

**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA NUMBER of 2001
OS NUMBER of 2001

Appellant: Pierre Mark Le Grand

Respondent: Criminal Justice Commission

Appellant's written submissions

Preliminary matters

1. The appellant appeals a decision of the Supreme Court constituted by a single judge.¹
2. This appeal is a rehearing.² There was no oral evidence received below. This Court "*is in as good a position*" as the primary court judge to determine the matter.³
3. The record contains all of the material filed by the parties before the primary court judge including the appellant's written outline below [R. 426-429].⁴ The present submissions seek to augment that which was stated below. They focus on the Court's power and jurisdiction and assume a grasp of the factual matters set out in the Boe & Callaghan memorandum, [R. 118] which is a necessary starting point.
4. The appellant will submit that there are special grounds that warrant the reception by the Court of further evidence as to questions of fact, by affidavit.⁵ See separate written

¹ Pursuant to Rule 745(1)(a) *Uniform Civil Procedure Rules 1999* ("UCPR").

² Rule 765(1) UCPR. "*An appeal to the Court of Appeal under this chapter is an appeal by way of rehearing*". See *De Innocentis v BCC & Anor* [1999] QCA 404 (24 September 1999) where it was held per Chesterman J (Pincus & Thomas JJA concurring) that Rule 765 applies in such an appeal. See also the general comments in *Builder Licensing Board v Sperway Constructions (Syd) Pty Ltd & Another* (1976) 135 CLR 617, 619-620:

"This appeal by way of rehearing involves rehearing of the cause at the date of the appeal, that is, 'by trial over again on the evidence used in the court below: but there is special power to receive further evidence' (in re Chennell; Jones v Chennell (1878) 8 Ch. D. 492 at p505.). On such an appeal, the rights of the parties must be determined by reference to the circumstances as they then exist and by reference to the law as it then exists; the appellate court may give such judgment as ought to be given if a case at that time came before the court at first instance."

³ This approach was recently applied in *C v C* [2001] QSC 126 p7 para 23 per Mullins J.

³ *Zuvela v Cosmarnan Concrete Pty Ltd* (1996) 71 ALJR 29 at 31 citing *Warren v Coombes* (1978-79) 142 CLR 531 at 551:

"Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it."

⁴ The proceedings below were not recorded after consultation of the parties by the primary court judge. The respondent made only oral submissions.

⁵ The two deponents are a former chairperson of the respondent and a former Chief Officer of the Complaints Section of the Official Misconduct Division of the respondent Commission.

submission ("the Rule 766 submission").⁶ Copies of these affidavits are in a sealed envelope and attached to that outline. If this or any other further evidence is received,⁷ this Court ought determine the matter on the totality of the evidence.⁸

Grounds of Appeal

5. It is contended that the primary court judge erred in concluding that an investigation into police official misconduct by the Official Misconduct Division of the respondent Commission is not being conducted unfairly, because it is not being conducted at all. **[R. 444]**
6. There are two bases for the contention *viz.*, the primary court judge:-
 - 6.1. Drew incorrect inferences from the material facts in reaching His Honour's decision; and
 - 6.2. Incorrectly interpreted section 34(1)(a) of the *Criminal Justice Act 1989* (Qld).

Inferences open on the evidence

7. There are several inferences drawn by the primary court judge's which are disputed:

- 7.1. Para [1]: **[R. 441]**
"The suggestion is that to ensure the investigation of the Senator continued, where because of political considerations the CJC was inclined to desist, Mr Le Grand leaked incriminating material to Nicholls with a view to garnering public pressure for continuation of the investigation."

To make this observation, the primary court judge has misunderstood the evidence: **[R. 132]**. Such a suggestion is not, and has never been, an inference open on the facts and for that matter even asserted. The appellant was the Director of the relevant Division in the respondent Commission.⁹ It defies logic to suggest that he would need to take action to "*garner public pressure for the continuation of the investigation*" when this operational decision was his to make. It is a point that tends to exculpate the appellant. Reference should also be made to the submissions advanced to the Parliamentary Commissioner¹⁰ and to the Director of Public Prosecutions.¹¹

⁶ Rule 766(1)(c):
"The Court of Appeal may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit or in another way."

⁷ The respondent has served 3 affidavits in reply if the Court receives the appellant's further material
⁸ See *Heery v CJC* [2000] QCA 511 at p11 para 33 per Thomas JA (Davies JA & Douglas J concurring), although this issue is more fully treated in the separate outline.

