406, para 6.2.

e.g. Pt II, doc 3, vol 2, p. 239, para 7.1.

Pt II, doc 3, vol 2, p. 239, para 7.1.

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Pt II, doc 3, vol 2, p. 241, para 7.8.
Pt II, doc 3, vol 2, p. 308, para 3.4.

thereto) and also believed that the change was 2.1 miles and so reported to Captain Johnson who authorised the change. They did not spot therefore the previous error involving the false co-ordinates and accordingly unwittingly made a correction of 27 rather than 2.1 nautical miles. The Commissioner found that Captain Simpson's recollection of the conversation was preferable to that of Captain Johnson: it was open to him to do so. He went on, however, in paragraphs 245(b) and 246 to conclude that Captain Johnson and the Navigation Section knew of the extent of the change and that someone failed to inform Captain Collins. This was a finding critical to paragraph 377, for, as already stated, it links with the next and very significant allegation.

54. Statements by Navigation Section witnesses that they believed that the alteration to the co-ordinates only amounted to 2 miles

The first and a fundamental criticism of this finding relates to the basis upon which Navigation Section witnesses were disbelieved. This stems from the explanation suggested as a possibility by the Commissioner in paragraph 245(b) and accepted by him in paragraph 246. The Commissioner states that the reason why Captain Johnson and the Navigation Section would consider a realignment from a position 27 miles west of the TACAN to the TACAN itself was because "this track had not officially been approved by the Civil Aviation Division". It was never put to Captain Johnson that he knew that the alteration he was authorising was 27

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miles. Moreover it was never suggested that this was done because of a lack of official approval for the track down McMurdo Sound. If this suggestion had been put the need or otherwise for such approval would have been verified so as to test the Commissioner's theory. For, if the theory was invalid, there would have been no reason for Captain Johnson to authorise the change. In the Court of Appeal there was exhibited to affidavits, a letter from the CAD confirming "that a change of route from the direct route to the McMurdo Sound route would not have required CAD approval and therefore could have been lawfully accomplished by the airline without reference to CAD." Thus this theory, the only possible sensible explanation why Captain Johnson would have authorised a change of 27 miles was speculation which could have been negatived.

e.g. Pt II, doc 8, vol 5, p. 608 (annexure "A").

55. Having speculated without evidence or putting the point as to the "possible" explanation in paragraph 245(b), the Commissioner goes on to compound error and unfairness by determining that this possibility is the actual explanation for the change. He does so on the grounds stated in paragraphs 246 and 247. These are in essence that Mr Brown deliberately, and not accidentally, typed in a symbol that led to the flight plan for U.S. Air Traffic Control containing the words "McMurdo" rather than the co-ordinates 166 degrees 58 minutes east. It is suggested that this was done to conceal the change from U.S. Air Traffic Control at McMurdo and (at paragraph 255(e)) "probably because it was known that the United

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States Air Traffic Control would lodge an objection to the new flight path". Here the Commissioner was making an extremely grave allegation, namely, that this official was willing to send false or inadequate information to air traffic control authorities in order to alleviate administrative difficulties faced by the company, irrespective of the possible consequences this might have for flight safety. There was a total failure to develop this thesis in evidence as the following analysis shows:

(a) It was known that Mr Brown made this entry. Three months before he gave his evidence the following question was put to Mr Hewitt by the Commissioner:

Pt II, doc 1, vol 4, p. 973.

> "I know you have explained to me how that happened but someone may suggest to me before the inquiry is over that the object was to thats (sic) not to reveal there had been this long standing error in the co-ordinates and that is why the word McMurdo was relayed to them. I take (sic) you would not agree with that."

Mr Hewitt said:

> "Certainly not Sir."

(b) In fact no one did make any such suggestion. In his proof of evidence Mr Brown explained that the error was inadvertent because of an entry in the wrong column of the work sheet. He was never cross-examined to suggest that this was other than an error.

Pt II, doc 3, vol 4, pp. 643-644, para 2.1.

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(c) Whilst the opinion was expressed to the Commissioner when overseas that the U.S. Navy would have objected to a route over Mt Erebus, there was no suggestion that this view was ever communicated to anyone in ANZ prior to the accident. Moreover, before the insertion of the "false co-ordinates" the details of the route over Mt Erebus were communicated to the U.S. Navy at McMurdo and were not the subject of any objection.

Pt II, doc 5, vol 1, p. 41.