⁹ The Official Misconduct Division.

¹⁰ Exhibit "A" to the affidavit of Terence Douglas Martin **[R. 239-240]** pp.26-27

"This alleged motive is inconsistent with both the factual situation at the time and what Nicholls reported back to Chapman about the motives of his sources (plural) for the leak. The evidence is clear and incontrovertible that, as at 9 May 1994, the CJC had experienced no unwillingness on the part of the NCA to assist in Operation Wallah. Indeed, no such unwillingness was demonstrated until 20 June 1994, when the NCA backed out of its involvement in the execution of search warrants in Sydney previously taken out by NCA officers. Further, no attempt was made to bring the AFP into the Operation until November 1994. Until that point, the only requests of the AFP had been for intelligence and those requests had been met."

¹¹ Exhibit "B" to the affidavit of Terence Douglas Martin **[R. 298-299]** pp 8-9
"...Indeed, Mr Nicholls stated clearly at page 5 of his interview on 31 march 1997 that the 'sole basis' upon which Mr Le Grand had provided the documents to him was his [Nicholls'] concern that federal

7.2. Paras [3] – [7]: **[R. 442]**

The primary court judge does not acknowledge the undisputed¹² fact that the evidence that tends to exculpate the appellant, incriminates a member of the Queensland Police Service of official misconduct under section 29(d)(i) of the *Criminal Justice Act*. It is a pivotal finding.

The impression left by the primary court judge's summation is that the application was merely an attempt to buttress the appellant's submissions to other agencies that he ought not be criminally charged.¹³

This is not a fair or complete characterisation of the nature of these proceedings.

The appellant seeks relief because the Commission is obliged to investigate police official misconduct and there is a specific statutory provision empowering the Supreme Court to ensure that it is undertaken fairly. It is coincidental that the Commission's refusal is unfair to him. It provides the appellant *locus standi* and understandable motivation. See paragraph 21 of the appellant's written submission below **[R. 438]**.

7.3. Para [6]: **[R. 442]**

"Mr Le Grand seeks an additional order, that his costs be paid by the CJC. It appears the CJC will not support him financially in relation to any prosecution, perhaps unsurprisingly, but he is particularly aggrieved because of a suggestion it is continuing to stand by Mr Pearce, who may also be charged."

The primary court judge has also misconstrued these matters. It has never been a complaint, particularly or otherwise, of the appellant in these proceedings that the respondent should stand by him in any prosecution or indeed, fund his representation. The material specifically disavows such a position.

The only references touching on these issues are in paras 4, 25 and 77.4 of the Boe & Callaghan memorandum. **[R. 119, 123 & 134]**.¹⁴ A proper reading of these paragraphs could not permit the conclusion His Honour reached. The only other reference to costs appears in paragraph 48 of the appellant's written submissions below **[R. 440]**. It merely points to the considerations in section 34(2) & (3) of the *Criminal Justice Act*. Although it is a largely irrelevant point, it is still incorrect and bespeaks a misapprehension of the proceedings.

7.4. Para. 15 **[R. 444]**

"These circumstances do not permit the conclusion that there is currently an investigation 'being conducted' by the Official Misconduct Division, in relation to these matters. At most for Mr Le Grand, the investigation following upon Mr Grice's complaint, when put into 'abeyance', might from that point have been

authorities were not pursuing the Operation Wallah investigation enthusiastically (...) As has been previously submitted in detail to the parliamentary Commissioner, this suggested motive did not exist as at 9 May 1994, as the AFP had not at that time even been asked for assistance, and the NCA was already providing assistance (see exhibit 360, a letter to the AFP on 31 May 1994 which notes that: 'To this time, the Commission has not felt the need to request your assistance', and Exhibit 381, which details the information which had already been provided by the NCA in April 1994."

¹² This concession is found in the letter from the chairperson Exhibit "BJB1" to the affidavit of Brendan James Butler **[R. 424]**, also appearing as Exhibit "H" to the affidavit of Andrew Boe, at p 2 **[R. 195]**.

¹³ Para 3, per de Jersey CJ: *"Fearing the CJC will otherwise do nothing to investigate avenues possibly favourable to Mr Le Grand's denial of wrong doing, and in an attempt to forestall the laying of any charge, he asks me to direct the CJC (...) to pursue certain lines of investigation ..."*

¹⁴ Exhibit "A" to the affidavit of Andrew Boe.

considered as suspended, pending the results of further treatment by other agencies"

"Any investigation in this case by the Official Misconduct Division has in truth been abandoned, notwithstanding an implicit recognition as at early 1998 that it might later be revived"

These inferences are addressed in detail below.

8. The material facts – which are undisputed – on the issue of whether *"an investigation ... is being conducted unfairly"* that the primary court judge had to consider are contained in:
 - 8.1. The affidavit from the respondent's chairperson [R. 417] which sets out the respondent's position on the matter:
 - 8.1.1. Para 5(b) *"On 17 May 1994, a complaint was registered with Mr Kerr shown as the complainant ...;"*
 - 8.1.2. Para 5(c) *"The Commission instituted a public inquiry ... arising from the complaint made by Mr Kerr;"*
 - 8.1.3. Para 5(d) *"On 5 February 1996 the complaint made by Mr Kerr was finalised" [our emphasis];*
 - 8.1.4. Para 5(e) & (f) *"On 13 September 1996, Mr Alan Grice alleged that [the appellant] unlawfully disseminated confidential operational information to Mr Christopher Nicholls"; and this information "was recorded by the Commission as a complaint;"*
 - 8.1.5. Para 5(g) *"... on 28 October 1997 ... the Commission resolved to hold any further substantive investigations of those matters in abeyance however the Commission noted that there would be a need to secure documentary and other material and for there to be a completion of certain forensic testing that was already underway. The Commission noted that it had been agreed between the Commission and the Crown Solicitor who was acting on behalf of the Director-General of the Department of Justice that those tests should be completed;"*
 - 8.1.6. Para 5(i) *"On 5 January 1998 the complaint by Mr Grice was finalised by the Chief Officer of the Complaints Section, noting that as the Parliamentary Commissioner will investigate the allegations made by Mr Grice no further action by the Commission was necessary at that stage."*
 - 8.2. The affidavit of the appellant exhibits documentation which confirms that further steps in forensic investigation were undertaken in respect of documents. See particularly, Exhibits "A" [R. 16] "B1" [R. 30], "B2" [R. 33], "C1" [R. 33] and "C2" [R.45].
 - 8.3. Exhibit "D" [R. 70] to the appellant's affidavit is a letter from the respondent's then Chairperson to the Parliamentary Criminal Justice Committee dated 24 December 1997. Relevantly, it includes the following:
 - 8.3.1. *"It is a matter of considerable concern to the Commission that the further investigation and resolution of these very serious allegations is*

to be again delayed."

- 8.3.2. *"Much relevant evidence has been accumulated and there is a very substantial basis for the belief that Mr Nicholls' allegations are fabricated. The Commission has been prevented by your Committee from taking steps to bring the matter to a close in a way which ensured independent supervision of the investigation."*
- 8.3.3. *"Quite apart from steps being taken by the Commission to preserve relevant evidence, there are important substantive investigative steps required to advance the matter to the point where the Director of Public Prosecutions can be properly briefed. Your Committee could oversee those investigations and has sufficient powers to have them carried out."*
- 8.3.4. *"I am also conscious of the fact that, if there is to be some further inquiry in these matters taking place after 28 February 1998¹⁵ it is also very much in the Commission's interests to ensure that the allegations are fully investigated by that inquiry and that the allegations are dealt with in the way best designed to arrive at the truth."*
- 8.4. Exhibit "E" [R. 73] to the appellant's affidavit is a letter dated 5 May 1998 from the PCJC to the Parliamentary Criminal Justice Commissioner. It notes:
- 8.4.1. *"We note that pursuant to s.118U(3) and (4) of the Criminal Justice Act, you are required to review the records of the former Connolly/Ryan Inquiry with a view to deciding if those records disclose any matter that should be investigated by an 'appropriate agency' , and to refer any such matter to the 'appropriate agency' for investigation. You will note that the Committee is an 'appropriate agency' as that term is defined in s.118U(5)."*
- 8.4.2. *"We therefore confirm our earlier oral advice and formally request that you examine all the events, facts and circumstances involved, surrounding or relevant to, and subsequent to, the allegations made by Mr Grice MLA in the Legislative Assembly on 13 September 1996. Specifically, we formally request that pursuant to s.118R(2)(b) of the Criminal Justice Act (the Act), you investigate... the complaint made against Mr Le Grand or the concerns expressed about his conduct..."*
9. This Court should reject these several inferences which were drawn by the primary court judge, particularly that *"any investigation in this case ... has in truth been abandoned."*
10. This Court has the power and responsibility to draw its own inferences and act upon them: *Rule 766(1)(b) UCPR* and in accordance with settled authority, *Zuvela v. Cosmarnan Concrete Pty Ltd:*¹⁶

"Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it."