Pt II, doc 3, vol 2, p. 242, para 8.1 and pp. 271-274 (Exh. no. 161).

The position was correctly summarised in the President's judgment at page 635, and the consequence is that adverse findings were made in breach of natural justice that Captain Johnson and the Navigation Section knew of the extent of the change. It is on the basis of these findings that the Commissioner goes on to say in paragraph 376 leading to the summary in paragraph 377, that the witnesses lied about their true state of knowledge.

56. In the preceding paragraph it has been demonstrated why the Commissioner breached natural justice in accepting the possibility canvassed in paragraph 245(b). The only alternative considered was that in 245(a) namely that Captain Johnson ordered the change believing that the alteration would be minimal. There was much evidence which was unchallenged to this effect.

(a) Mr Hewitt gave evidence that he inserted the figures 164 degrees 48 minutes east in error for 166 degrees 48 minutes east. This evidence emerges from his proof

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Pt II, doc 3, vol 2, p. 238, para 5.2. Pt II, doc 2, Exh. no. 3A. c.f. Pt II, doc 2, Exh. 14.

of evidence and no-one put to him that the entry was otherwise than an error. It was confirmed by the fact that no alteration was made to the track and distance calculation at the same time.

(b) Mr Hewitt and Mr Lawton were principally involved with the change required by Captain Johnson in November 1979 and Mr Amies and Mr Brown were aware of the change. They all gave evidence that they did not know of the error previously made by Mr Hewitt and also believed that the extent of the change was 2.1 nautical miles. The references in the evidence are as follows: Mr Hewitt's proof, Mr Lawton's proof, Mr Amies' proof and cross-examination of Mr Brown. Moreover, the change to track and distance then made accorded with the belief that the extent of the change was ten minutes of longitude or 2.1 miles.

Pt II, doc 3, vol 2, p. 241, para 7.8. Pt II, doc 3, vol 2, p. 308, para 3.4. Pt II, doc 3, vol 2, p. 221, para 8.24. Pt II, doc 1, vol 6, p. 1887. Pt II, doc 2, Exh. 14. c.f. Pt II, doc 2, Exh. 15 and Pt II, doc 1, vol 4, p. 1074.

Pt II, doc 1, vol 6, pp. 1906-1908. Pt II, doc 8, vol 5, p. 607, para 9 and pp. 609-618 (attachment "B").

Mr Amies gave evidence in cross-examination as to how the error came to be discovered after the accident. This was never challenged and in an affidavit by Mr Hewitt in the Court of Appeal it was made plain that further detailed evidence to this effect could have been given if the matter had been a live issue. None of these witnesses were ever cross-examined to suggest, and no suggestion emanated from the Commissioner or Counsel Assisting, that any of them knew that the change they were effecting was not 2.1 but 27 nautical miles.

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57. 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

During the course of the inquiry exhibit 164 emerged. This exhibit was a chart on which was drawn various tracks in respect of which Mr Amies gave evidence. The significance of the chart was that it could reasonably be interpreted as suggesting a route down McMurdo Sound to the west of Mt Erebus returning north by a track to the east of Mt Erebus on which Mr Amies had drawn an arrow. It is accepted that it was open to the Commissioner to reject Mr Amies' evidence about these facts including his explanation for the arrow. It is not however accepted that this challenge gave any indication of a possible finding that all the Navigation Section witnesses were conceding their knowledge of the magnitude of the change in the computer in November 1979 and doing so in concert. We have already explained in preceding paragraphs the extent to which that theory was propounded in breach of natural justice and not put to Mr Amies or other witnesses. Moreover, whilst undoubtedly the briefings at which exhibit 164 was made available were unclear, the evidence of Captain Wilson was that he explained that the flight plan track lay from Cape Hallett directly to McMurdo Station although pilots knew that they had a discretion to deviate from the track in suitable weather conditions. Indeed, the evidence of pilots as to what they derived from the totality of the briefing reflected the unclear nature of the briefing material. Some

Pt II, doc 1, vol 4, p. 975.

Pt II, doc 2, Exh. no. 164.

Pt II, doc 3, vol 2, p. 355, para 4.9.