¹⁵ This was the then scheduled end date of Mr Le Grand's contract with the Commission. It was in fact extended for a further 12 months. See para 2 to the affidavit of Pierre Mark Le Grand.

¹⁶ (1996) 71 ALJR 29 at 31 per Brennan CJ, Toohey, McHugh, Gummow & Kirby JJ

The Primary Court Judge's interpretation of section 34

11. Section 34(1)(a) provides:

"Judicial Review of Division's activities

A person who claims that an investigation by the official misconduct division is being conducted unfairly may make application to a judge of the Supreme Court for an order in the nature of a mandatory or restrictive injunction addressed to the director of the official misconduct division."

12. The primary court judge concluded that there was no investigation "being conducted" as required by section 34(1)(a). Specifically, His Honour held:

"These circumstances do not permit the conclusion that there is currently an investigation 'being conducted' by the official misconduct division in relation to these matters."

and

"In my view, however, the natural meaning of the provision assumes the existence of an investigation, on foot, being pursued with some degree of activity, and in a way which is unfair to the complainant – whether through things done or not done. Any investigation in this case by the Official Misconduct Division has in truth been abandoned, notwithstanding any implicit recognition as at early 1998, that it might later be revived."

13. His Honour's determination turns on the finding that an investigation was not "being conducted", and also upon an interpretation of what is meant by "in abeyance" and the chairperson's view that it had been "finalised" upon the Chief Officer of the complaint's section having noted in the complains section file "as the Parliamentary Commissioner will investigate the allegations made by Mr Grice no further action by the Commission was necessary at that stage."

14. The appellant relies upon the ordinary meaning of those phrases.

"abeyance *n.* (usu. prec. by *in, into*) a state of temporary disuse or suspension."¹⁷

"at this stage" is clearly and self-evidently a conditional state.

15. The appellant's contention is that the entering into an abeyance phase of an investigation – where no active steps are taken for the time being – does not mean that an investigation has stopped being conducted. The only event that might perhaps affect this would be the death of any person who might be charged or indeed the resolution of the investigation.¹⁸ In this case the placing into abeyance was *not* indefinite, rather conditional upon a fixed event *viz.*, proper investigation being undertaken by another. Otherwise, long vacations or reassignment of all personnel to an emergency investigation would conceivably be similarly construed as a cessation/finalisation of investigation by default.

16. However viewed, the effect of the two aspects to the Commission's resolution - the placing into abeyance of "substantial investigations" and the undertaking to complete document security and forensic testing – merely amounted to a narrowing of the investigation. As to the forensic testing, as set out in Exhibit "B8" to the Affidavit of Boe

¹⁷ The Australian Concise Oxford Dictionary 2nd Ed., Oxford University Press Australia, Melbourne

¹⁸ One matter that does perhaps arise in considering these terms is whether the effluxion of time *per se* changes the character of the investigation that is in abeyance. In police investigations of criminal conduct – in particular missing persons investigations – years can elapse before a fresh lead prompts actual steps of investigation. These investigations remain open for many years at times.

[R. 172], they are still yet to be finalised.

17. Moreover, the conclusion reached by the primary court judge becomes unworkable and wrong if one looks at the basic steps in the proposition:
 - 17.1. Senior Counsel advised that the Commission had a responsibility to investigate the matter;
 - 17.2. An investigation *was* commenced into official misconduct;
 - 17.3. At one point the investigation placed substantial investigation in abeyance, pending the investigation by another agency and otherwise narrowed the steps that it was undertaking in the investigation;
 - 17.4. Active policing steps have not been taken recently;
 - 17.5. Other steps have not been completed;
 - 17.6. No decision has been made not to investigate;
 - 17.7. Commissioner officers and independent lawyers acting for the Commission have forwarded detailed submissions to the Parliamentary Commissioner and the DPP after lengthy examination and consideration of the evidence; and
 - 17.8. No event has occurred to render the investigation nugatory.
18. The primary court judge's approach means that section 34 intervention is open if some active steps are still being taken but not if none are. That is to say a position of greater "unfairness" – where no active steps are being taken – bears no remedy under the section, yet a lesser state of "unfairness" – where some, but not all steps are taken – does. This cannot be the legislative intent.
19. The resolution of the Commission on 28 October 1997 was the pivotal basis for the primary court judge's analysis of the state of the investigation. It must be borne in mind that this resolution was made in the following circumstances:
 - 19.1. The state of the relevant evidence as found by Thomas J in *Carruthers v. Connolly* [1998] 1 Qd R 339 at 373:

"When all the relevant factors are brought into account I venture to think that there is overwhelming evidence of ostensible bias against Mr Connolly with respect to matters that his Commission had to consider. The picture would include all of the following perceptions in the mind of a fair minded and informed member of the public:[including] his uneven conduct in relation to the important issue of alleged impropriety by Mr Le Grand including a refusal to receive evidence that would support Mr Le Grand's defence"
 - 19.2. The recognition by the chairperson that *"Quite apart from steps being taken by the Commission to preserve relevant evidence, there are important substantive investigative steps required to advance the matter to the point where the Director of Public Prosecutions can be properly briefed"* [R. 71]
 - 19.3. It was made prior to the finding by Muir J that the Parliamentary Commissioner was not empowered to undertake any investigatory steps.
20. From all of this evidence, the primary court judge was not correct to equate the placing of a matter "into abeyance" - with the above identified specified condition - with the finding that the investigation *"has in truth been abandoned."*
21. One dictionary meaning of "investigate" is:¹⁹

"investigate v. **1 a** inquire into; examine; study carefully. **b** make an official inquiry into.

¹⁹ The Australian Concise Oxford Dictionary 2nd Ed., Oxford University Press Australia, Melbourne

2 *intr*, make a systematic inquiry or search.”

22. Moreover, and most importantly, the term “investigate” is defined in section 3 of the *Criminal Justice Act* as:

“investigate” includes examine and consider.

23. The statutory definition perhaps extends the commonly used ambit of “investigate”. It must follow that for the purposes of the Act, “investigation” includes “examination” and “consideration.”

24. Further to the matters already set out above, matters that the appellant also relies upon:

- 24.1. On 23 October 1996 the Commission starts its investigation through its investigative unit, the Official Misconduct Division.²⁰
- 24.2. In April 1998, McCullough Robertson sent a submission to the Parliamentary Commissioner for and on behalf of the appellant *and* the Commission; [R. 211]. The preparation of the submission involved examination and consideration of the evidence by senior personnel of the commission.
- 24.3. On 9 March 2001, Mr Martin SC sent a submission to the DPP for and on behalf of the appellant *and* the Commission; [R. 288] Again, officers of the OMD examined the evidence for Mr Martin. The chairperson was provided with that submission and he informed Mr Martin that it was in order for it to be sent on behalf of the Commission. [R. 208] & [R. 114]²¹
- 24.4. On 29 March 2001, Mr Martin sent an addendum to his submissions to the DPP; [R. 413]
- 24.5. On 10 August 2001, the Chairperson and one Commissioner heard, considered and discussed matters raised by the appellant’s solicitor concerning the leak of Operation Wallah documents [R. 113-4];
- 24.6. On 14 August 2001 the Commission, in a letter to the appellant [R. 194], recorded *inter alia* that:
- 24.6.1. “A special meeting of the Commission was convened this afternoon to consider your submission dated 10 August 2001 regarding the Grice and Nicholls allegations”;
- 24.6.2. “... each Commissioner had an opportunity to peruse the material”;
- 24.6.3. “The Commission considered:
* the objects of the Criminal Justice Act as set out in s2; and
* the functions and responsibilities of the Commission as set out in Division 3 of Part 2 of the Act, particularly as set out in ss21-23 of the Act”
- 24.6.4. “The Commission noted section 38 (...) further noted section 38(7) and the Commission considered this to be an issue of relevance in the context of the current submission”;
- 24.6.5. “In respect of the allegations of official misconduct by police officers, the Commission considered that they involve the same issues as

²⁰ Section 29(1): “The official misconduct division is the investigative unit within the commission.”