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e.g. Pt II, doc 3, vol 3, p. 517, para 4.
e.g. Pt II, doc 3, vol 3, p. 504, para 5.
Pt II, doc 1, vol 6, pp. 1701-1702.

pilots (Captains McWilliams, Calder, and Simpson) understood that they would track down McMurdo Sound, some (Captains Ruffell and Dalziell) that they would track over or close to Mt Erebus to McMurdo Station and one (Captain White) believed he would track down McMurdo Sound but end up close to the McMurdo Station area. This lack of clarity is a contra-indication to clear knowledge of the use of the false co-ordinates.

58. The statements 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

The extent to which this finding is in breach of natural justice has been dealt with in paragraph 54. We would simply observe at this stage that this same finding is relied upon yet again as part of the conspiracy theory and thus the criticisms of it assume further importance. It is moreover central to the conspiracy allegation which clearly echoes paragraph 255(f) and it depends on the belief of the Commissioner that the Navigation Section knew of the extent of the change and had, under the direction of Mr Davis, concocted a story to explain why Captain Collins was not told of the change.

59. The importance of the conspiracy theory, and underlying material, not being put to witnesses has the obvious consequences to which we have referred: there is a lack of opportunity to make answer as well as a lack of

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evidence and speculation by the Commissioner. In addition, it deprives the party concerned of one of the essential safeguards contemplated by section 4A, the right of counsel to make submissions as to the validity of the theory and the strength of the evidence in support of it. The preceding paragraphs have indicated some of the points which could have been powerfully made even on the material before the Royal Commission and without regard to the strength which could have been added by the other material referred to in the Court of Appeal. Moreover, Counsel would have been able to address arguments as to the probabilities. Examples are as follows:

(i) The absence of evidence of probative value.

(ii) The unlikelihood of the ability to conceal such conspiracy from an internal inquiry committee which included a representative of ALPA and other union representatives and numerous other employees of the airline who were not suggested to be party to the conspiracy. This is illustrated by an unsolicited letter written to Mr Davis by senior management which was duly exhibited before the Court of Appeal.

Pt II, doc 8, vol 5, p. 550 (attachment "B").

(iii) The unlikelihood of being able to maintain such a conspiracy over a lengthy period of time in a situation where proofs of evidence were taken individually from witnesses by members of the legal team representing ANZ.

e.g. Pt II, doc 8, vol 4, pp. 401-402, para 2.

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(iv) In any event the elaborate conspiracy would have been but to substitute the admission of one blunder for another. The facts to be concealed were apparently that the Navigation Section had known of the magnitude of the change of co-ordinates of which Captain Collins was not informed. The course suggested to have been adopted by elaborate conspiracy was to contend that a blunder of great magnitude in entering the "false co-ordinates" had gone undetected until after the disaster. The extent of such a blunder is highlighted by the cross-examination of Hewitt by Counsel for ALPA. It still led to the consequence that Captain Collins was misinformed. The establishment of this different, but also very serious, blunder hardly merited an elaborate litany of lies.

Pt II, doc 1, vol 4, pp. 988-990.

It is not suggested these points are necessarily compelling, but they exemplify important arguments which could have been presented if Counsel had been made aware of the theory of conspiracy. We have already observed that no suggestion of a concerted pattern of lies had been put in final speeches by any other counsel. Similarly, not a hint of such thinking was put to Counsel for ANZ in the course of the Judge's interpolations and questions during Counsel's final speech.

60. SUMMARY

The Respondents have sought to go through the separate points referred to in paragraph 376

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together with the other factors which must have conditioned the finding of a conspiracy to commit perjury. In doing so they have accepted that there were certain conclusions which it was open to the Commissioner to reach on the basis of issues fairly put to witnesses: namely that Mr Davis and executive pilots knew that flights went well below 6,000 feet; that Captain Simpson's recollection of the conversation with Captain Johnson was accurate; and that the arrow on exhibit 164 was not drawn to represent true north. These facts do not, however, indicate or establish on their own or collectively a conspiracy to conceal the eventual cause of the accident nor suggest to any witness or counsel what was in the Commissioner's mind. Nor does the fact that these aspects of ANZ evidence were challenged give any indication of a suggestion that there was such a conspiracy. As stated in Mr Justice Cooke's judgment at p.663, lines 12-13:

> ". . .it was adding a further and sinister dimension to their conduct to assert that they went as far as organised perjury."

To challenge recollection, or even credibility, on individual issues is an ordinary incident of inquiry. The allegation in paragraph 377 is of a different and much graver nature: it is of a high and grievous attempt to practice wholesale deception and to do so in unison. Yet it was made unfairly, as were the allegations in the other criticised paragraphs, for the following summarised reasons:

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1. The Commissioner unfairly condemned and suspected the airline for tampering with and withholding evidence and applying pressure to witnesses to give inaccurate evidence. Thus:-

(a) Mr Davis' instructions in regard to documents were misrepresented.