²¹ Affidavit of Andrew Boe, para. 7.5.3

those under current investigation by the investigators supervised by the DPP”;

- 24.6.6. *“The Commission decided that there is no basis to conclude that the DPP, or the officers under her supervision, could not properly undertake the investigations suggested by the solicitors for Mr Le Grand, including investigations in relation to the evidence of “C”, “Neil” and the “fluttering note”*
- 24.7. On 16 August 2001, the current Chairperson of the Commission in his affidavit **[R. 417]** deposed:
- 24.7.1. That the Boe & Callaghan memorandum was registered by the Chief Officer of the Complaints Section of the Commission in accordance with the *Criminal Justice Act*;
- 24.7.2. That he had *“reviewed”* documents held by the Commission that had been previously recorded by it which have dealt with aspects of the allegations contained in the Boe & Callaghan memorandum;
- 24.7.3. That on 14 August 2001, a special meeting of the Commission was convened to *“consider”* the Boe & Callaghan memorandum.
25. The matters set forth in the preceding paragraph reveal that the chairperson, other members of the Commission, officers of its Official Misconduct Division, together with independent solicitors and counsel have been undertaking *“examinations”* and *“considerations”*, thus have been conducting *“investigations”*, upon the Grice allegations, relating to suspected police official misconduct, up to and including 14 August 2001.
26. In all the circumstances it has been demonstrated that the conclusion of the primary court judge that *“any investigation ... has in truth been abandoned”*: **[R. 444]** is wrong.
27. The temporary state of suspension of *“substantial investigations”* that the resolution of 28 October 1997 created was attached to a precise condition – the undertaking of further necessary investigation – which has not been met. The profound unfairness to the appellant as identified by Thomas J [para. 19.1 above] has not been corrected; indeed, it has worsened.
28. The further evidence referred to in the Rule 766 submission only makes it clearer.²²

Court of Appeal Intervention

29. This Court has all of the powers and duties of the primary court judge.²³
30. The primary court judge did not address the several propositions advanced in submissions below **[R. 430]** as to why the mandatory injunction sought should be ordered. It is submitted that the circumstances of this case are such that this Court ought address them now rather than remit the matter back to the primary court judge.²⁴
31. The Court is urged to consider the evidentiary detail in the record. It is conceded that the attempts to distil the necessary facts have still resulted in lengthy documents of considerable factual complexity. It is still necessary that they be carefully absorbed to

²² The primary court judge's assessment was hindered by the incompleteness in the evidence.
²³ Rule 766(1) of the *UCPR*

²⁴ *Heery v CJC* [2000] QCA 511 at para 33 per Thomas JA, with whom Davies JA and Douglas J concurred.

understand the appellant's contentions of unfairness, particularly as set out in the Boe & Callaghan memorandum and attachments [R. 118].

32. The respondent to this point has not disputed the essential facts. [R. 112 & 187], and there were no submissions below from the respondent that the failure to investigate as urged is not relevantly unfair to the appellant.
33. The following matters which are further to the written submissions, and orally advanced before the primary court judge, are recorded:²⁵
- 33.1. The appellant's contentions do not seek any judicial review of the conduct of the respondent, the PCJC, the Parliamentary Commissioner or the DPP.
- 33.2. As to the respondent's contention below that a proper reason for refraining from taking active steps was the respondent's knowledge that the DPP was asked by the PCJC to undertake this investigation:
- 33.2.1. Section 22 requires the Commission to act "*independently, impartially, fairly and in the public interest*";
- 33.2.2. Sections 74, 77 and 78 provide the respondent Commission with coercive powers not possessed by either the DPP or the Commissioner of Police;
- 33.2.3. In any event, the DPP had not properly completed her task *before* her recommendation on 1 June 2001 to charge the appellant; and
- 33.2.4. The Boe & Callaghan memorandum [R. 127 & 132], the outline below [R. 438], and the Statutory Declarations of Andrea Bell [R. 187], Senator Chapman [R. 165] and David Quilty²⁶ [R. 169] set out the appellant's argument and evidence that necessary investigations to fairly uncover the truth have still not been undertaken.
- 33.3. A beneficial construction should be adopted in interpreting section 34.
- 33.4. There is a clear "*fairness*" criterion in the section. There should be no reluctance for a court to ensure that fairness occurs.

[Reference in this context should be made to what Thomas JA observed in *Heery* (supra) at para 24:

"This supervisory jurisdiction, as it has now developed, remains one of the critical tools by which courts protect individual rights and maintain the rule of law."]

- 33.5. Further references in *Ainsworth v CJC* (1991-1992) 175 CLR 564:
- 33.5.1. At p 585 per Mason CJ, Dawson, Toohey & Gaudron JJ:
"It is especially appropriate that judicial review should be available when the function conferred by statute is to inquire into and report on a matter involving reputation, even though the report can have no effect on legal rights or liabilities, for no remedy may otherwise be available to vindicate the damaged reputation. The judgment of this Court in Annetts v McCann shows that where an inquisitorial power is being exercised without observing the rules of natural justice and reputation is at risk, the court may order that the rules of natural justice be observed and the court can thus, to an extent, protect the

²⁵ No transcript was taken of the proceedings below
²⁶ Exhibit "B7" to the Affidavit of Andrew Boe.

reputation at risk. In such a case, however, the protection is incidental to the constraints imposed on the proposed manner of performance of the statutory power."

- 33.5.2. At p 591 per Brennan J:
*"It would be an extreme view that any failure to observe the injunction to 'act fairly' would stamp the discharge of the function or responsibility as ultra vires so as to attract judicial review by way of prohibition or certiorari. The obligation to 'act fairly' imposed by s.3.21(2) [section 22] extends to every aspect of a proceeding; it is not limited to (though it includes) the obligation to do natural justice in the course of conducting the proceeding. In my opinion, these considerations show that although the Commission can be compelled by injunction to observe the obligations imposed by [section 22], a failure to observe these obligations does not per se establish that the functions and responsibilities in discharge of which the proceedings are conducted are outside the statutory authority of the Commission. However, an obligation to accord natural justice may be implied as a condition governing the exercise of a statutory power or, I would add, a statutory function (reference made to *Kioa v West* (1995) 159 CLR 550 at 619) The same reasons would lead me to apply the presumption to a statutory function the exercise of which is apt to affect the reputation of an individual. As Lord Denning said in reference to inspectors appointed to report on the affairs of a company in *In re Pergamon Press Ltd* [1971] Ch. at pp 399-400:*

'The inspectors can obtain information in any way they think fit, but before they can condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.'

34. Given the section 3 definition of "investigate", another matter raised in the material below is the effect of the Boe & Callaghan memorandum of itself upon the Commission's statutory obligations. In paragraph 4 of Mr Butler's affidavit [R. 418] it is deposed that this document was registered by the Complaints Section in the Commission "in accordance with the Criminal Justice Act and the established procedures of the Commission".
35. There seems no reason why this document does not satisfy the requirements of section 29(3)(d)(i), which activates the Commission's functions to investigate. See paragraph 2.8.1 of the appellant's affidavit. [R. 11]

Conclusion

36. In essence, the appellant contends that the profound unfairness he has borne since a criminal charge was foreshadowed against him by the DPP – in necessary investigations not having been completed and there now being a refusal by the respondent to complete these investigations – unlawfully continues. Such unfairness was described in the letter from the respondent's chairperson to the PCJC in December 1997,²⁷ found by Thomas J in *Carruthers v Connolly*,²⁸ recognised and particularised by the Parliamentary

²⁷ Exhibit "D" to the affidavit of Pierre Mark Le Grand [R. 71]:
"Simply put, it is unfair in the highest degree, in light of his performance, that he [Mr Le Grand] should be expected to conclude his term of office without the matters raised by Mr Grice being resolved – at least insofar as Mr Le Grand's involvement is concerned."

²⁸ [1997] 1 Qd R 339 at 367

Commissioner, taken into account by the PCJC and referred to the DPP to address.

37. There is clear evidence that the necessary investigations that were expected by all to be undertaken in order to address this unfairness, have not been so investigated to their finality **[R. 438]**.²⁹ This Court is urged to make the orders sought below to address the unfairness that bears upon the appellant. The need to act urgently is self-evident.³⁰

A. Boe

27 August 2001

²⁹ These matters are noted in para 38 of the appellant's submissions below and in Exhibit "B12" **[R. 187]**, "B6" **[R. 165]** and "B7" **[R. 169]** to the affidavit of Andrew Boe.

³⁰ Because of the foreshadowed charge from the DPP **[R. 416]** and the Commissioner of Police's pending decision **[R. 198, 200 & 201]**.