(b) It was wrongly suggested that Mr Davis had taken steps to see that no word of this "incredible blunder" over the co-ordinates ever became publicly known.

(c) It was wrongly suggested that Captain Gemmell had been involved with the extraction of documents belonging to Captain Collins, and wrongly inferred that an ANZ representative had alienated documents of Flight Engineer Cassin.

(d) It was stated that Captain Eden sought to intimidate First Officer Rhodes, despite the fact that this was never suggested in evidence.

(e) As a result of further inquiries, the making of which was never revealed to Captain Gemmell or ANZ Counsel, it was suggested that ANZ, through Captain Gemmell, had caused the flight bags of Captain Collins and First Officer Cassin to disappear.

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2. The cross-examination of pilots as to altitude; the conflict between Captain Simpson and Captain Johnson; and the disputed significance of the mark on Exhibit 164 in no way provided warning of a charge that numerous witnesses were telling lies or that they were doing so in concert under the guidance of Mr Davis. The possibility of such a finding was not indicated, let alone clearly put, to any witness and most particularly was not put to Mr Davis.

3. The Commissioner reached the conclusion that Captain Johnson and the Navigation Section knew the magnitude of the change of co-ordinates on the basis of speculation as to the attitude of the CAD which could have been refuted by evidence.

4. The Commissioner further reached this conclusion on the basis of speculation as to the reason for including the word "McMurdo" in the flight plan, despite the evidence of the relevant witness not being challenged and there being no evidence or suggestion that ANZ knew of the supposed attitude of the U.S. authorities. Again, the conclusion was based on speculation.

5. If the conspiracy allegations had been fairly put, further evidence was available which could have answered them.

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6. Likewise, Counsel would have had the opportunity both to consider such further evidence as needed to be called, and to address the issue in their final speech.

61. In the course of the foregoing summary of the facts, reference has been made to what are considered the most relevant parts of the transcript of proceedings and the significant aspects of conduct of the inquiry. The Respondents submit that the record taken as a whole confirms their submission. They submit that there was ample justification for that part of Mr Justice Cooke's judgment (at p.662, line 52 to p.663, line 4) which has already been cited. Moreover, there was no warning of the conspiracy allegation; it was certainly not clearly put, and emerged in the Report for the first time. It was an immensely serious charge: before it was made there should have been proper warning and opportunity of answer: this was wholly lacking and natural justice was not done.

62. COSTS

A further issue in the Court of Appeal concerned the award by the Commissioner of costs against ANZ in the sum of $150,000.00. These Respondents sought an order quashing the Commissioner's decision as to these costs, although this aspect of the review proceedings was of secondary importance to challenging successfully the adverse findings against ANZ. The Commissioner had, in addition to the costs of $150,000.00, ordered ANZ to pay two-thirds of the costs of the Airline Pilot's Association,

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and the estates of Captain Collins and First Officer Cassin. These costs, amounting to some $102,878.12, were paid by ANZ without prejudice to the validity of the order.

63. As a further alternative argument on costs, it is submitted that if the Commissioner was entitled to award costs, such costs should have been limited to $600.00. Reliance is placed upon Rule III of the Rules made by the Judges which appear in the New Zealand Gazette of 11 February 1904 whereunder no costs of any Inquiry shall exceed $600.00. Although the scale fixed by the Rules is now out-of-date, it is submitted that it is still extant and applies to limit the amount of the award which should have been made by the Commissioner.

THE RESPONDENTS THEREFORE SUBMIT that this appeal should be dismissed for the following amongst other REASONS:

1. Because the Report is reviewable at law for excess of terms of reference and/or breach of natural justice.

2. Because the conclusion in paragraph 377 of the Report was beyond the terms of reference of the Commission.

3. Because in reaching the said conclusion, and in making the challenged findings upon which such conclusion was based or by

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which it was influenced, the Commission acted in breach of natural justice and without evidence of probative value.

4. Because the Court of Appeal was right to quash the costs order.

5. Because the Respondents were entitled to the Declarations claimed and an order setting aside the findings successfully challenged below.

6. Because the decision of the Court of Appeal was right and ought to be affirmed. 10

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